FINAL REPORT

Ninth Circuit Judicial Council
Task Force on Self-Represented Litigants

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NINTH CIRCUIT TASK FORCE ON SELF-REPRESENTED LITIGANTS

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REPORT OF THE NINTH CIRCUIT TASK FORCE ON SELF-REPRESENTED LITIGANTS

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EXECUTIVE SUMMARY

Ninth Circuit Task Force on Self-Represented Litigants

The Task Force on Self-Represented Litigants was created by the Ninth Circuit Judicial Council in late 2002, in recognition of the number of cases in all courts in the circuit in which one or more parties appeared without counsel, either on a temporary basis or throughout the course of litigation. Chief Judge Mary Schroeder had also observed: 1) although there continued to be a steady stream of filings by pro se prisoners, the incidence of filings by non-prisoner pro se litigants in cases ranging from breach of contract to civil rights cases was on the increase, and 2) many states in this circuit and elsewhere had already developed a variety of innovations to cope with a corresponding pro se phenomenon in their court systems.

The Task Force was charged with studying and evaluating existing approaches to pro se litigation in the federal courts, exploring possible alternative or additional approaches, soliciting feedback, and making recommendations to the Ninth Circuit Judicial Council and its courts and the bar with respect to the management of pro se cases and assistance to self-represented litigants. Another charge was to aid in the development and monitoring of pro se programs. However, the Task Force, which represents a cross-section of judges, court staff, and attorneys of the Ninth Circuit, ultimately concluded that implementation of its recommendations could best be handled by a smaller committee to be appointed following acceptance of this Report.

The Task Force has been impressed with the many state court innovations in this field. However, it recognizes that many of those innovations are tailored for the subject matter jurisdiction of those courts and do not easily translate to the federal courts' diverse and complex case loads. The challenge has been to develop recommendations that are sufficiently focused to be meaningful but sufficiently general to allow for the specific needs and court culture of each of the 15 districts within the circuit. One size definitely does not fit all. Therefore, the following recommendations are offered as options for the districts' consideration, to be explored as each district deems appropriate given its needs, size, demographics, and legal culture.

One thing became clear as the Task Force undertook to fulfill its mission. There is a dearth of data available on a national basis on the dimensions of the pro se litigation explosion in federal courts. The lack of statistical information is particularly great with respect to non-prisoner filings. Nonetheless the Task Force was able to gather a great deal of information before framing its recommendations; much of it is contained in Appendices A to O to this Report. Additional information is on file at the Office of the Circuit Executive. In light of the continuing good work that is being done in the area of pro se case management, the Task Force's concluding recommendation includes the suggestion that the smaller working committee serve as a clearinghouse for such information and seek to improve the collection of data on pro se cases.

The body of this Report contains a full discussion of the background for the Task Force's charge and an analysis of the information that led to its recommendations. We commend the full text, including the Appendices, to the readers' attention. Following is a list of the recommendations made by the six subcommittees of the Task Force and adopted by the full Task Force.

Case Management

The circuit, through the judicial council, a committee of the judicial council, or the Office of the Circuit Executive, as appropriate, should:

- Convene a pro se conference at least biennially. In addition to the pro se law clerk attendees, each district should designate one judge and/or one representative of the clerk of court to attend the conference. Topics should include trends in and best practices for both prisoner and non-prisoner pro se cases. A report of the proceedings of the conference should be made available to each district promptly after its conclusion.

- Develop and maintain an electronic directory of pro se law clerks and an electronic message board to facilitate communication among pro se law clerks.

Each district should consider:

- Designating one judge or committee charged with general administrative oversight of pro se cases, including the appointment of pro bono counsel, educational materials, and staffing innovations.

- Reviewing the memoranda and proposed model local rules for vexatious litigants and early merit screening contained in Appendices C and D for their possible implementation.

- Encouraging the development of mediation, early neutral evaluation, and other alternative dispute resolution methods in pro se cases. Assistance is available from the Ninth Circuit Standing Committee on Alternative Dispute Resolution, the Federal Judicial Center, and other sources.

- Reviewing the prison ombudsman materials contained in Appendix F to determine whether such programs might be successfully initiated or expanded in its jurisdiction. In the absence of a circuit-wide conference on the subject, districts should involve prison officials, defense counsel, and public agencies in a dialogue on this subject.

- Reviewing the pro se law clerk survey data and its own case statistics to determine whether staffing is adequate to process both prisoner and non-prisoner pro se cases in a timely manner. If appropriate, changes in the pro se law clerk staffing formula should be pursued.

- Reviewing the pro se law clerk survey data, as well as the case management summaries contained in Appendix G, in connection with assessing whether the amount of judge time in screening pro se cases of all types could be reduced by adjusting staffing and case management procedures. Districts should periodically evaluate whether their pro se case loads are best served through elbow law clerks

assigned to individual judges, elbow law clerks assigned to more than one judge, or a central pool of pro se law clerks working for all judges. Consideration should be given to having certain pro se law clerks specialize in particular areas, such as Social Security cases, habeas petitions, prisoner civil rights cases, and non-prisoner civil rights cases. Consideration should also be given to assigning one or more pro se law clerks the responsibility for administrative tasks such as form preparation, development of rules and orders, and training, thereby enabling other staff to concentrate exclusively on individual case management. Where elbow law clerks are given responsibility for staffing non-prisoner pro se cases, districts should ensure that they receive adequate training in effective communication and case management techniques.

Appointment of Counsel

The circuit, as defined above, should:

- Appoint a standing committee on pro bono representation (or charge any new pro se committee with oversight of pro bono representation) and a circuit-wide pro bono coordinator.

- Explore development of a program for inter-district pro bono appointment of counsel.

Each district should consider:

- Adopting a formal program for the appointment of pro bono counsel. The program should be published and include a screening mechanism.

- Appointing a pro bono coordinator, based upon court size and workload, to be responsible for establishing and maintaining a pro bono panel, securing appointments, and related duties.

- Working with judges, bar associations, and law schools to provide training and educational materials for pro bono counsel as needed, especially in substantive areas that tend to recur in pro se cases, such as civil rights, employment, Social Security, and immigration law.

- Providing attorneys, upon acceptance of a pro bono assignment, with sample forms to facilitate case management, such as the sample Ninth Circuit Court of Appeals contract letter in Appendix H.

- Utilizing all available resources, including the use of limited representation, advisory counseling, mediation programs, law students, and attorney admission funds to increase pro bono representation.

- Providing for some form of reimbursement of pro bono attorneys' out-of-pocket expenses, and informing an attorney of the court's reimbursement policy before he or she takes a pro bono case.

- Exploring ways to increase pro bono representation by the bar, including enhanced recruitment efforts through websites, conferences, enhanced training, and recognition by the court of the service provided, among other methods.

- Encouraging new admittees to participate in pro bono service and informing them of the various ways in which they can provide such service to the public and the courts.

Coordination with Prisons and Prosecutors

The circuit, as defined above, should:

- Convene a meeting of representatives from the Federal Bureau of Prisons and all state correctional departments within the circuit. The twin purposes of the conference would be to improve access to case information, legal materials, mail, assistance, and equipment; and to explore further development of prison mediation and/or ombudsman approaches in addition to existing grievance procedures.

- Convene a similar meeting of representatives from all state Attorneys General and United States Attorneys within the circuit to discuss waivers of service of process and other procedures for reducing delay in prisoner cases.

- Seek outside funding to convene the meetings, if necessary.

Each district should consider:

- Exploring the use of court resources to develop its own ombudsman programs. For example, the Northern District of California is using a part-time magistrate judge to provide such a service in one prison in the district. Resources such as the Ninth Circuit Alternative Dispute Resolution Committee and the Federal Judicial Center should be consulted for possible assistance with such programs.

- Convening meetings with local prison officials, prosecutors, defense counsel, and appropriate public agencies in the absence of circuit-wide conferences addressing prisoner litigation.

- Utilizing representatives on state-federal judicial councils to facilitate meetings or conferences addressing prisoner litigation.

Pro Se Education

The circuit, as defined above, should:

- Request the Federal Judicial Center to provide training for new and continuing judges and court staff on management and communication techniques in pro se litigation. Existing resources include state court training materials, model guidelines, and forms, which could be reviewed for possible adaptation for the federal courts.

Each district should consider:

- Regularly reviewing and updating the educational materials and forms that are available to pro se litigants and evaluating whether it could be doing more to provide information about court procedures. The Table of Contents of the manual contained in Appendix L provides a useful checklist of topics suitable for information sheets or pamphlets. Wherever possible, such materials should be available on a court's website as well as in its clerk's office(s) or library (ies).

- Encouraging local law schools and bar associations to develop educational materials for pro se litigants. Lawyer representatives and non-lawyers could also assist in the effort to translate forms into different languages and ensure plain, understandable English. Assisting in the preparation of educational materials is one means of discharging a lawyer's pro bono responsibilities.

- Reviewing available information on service of process and appropriate methods of bringing matters to a court's attention. Each court should review the procedures its clerk's office utilizes in providing information and/or responding to requests for information from pro se litigants. The policies should be communicated to pro se litigants and followed by court staff.

- Creating new positions, such as small claims court advisors employed in some state courts, to provide basic information and answer the questions of pro se litigants. District courts should examine the feasibility of providing similar resources through the auspices of a local law school or bar association.

- Communicating to pro se litigants what legal information can and cannot be provided by court staff. For example, Appendix K is an example of signage used to define the distinction between legal information and legal advice.

- Reviewing such state court initiatives as legal information kiosks, self-help centers, and forms for possible adaptation.

- Authorizing clerks' offices to provide access to case management/electronic case filing (CM/ECF) and related training materials to pro se litigants.

Habeas Corpus Education

The circuit, as defined above, should:

- Create a directory of information and make it available to prisons, perhaps electronically, in order to direct pro se habeas petitioners to educational materials that are already available.

Each district should consider:

- Evaluating the information it currently provides to prisoners in the areas of procedure and pre-filing requirements and determining whether it can or should do more.

- Enlisting law schools or bar associations to assist in the development and/or updating of self-help materials.

- Addressing the subject of habeas educational materials at an appropriate district sponsored conference with prison wardens and/or prosecutors.

- Asking state-federal judicial councils to explore a coordinated system of post-conviction relief in state and federal courts. Possible options include publication of a post-conviction relief manual for each state, and a regional state-federal conference devoted to a coordinated system.

Data Collection

The circuit, as defined above, should:

- Request that the Administrative Office of the of the U.S. Courts, in conjunction with the courts, customize CM/ECF on a national basis so that standard reports can be generated that reflect all categories and types of pro se litigants, the status of each case, and the disposition by stage of proceeding. Case aging reports should be available on all pro se cases.

- Request that the Administrative Office of the U.S. Courts develop a national or circuit-wide database of "strikes" recorded against individuals, to give effect to 28 U.S.C. § 1915(g) by facilitating sharing of information among districts.

Each district should consider:

- Taking steps to ensure that clerks' offices receive adequate training and written instructions regarding the importance of collecting and maintaining data in pro se cases.

- "Flagging" the status of pro se litigants under CM/ECF so that standard reports can be generated to track pro se cases (both prisoner and non-prisoner) by nature of suit and stage of disposition.

Concluding Task Force Recommendation

- The Chief Judge should discharge the Task Force on Self-Represented Litigants and, in its place, appoint a small working Pro Se Committee to be available to consult with each district as to its needs and desires for improvements in its pro se litigation management, and to assist the districts in implementing those improvements, on either a pilot or a permanent basis. The Pro Se Committee should also assist the Chief Judge in implementing approved circuit-wide recommendations, and serve as a clearinghouse of pro se case management information for judges, court staff, the bar, and the public.

INTRODUCTION
by
Hon. James K. Singleton
Chair, Task Force on Self-Represented Litigants

According to data from the Federal Judicial Center, during Fiscal Year 2002 pro se cases represented 32.4 percent of all civil filings in the Ninth Circuit. This four-year high resulted from a decrease in total civil filings, coupled with a 1.6 percent increase in pro se civil filings. Responding to the data, in the fall of 2002 the Judicial Council of the Ninth Circuit approved the formation of a Task Force to study problems posed by the increasing proportion of civil cases that were being filed by unrepresented litigants. Chief Judge Schroeder appointed the members of the Task Force shortly thereafter.

The Task Force was given the charge of considering the impact on all courts in the circuit of actions brought by unrepresented litigants and making recommendations for improving the administration of those cases. For a general definition of the courts and the judicial processes that are discussed in this report, see the glossary at Appendix A. While we considered pro se litigation in all courts, we focused on the district courts. The large number of unrepresented litigants poses challenges to traditional case management in pre-trial matters and at trial, and different strategies need to be devised to respond to those challenges, both in the clerks' offices and in judicial chambers.

The Judicial Council amplified the charge by requesting that the Task Force:

1. Study and evaluate existing case management practices in pro se cases;
2. Study and evaluate existing assistance to litigants in pro se cases;
3. Explore alternative case management practices and methods of assisting pro se litigants;
4. Publicize such alternative methods and solicit feedback with respect to them;
5. Aid in the development and monitoring of such programs;
6. Make recommendations to the Judicial Council, the courts of this circuit, and the bar with respect to management of pro se cases and assistance to unrepresented litigants;
7. Undertake such other activities as are consistent with the Task Force's mission.

The work of the Task Force was divided among six subcommittees, which addressed: 1) case management, 2) appointment of counsel, 3) coordination with prisons and prosecutors, 4) pro se education, 5) habeas corpus pro se education, and 6) data collection. The remainder of this report will address the work of each subcommittee and their recommendations, which have been adopted by the full Task Force. Before proceeding to that discussion, however, some relevant overriding belief systems must be addressed.

A. The Premises and Orientation of Our Adversary System

Put simply, the current justice system and the various rules of civil, criminal and appellate procedure, as well as the rules of evidence that govern trials, are all fashioned to serve the "adversary system." Central to the adversary model of judicial administration is the idea of the trial judge as a "generalist" neutral whose areas of expertise are procedure, both civil and criminal, and evidence. The model does not expect trial judges to know much about the specific areas of substantive law involved in the cases that come before them. Rather, the model assigns to each party's lawyer the responsibility of knowing the substantive law involved in the cases they litigate. It is the lawyer's task to educate the generalist judge to the specifics of a particular case. Even in those cases where the lawyers are not specialists, counsel do, under this model, recognize their responsibility to study the law involved in a case thoroughly before bringing it or responding to it. Under the adversary model, judges expect that lawyers will recognize the legal problems their cases pose and then through mastery of research will exhaustively marshal the determinative decisions, speeding the way to a swift and fair result.

Knowing the substantive law is only half of a lawyer's responsibility. Equally important is a lawyer's duty to know the facts and assure through control of pre-trial investigation that all available evidence has been canvassed and all important witnesses interviewed. In the adversary system, the court and its employees are neutrals and have no responsibility to develop the facts, locate witnesses or assemble evidence.

Marshaling the facts and researching the substantive law are two of the most important responsibilities the adversary system assigns to lawyers in the preparation of their cases for trial. Two closely related duties, which every judge expects the attorneys to perform long before a case enters the court's docket, are evaluating whether a legal claim exists based on the available facts, and screening out frivolous aspects of an otherwise valid claim. The lawyer meets with the prospective client, gently extracts the important facts, and in the process provides the client a reality check on what can and what cannot be accomplished in court. The lawyer thereby heads off meritless cases before they reach court. Furthermore, when the client has one arguable claim coupled with an emotional litany of non-claims, the lawyer screens the claim to eliminate its frivolous aspects. Lawyers routinely perform these functions because, among other reasons: (1) as officers of the court they may be sanctioned for filing improper or unwarranted pleadings, (2) they do not want to expend economic and other resources on doomed claims, and (3) they want to maintain a reputation with the court for candor and diligence. Indeed, it is the absence of this screening and evaluation process by a lawyer that primarily distinguishes the pro se litigant from the represented litigant.

To summarize, then, the unrepresented litigant presents the court with an initial challenge: his or her case has not been screened by a trained lawyer. In order for the court to manage the case effectively, someone must screen the case and determine the material law and facts.

B. Differing Perspectives on Pro Se Litigation

It is a cornerstone of our judicial system that every litigant who comes to court is entitled to a fair hearing. There are different perspectives, however, about how to fulfill that promise to unrepresented litigants. Some judges and lawyers are convinced, for example, that pro se litigants as a class generally bring meritless claims, and that any program designed to educate or assist them would only increase the number of meritless claims in the court system. This point of view is doubtless influenced by those pro se cases that are brought by individuals suffering from a mental disability or for purposes of harassment. Closely related to that thought is the belief that appointing attorneys for pro se clients is a waste of resources and in the long run simply complicates efforts to keep the system clear of meritless cases.

On the other hand, many judges and lawyers recognize that pro se litigants have been responsible for such landmark decisions as *Gideon v. Wainwright*, 372 U.S. 335 (1963), which significantly changed the legal landscape. Furthermore, the United States Supreme Court and this circuit have recognized that there are instances in which due process requires special efforts to inform pro se litigants of important procedural nuances. See Appendix B for a discussion of the case law. In any event, the fact that a party is unrepresented does not necessarily indicate that a lawyer was first consulted and determined that the claim lacked merit. It would be useful for courts to pursue strategies for reducing this tension, such as training for judges and court staff about improving communication between the court and pro se litigants.

The Task Force solicited input to better understand the community's perspective on pro se issues, and particularly appreciated comments expressed by individuals who have appeared in propria persona in the courts or commented on behalf of interest groups of pro se litigants. Approximately 30 written responses have been received from external organizations, government officials, pro se litigants and community members. The Task Force also held public hearings in Los Angeles and Seattle in August 2005, at which testimony was received from three pro se litigants, three legal services providers, four state court representatives, and three federal court representatives. Many comments highlighted the need for courts to improve the quality of and access to legal counsel and pro se services. Self-help centers modeled on those in the state courts, the need for collaboration with community partners, the need to translate court materials into clear English and foreign languages, the possible use of form pleadings for certain cases, and innovative uses of technology and calendaring systems were among the suggestions made.

A few respondents highlighted the potential benefit of improving mechanisms for screening. In particular, respondents recommended the expanded use of questionnaires or hearings in the initial screening of pro se complaints, and more accurate screening of vexatious litigation to improve the court experience for pro se litigants with sound cases. Additional comments from the public addressed the need for effective grievance procedures in prisons, the concerns of small business owners, and corrections to previously collected data on pro bono programs. All public comments have been considered by the Task Force and specific revisions have been made to the report based on the recommendations that were received. Additional revisions resulted from discussion at the 2005 Ninth Circuit Pro Se Conference.

Several pro se litigants who commented urged the abolition of judicial immunity and criticized the availability of immunity for judges as a recent and pernicious violation of litigants' rights to seek redress. In reality, judicial immunity has been recognized for centuries in the United States and, earlier, in England and in other countries. E.g., *Pulliam v. Allen*, 466 U.S. 522 (1984); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). The remedy for an erroneous decision in the trial court is an appeal and reversal of the trial court judgment, not a lawsuit for damages or other relief against the individual judge. The appellate courts can, will, and do reverse trial court decisions that are based on errors of law and fact. Without judicial immunity, few individuals would accept judicial appointment, because every lawsuit would unavoidably result in one side that wins and another side that loses and could then sue the judge in the absence of judicial immunity.

Some pro se litigants commented that judges were biased against pro se litigants and favored attorneys in the decision-making process. These individuals felt that it was unfair that the statutes, rules and cases the attorneys cited in support of their motions were often relied upon by judges in making their decisions. The reality, however, is that judges are not free to decide cases in a vacuum. Trial judges are obligated by their oaths and the rule of law to follow the dictates of the appellate courts in earlier cases and also to abide by the requirements of the applicable statutes and rules. "The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible." *Board of Supervisors v. Local Agency Formation Comm'n*, 3 Cal.4th 903, 921, 13 Cal.Rptr.2d 245, 838 P.2d 1198 (1992), *cert. denied*, 507 U.S. 988 (1993). As a result of their training, attorneys often recognize the cases, statutes and rules that are relevant in a given situation, so it is not surprising that the authorities the attorneys cite are often the ones that appear in the judges' decisions. In cases with attorneys representing both sides, the briefs supporting and opposing a motion commonly overlap in the authorities cited. Although it is not surprising that a pro se litigant may be frustrated by observing that the judge and the opposing attorney share knowledge about a particular statute, rule or case, that common knowledge is both understandable and unavoidable.

The fact that one side wins and the other loses in litigation is the practical reality of every lawsuit that is not settled. The fact that a plaintiff or defendant loses a motion or a case does not mean the judge was biased. Someone must lose. Cases are assigned to particular judges randomly by the clerk's office. Judges are required to recuse themselves if they are assigned a case in which they have a personal interest or connection, and statutes and ethical rules identify the circumstances in which a judge must decline to hear a case. See, e.g., 28 U.S.C. § 455. Moreover, litigants may move for disqualification of a judge if they perceive a bias or other reason for disqualification, and the relevant statutes, rules and precedents guide and define the forms of bias that require disqualification. Although recognizing that we live in an imperfect world so that mistakes of fact, of law and of personal judgment can occur, the Task Force members do not believe that the judges in state and federal courts routinely sit on cases in which the judges are biased for or against any party.

The essence of the adversary process is the ability of litigants to marshal the law and facts in support of their positions and in opposition to the positions taken by the other side. The one who is best able to present and argue the facts and law is often the one who prevails in the litigation.

Attorneys are trained and may have had years of practice and experience in finding the relevant law and in identifying and presenting the facts that best support their clients' positions. A person appearing in propria persona has multiple disadvantages as a result of lack of legal training and experience and lack of objectivity about the subject matter of the litigation. It is no accident that patients seek out surgeons with experience or that doctors do not treat their family members because emotional involvement interferes with their medical judgment. By the same token, it is unavoidable that pro se litigants are disadvantaged by their lack of training and objectivity. The pro se litigant's knowledge of the facts and passion for the cause may overcome the disadvantages in some cases, but the disadvantages remain significant impediments to success.

Several people who commented on the work of the Task Force urged the development of forms and other fill-in-the-blank documents to take the place of pleadings and other court documents. Law is a learned profession and is increasingly complex as it mirrors the complexities of the modern world. Although some specific legal issues lend themselves to resolution through form documents, most do not. The federal courts have only limited subject matter jurisdiction, and the types of issues that are litigated in federal court are especially likely to be difficult and multi-faceted. There is little the Task Force can do to alter these realities, but the Task Force has made recommendations when possible.

Finally, the laws of the United States and of all 50 states are inconsistent with the proposal that most or all lawsuits should proceed promptly to jury trial, with the role of the judge and pretrial motion practice severely limited. Such a judicial system can be contemplated but does not exist anywhere in the United States; those who seek the adoption of such a system of justice must seek legislative repeal of existing laws and enactment of very different laws. The Task Force was created by the existing judicial system and assigned the duty to work to improve that existing system. The Task Force cannot bring about fundamental changes in the existing judicial system and has not sought to do so.

C. Alternatives Beyond the Scope of the Task Force

Philosophically, one approach to the challenge of pro se litigation would be a complete overhaul of the judicial system. Thus, one could revamp the system to create two tiers: 1) a first tier open only to litigants who had retained or been assigned counsel and would proceed under the rules as currently drafted, and 2) a second tier, operable when at least one party was pro se, in which the case would be exempted from the rules and instead be subjected to a different system. Three options for "second tier" justice come to mind. First, all pro se plaintiffs could be required to file their complaints with an administrative judge who would interrogate them to draw out the relevant facts, assign a public employee investigator to investigate those facts and evaluate the evidence for the administrative judge, and determine whether the case has sufficient potential merit to proceed. Otherwise, the case would be dismissed, perhaps subject to some internal administrative appeal procedure to check against errors. Second, small claims court procedures could be made universally applicable to unrepresented litigants regardless of the amount in controversy. Third, pro se cases could proceed in court, but without enforcement of the Federal Rules of Civil Procedure. Instead, a pre-Rules system of pleading could be reinstated. Under this "precode" practice, very little discovery was allowed. Most lawyers and judges believe that the primary cost and delay in the current system lies in liberal discovery.

D. Feasible Alternatives to the Challenge of Pro Se Litigation

Realistically, the Task Force recognized that no such major changes in the administration of justice were likely to result from its work. The federal rules are here to stay. The Task Force therefore concentrated its efforts on ways of assisting the unrepresented litigants and the courts under the present system of justice. One significant emphasis has been on finding lawyers for those who want them but cannot afford them or do not know how to find them. We also considered various unbundling proposals and related procedures to involve lawyers to the greatest extent possible. Recognizing that it is unrealistic to expect that a lawyer will take every case, or that the litigant will always accept a lawyer, we studied various ways that courts can perform the screening function and provide the reality check that lawyers would otherwise provide, without a significant impact on court staff and budgets. In this regard we have noted that Congress has expressly provided for increased screening in two situations: where litigants are prisoners or wish to proceed in forma pauperis. We explored ways consistent with the Constitution and existing statutes to extend pre-service screening to other aspects of pro se litigation. For example, we carefully considered those cases dismissed for lack of subject matter jurisdiction because they were frivolous. We also looked at the quantity and quality of materials furnished to various classes of litigants to familiarize them with court procedures and considered the tension between providing information and legal advice.[1]

Having recognized, however, that statutory or other nationwide changes to the administration of justice are unlikely to occur as a result of its work, the Task Force still seeks to encourage innovation district-wide and/or circuit-wide, even if on a pilot basis. Many of the recommendations that follow lend themselves to such experimentation. Ultimately the challenge presented by the unrepresented litigant is to provide due process of law to all the men and women who submit their cases to the courts for determination, not just those who are represented by counsel. It is in that spirit that the Task Force presents this Report.

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[1]Although the issue of language barriers affects pro se litigants' access to the courts, it was deemed outside the scope of the Task Force's mission. The Task Force acknowledges, however, that there is a need for future consideration of language barriers, their impact on all forms of interaction between citizens and the judiciary, and possible solutions.

The following are the reports of the Task Force subcommittees.

I. Case Management

A. Subcommittee Activities

This subcommittee's mission was to address staffing and other case management proposals to reduce judge time spent on pro se cases. The subcommittee was charged with determining how each district staffs and screens its pro se cases, and making specific recommendations with respect to best practices and suggested innovations. The subcommittee was also asked to consider whether an annual or biennial pro se law clerk conference should continue to be held; whether district court retreats should include pro se staff; whether specific judges should be assigned to mediate pro se complaints; whether prison ombudsman programs can be created; and whether and how mediation and/or early neutral evaluation can be expanded in pro se cases. In addition, the subcommittee looked at early judicial screening mechanisms for pro se cases.

The subcommittee focused on case management in the district courts, but also collected some information about the Court of Appeals and bankruptcy courts. The Ninth Circuit Court of Appeals maintains a central office of staff attorneys in its San Francisco headquarters; the attorneys do not work for any particular judge and are part of the clerk's office. The attorneys screen all new appeals and petitions for review, whether filed by counsel or pro se litigants, for jurisdictional defects, fee status, frivolity, and case management issues. They present jurisdictionally defective and clearly meritless appeals to motions panels of circuit judges for their determination regarding whether the appeal should be dismissed or disposed of summarily by the court prior to briefing on the merits. They also present certain fully briefed appeals to screening panels of circuit judges for adjudication where the appeal presents only a few issues and the law in the circuit is clear with respect to those issues. In addition, the staff attorneys monitor frequent filers for vexatious litigant status and screen new appeals filed by those who have been previously determined by the court to be vexatious litigants. Finally, the circuit has a well established and long-standing formal Pro Bono Program.

In order to investigate more specific issues, the subcommittee held several conference call meetings, gathered information from a variety of sources, and commissioned a survey, implemented by the Office of the Circuit Executive, concerning staffing of pro se cases. In particular, the 2004 Pro Se Law Clerk Conference was useful for learning about the perspective of the pro se law clerks, as well as how their functions differ between courts. The data gathered in the survey is compiled below, describing the functions performed by district court pro se law clerks. As is apparent from the research, pro se law clerks are often responsible for critical case management activities, such as screening prisoners' in forma pauperis applications, and play a vital role in processing the pro se cases assigned to them for initial review.

For the past several years, the circuit has convened periodic pro se law clerk conferences. Review of past conference agendas and comments by pro se law clerks demonstrated that the opportunity to receive training and to share best practices in the management of pro se cases has been invaluable, and that the conferences should continue to be held. The Task Force determined that the conferences also offered the opportunity to include judges and other court staff in discussions or training about strategies for improving court operations. As a result, judges from the

15 districts were invited to participate in the 2005 Pro Se Conference. Evaluations of the conference, held in August 2005, supported the belief that courts would benefit from discussion among judges and pro se law clerks on a variety of case management issues. The subcommittee considered the inclusion of pro se law clerks in annual district conferences as well and determined that clerks are, and should continue to be, invited to participate in segments of programs that specifically address pro se case management.

The subcommittee also reviewed a memorandum and model local rule proposed by the Ninth Circuit Advisory Board to address the subject of vexatious litigants, contained in Appendix C, and a proposal from Task Force member Ann Taylor Schwing concerning early termination of non-meritorious cases, contained in Appendix D. Both proposals are included for consideration by the district courts, which can best evaluate whether such local rules would be beneficial.

The subcommittee explored the use of mediation, early neutral evaluation, and other alternative dispute resolution mechanisms for pro se cases. Materials on existing pro se programs in the Northern District of California and the District of Idaho are contained in Appendix E. Another proposal addressing the use of prison ombudsman programs, designed to resolve disputes before a case is filed, is contained in Appendix F. Preliminary review of these programs indicates that they could be effective in satisfactorily resolving many disputes.

On July 2, 2004, the Task Force distributed a questionnaire to pro se law clerks in an attempt to assess the current range of pro se functions. The goal was to collect information that would inform debate about operational reforms. Specifically, the subcommittee intended to explore how the role of pro se law clerks varies and how pro se law clerk time is distributed.

The survey included a 13-question section of both open-ended and multiple option questions and a table of possible work categories in which to record hours over a two-week period (July 12th through July 23rd). The research team obtained and updated a contact list of pro se law clerks, to whom the survey was emailed. Of 78 pro se law clerks, the Task Force received responses from 60, yielding a 77 percent response rate.

The survey analysis revealed the following:

- The majority of pro se law clerks work on non pro se cases to some degree.
- Only 3.3 percent of pro se law clerk hours were spent on non-prisoner cases.
- Nearly all pro se law clerks make recommendations that some cases be dismissed because they lack merit.
- Over half of elbow clerk respondents work on §2254 and §2241 prisoner cases.
- §1983 and §2254 prisoner cases dominated the pro se law clerk workload.
- The review of habeas corpus petitions represents the most time-consuming stage of case management.
- Whether highly concentrated workloads were spent on §1983 or §2254 cases varied by district.

These findings are discussed in more depth in the following research summaries.

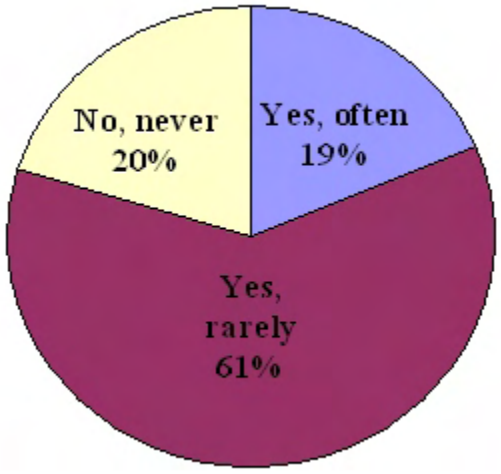
PRO SE LAW CLERK (PSLC) SURVEY
1. PRELIMINARY FINDINGS

A recent survey conducted by the Ninth Circuit Task Force on Self-Represented Litigants polled pro se law clerks about their job responsibilities and the amount of time they spent on different types of casework during the two-week period July 12 through July 23. We contacted 78 pro se law clerks and received surveys from 60, a 77 percent response rate. Pro se law clerk surveys were received from the following districts.

ALASKA	1	IDAHO	2
ARIZONA	6	MONTANA	2
CA CENTRAL	14	NEVADA	4
CA EASTERN	13	OREGON	3
CA NORTH	6	WA EAST	1
CA SOUTH	6	WA WEST	2

Preliminary findings from these surveys follow.

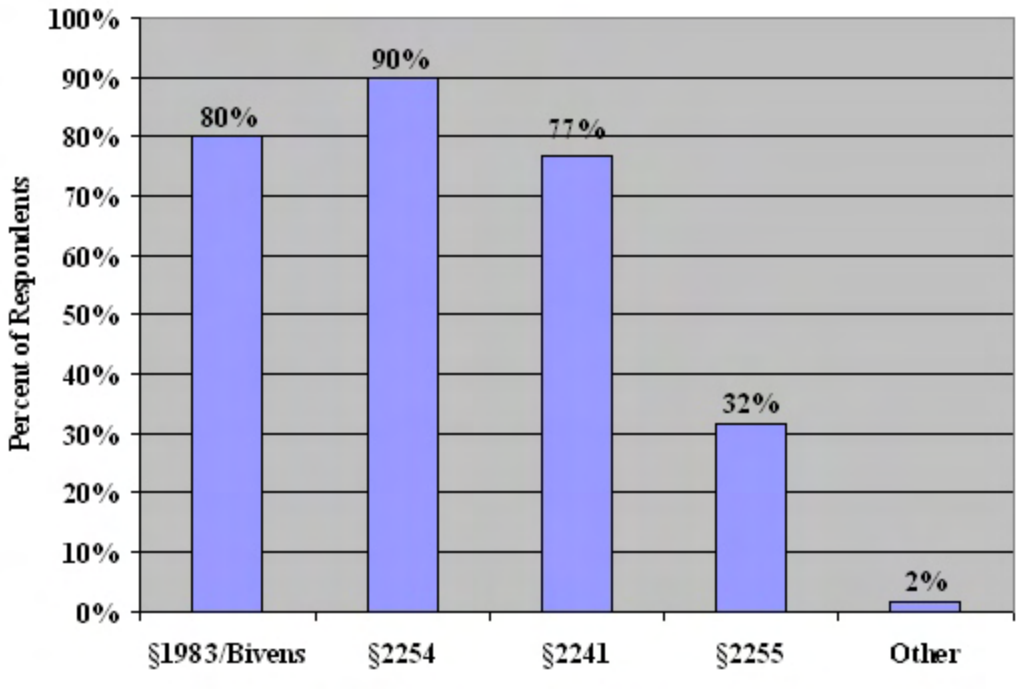
Do you work on non pro se cases?



Of 60 pro se law clerk surveys, 2 respondents did not answer the question and 1 respondent marked 2 answers ("Yes, often" for habeas and "Yes, rarely" for civil rights cases). The majority (61 percent) responded that they work on non pro se cases, but rarely. The types of non pro se cases noted by respondents were:

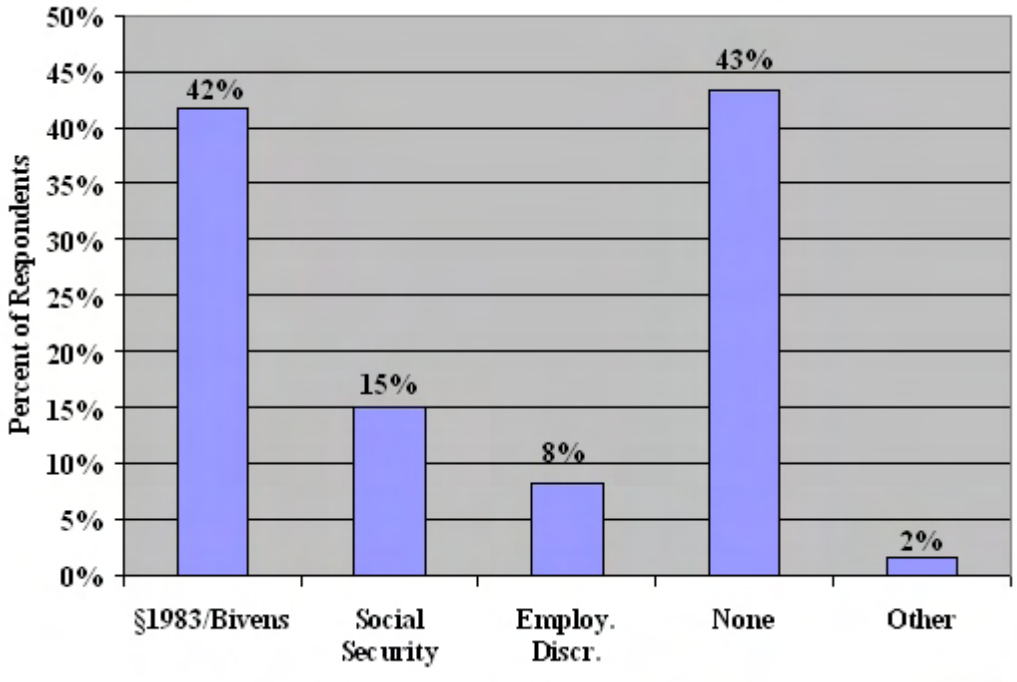
- Prisoner cases
- Habeas Corpus
- Social Security
- §1983
- §2241
- §2254

On what type of prisoner cases do you work?



Ninety percent of respondents work on §2254 cases, 80 percent on §1983/Bivens, 77 percent on §2241 and 32 percent on §2255. The 2 percent of respondents who reported "Other" described work related to §1361, FTCA, extradition cases, motions for injunctive relief, motions for return of property, mandamus/coram nobis and, in some cases, "all civil actions brought by prisoners."

On what type of non-prisoner cases do you work?



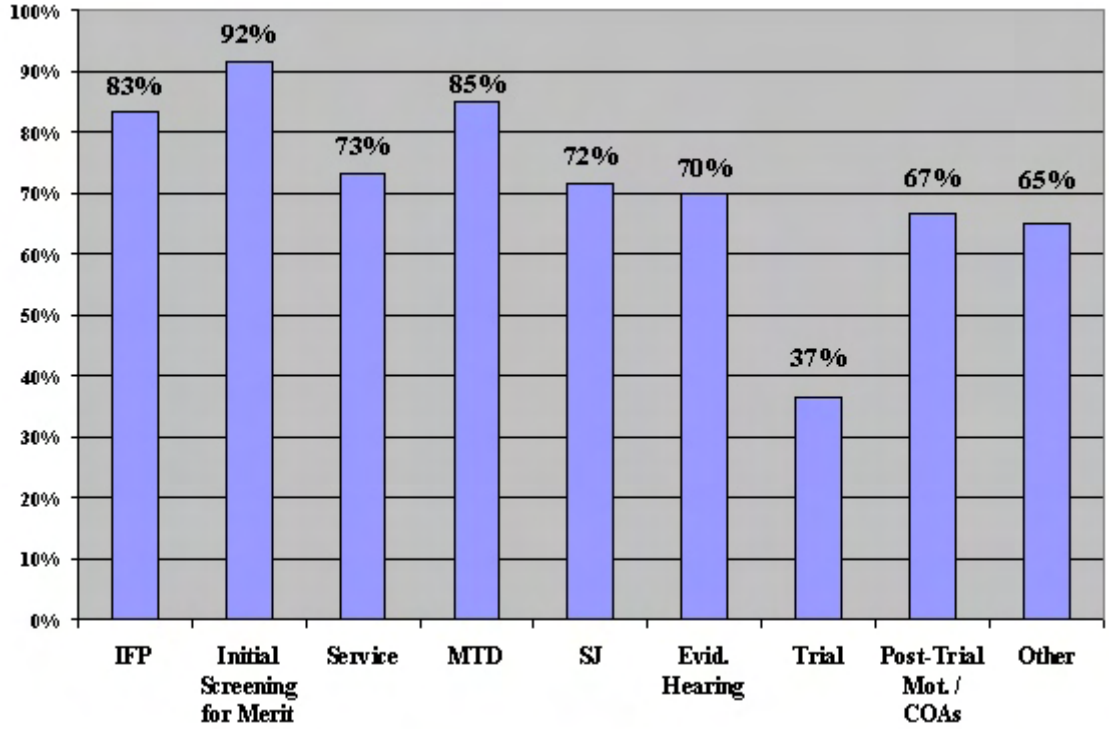
The most common type of non-prisoner case on which pro se law clerks work is §1983/Bivens. Of 25 respondents who work on non-prisoner §1983/Bivens cases, 6 (43 percent) were in Central California, 4 (100 percent) in Nevada, 3 (50 percent) in Southern California, 2 (100 percent) in Idaho, 2 (100 percent) in Montana, 2 (67 percent) in Oregon, 2 (15 percent) in Eastern California, 1 (17 percent) in Arizona, 1 (100 percent) in Eastern Washington and 1 (50 percent) in Western Washington.

Forty-three percent of respondents reported that they work on "none" of non-prisoner cases. These responses were most prevalent in Arizona and the Eastern District of California, in which 83 percent and 77 percent of pro se law clerks fell into this category respectively.

How many PSLCs work on "none" of non-prisoner cases?			
AZ	5 (83 %)	of	6 PSLCs
CA, C	3 (21 %)	of	14 PSLCs
CA, E	10 (77 %)	of	13 PSLCs
CA, N	4 (67 %)	of	6 PSLCs
CA, S	3 (50 %)	of	6 PSLCs
OR	3 (50 %)	of	6 PSLCs

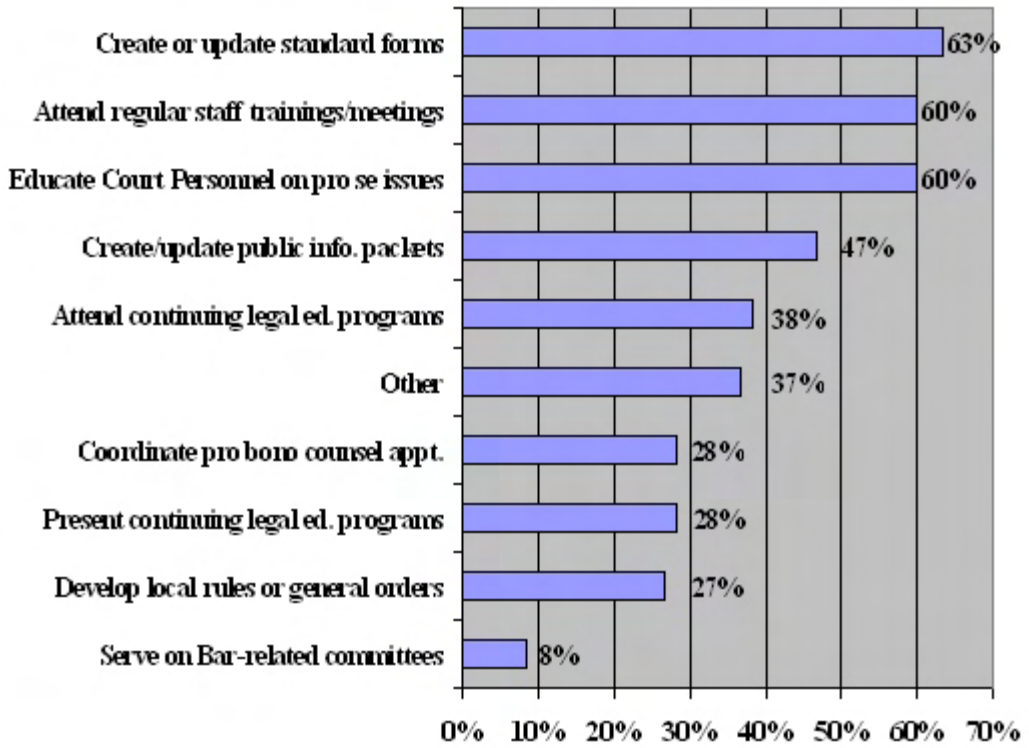
*Only those districts in which at least one PSLC reported that they work on none of non prisoner cases were included.

For what stages of case management are you responsible?



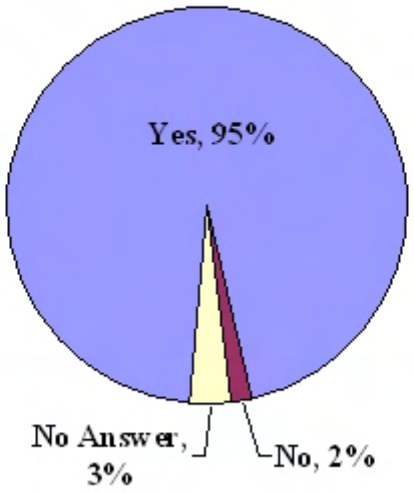
A majority of respondents (over 60 percent) are responsible for reporting their research and recommendations to the assigned judge at each stage of case management except for the trial. Only 37 percent of respondents consider the trial to be their responsibility.

What other duties do you have as a pro se law clerk?



The most common activities considered to be the responsibility of pro se law clerks are creating or updating standard forms (63 percent of PSLCs), attending regular staff trainings or meetings (60 percent of PSLCs) and educating court personnel on pro se issues (60 percent of PSLCs). The most common "other" activities included updating a legal database, supervising externs, hiring staff, and reporting to judges.

Do you make recommendations that certain cases be dismissed because they lack merit?



Nearly all respondents make recommendations that certain cases be dismissed because they lack merit.

2. HOW DO PRO SE LAW CLERKS SPEND THEIR TIME?

Circuit Total

On average, pro se law clerks spent a majority (91.2 percent) of their time on prisoner cases, while only 3.3 percent of their time was spent on non-prisoner cases. §2254 and §1983 prisoner cases dominated the workload with 50.8 percent and 34.9 percent of pro se law clerk hours respectively. The stage of case management that required the most time was habeas merits, with 38.6 percent of total pro se law clerk hours.

PERCENT OF TIME SPENT BY PRO SE LAW CLERKS

	PRISONER					NON-PRISONER				GENERAL	TOTAL
	§ 1983	§ 2254	§ 2241	§ 2255	Other	§ 1983	Social Sec.	Employ. Discr.	Other		
IFP	1.8%	0.6%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.1%	0.0%	2.7%
Initial Screening - Merit	11.4%	3.7%	1.1%	0.3%	0.1%	0.2%	0.0%	0.1%	0.0%	0.0%	16.9%
Habeas Merits	0.0%	36.6%	0.9%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.8%	38.6%
Service	0.7%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.1%
Motions to Dismiss	4.6%	4.7%	0.0%	0.0%	0.2%	0.1%	0.0%	0.2%	0.0%	0.0%	9.8%
Discovery Motions	0.5%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.6%
Evidentiary Hearing	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.1%
Summary Judgment	10.2%	0.6%	0.0%	0.0%	0.0%	0.0%	1.2%	0.0%	0.0%	0.0%	12.0%
Trial	0.4%	0.0%	0.0%	0.0%	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%	0.5%
Post-Trial Mots./COAs	0.8%	0.8%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.7%
Admin. Case Mgmt	2.2%	1.5%	0.2%	0.1%	1.2%	0.0%	0.0%	0.0%	0.0%	1.3%	6.4%
Misc.Office Work	0.5%	0.5%	0.0%	0.0%	0.5%	0.1%	0.0%	0.0%	0.0%	1.7%	3.2%
Other:	1.9%	1.5%	0.1%	0.0%	0.3%	0.3%	0.5%	0.0%	0.3%	1.5%	6.3%
TOTAL	34.9%	50.8%	2.4%	0.8%	2.3%	0.9%	1.7%	0.3%	0.4%	5.4%	100.0%

Prisoner §2254 Cases

Of the 2145.7 total hours that pro se law clerks committed to prisoner §2254 cases, 72.0 percent were spent on habeas merits.

PRISONER §2254 CASES, HOURS BY STAGE OF CASE MANAGEMENT		
	Hours	**Percent of Total**
IFP	26.1	1.2%
Initial Screening for Merit	155.2	7.2%
Habeas Merits	1544.7	72.0%
Service	13.9	0.6%
Motions to Dismiss	198.5	9.2%
Discovery Motions	0.5	0.0%
Evidentiary Hearing	4.3	0.2%
Summary Judgment	26.0	1.2%
Trial	0.0	0.0%
Post-Trial Motions/COAs	33.7	1.6%
Admin. Case Mgmt	62.4	2.9%
Misc. Office Work	19.0	0.9%
Other	61.7	2.9%
TOTAL	2145.7	100.0%

Prisoner §1983 Cases

The 1472.9 hours spent on prisoner §1983 cases were concentrated in initial screening, summary judgment and motions to dismiss stages. These three categories comprise 74.9 percent of the §1983 casework.

PRISONER § 1983 CASES, HOURS BY STAGE OF CASE MANAGEMENT		
	Hours	**Percent of Total**
IFP	74.6	5.1%
Initial Screening for Merit	481.2	32.7%
Habeas Merits	0.0	0.0%
Service	30.7	2.1%
Motions to Dismiss	192.8	13.1%
Discovery Motions	22.8	1.5%
Evidentiary Hearing	0.8	0.1%
Summary Judgment	429.1	29.1%
Trial	16.0	1.1%
Post-Trial Motions/COAs	35.3	2.4%
Admin. Case Mgmt	91.8	6.2%
Misc. Office Work	19.5	1.3%
Other	78.5	5.3%
TOTAL	1472.9	100.0%

Type of Case

Six districts spent over 90 percent of pro se law clerk hours on prisoner cases.

- Eastern California spent 97.8 percent of hours on prisoner cases.
- Northern California spent 93.2 percent of hours on prisoner cases.
- Southern California spent 93.4 percent of hours on prisoner cases.
- Nevada spent 95.9 percent of hours on prisoner cases.
- Oregon spent 96.0 percent of hours on prisoner cases.
- Western Washington spent all hours on prisoner cases.

In nine districts, over 50 percent of hours were allocated to either §1983 or §2254 prisoner cases.

§1983

Arizona spent 58.6 percent of hours on §1983 cases.
Eastern California spent 52.8 percent on §1983 cases.
Idaho spent 87.6 percent on §1983 cases.
Montana spent 62.0 percent on §1983 cases.

§2254

Central California spent 77.1 percent on §2254 cases.
Northern California spent 61.2 percent on §2254 cases.
Southern California spent 62.9 percent on §2254 cases.
Nevada spent 71.0 percent on §2254 cases.
Oregon spent 51.2 percent on §2254 cases.

TYPES OF CASE, PERCENT OF TOTAL BY DISTRICT

	PRISONER CASES					NON-PRISONER CASES				GENERAL	TOTAL
	§ 1983	§ 2254	§ 2241	§ 2255	Other	§ 1983	Social Sec.	Employ. Discr.	Other		
AK	20.0%	17.8%	0.0%	4.4%	0.0%	17.8%	0.0%	0.0%	0.0%	40.0%	100.0%
AZ	58.6%	9.8%	15.0%	1.7%	1.9%	0.0%	0.0%	0.0%	0.0%	13.0%	100.0%
CAC	9.6%	77.1%	0.3%	0.0%	0.3%	1.3%	7.6%	0.0%	0.0%	3.8%	100.0%
CAE	52.8%	36.5%	4.2%	0.6%	3.7%	0.3%	0.0%	0.2%	1.1%	0.6%	100.0%
CAN	32.0%	61.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	6.8%	100.0%
CAS	28.4%	62.9%	1.5%	0.3%	0.3%	2.4%	0.0%	0.0%	0.0%	4.2%	100.0%
ID	87.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	12.4%	0.0%	0.0%	100.0%
MT	62.0%	17.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	2.2%	18.7%	100.0%
NV	16.3%	71.0%	0.7%	0.2%	7.7%	1.3%	0.1%	1.4%	0.9%	0.5%	100.0%
OR	40.3%	51.2%	3.6%	0.0%	0.9%	0.0%	0.0%	0.0%	0.0%	4.0%	100.0%
WAE	42.7%	17.3%	6.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.6%	32.3%	100.0%
WAW	22.0%	39.0%	0.0%	39.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%

Stages of Case Management

The amount of time spent on different stages of case management varied by district.

- Habeas merits required more pro se law clerk time than other stages in Central California, Northern California, Southern California, Nevada, Oregon and Western Washington.
- Initial screening for merit required more pro se law clerk time than other stages in Alaska, Arizona and Eastern Washington.
- Summary judgment required more time than other stages in Eastern California, Idaho and Montana, although initial screening for merit ran a close second in Montana.

A single stage of case management required more than 50 percent of pro se law clerk hours in four districts.

- In Alaska, pro se law clerks spent 51.1 percent of hours on initial screening for merit.
- In Arizona, pro se law clerks spent 69.5 percent of hours on initial screening for merit.
- In Central California, pro se law clerks spent 76.5 percent of hours on habeas merits.
- In Idaho, pro se law clerks spent 77.9 percent of hours on summary judgment.

STAGES OF CASE MANAGEMENT, PERCENT OF TOTAL BY DISTRICT

	IFP	Initial Scrng. for Merit	Habeas Merits	Service	Motions to Dismiss	Discovery Motions	Evidentiary Hearing	Summary Judgment	Trial	PostTrial Mots/COAs	Admin. Case Mgmt	Misc. Office Work	Other	TOTAL
AK	4.4%	51.1%	0.0%	4.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	4.4%	26.7%	8.9%	100.0%
AZ	3.7%	69.5%	2.5%	0.3%	2.2%	0.0%	0.2%	2.8%	0.0%	1.5%	7.2%	5.3%	5.0%	100.0%
CAC	0.4%	3.3%	76.5%	0.0%	6.6%	0.0%	0.1%	7.7%	0.5%	1.7%	0.4%	0.3%	2.5%	100.0%
CAE	3.1%	9.2%	22.8%	0.9%	17.8%	1.1%	0.0%	23.9%	1.6%	1.1%	10.2%	2.5%	5.8%	100.0%
CAN	2.0%	14.7%	39.4%	2.4%	10.8%	1.2%	0.7%	7.2%	0.0%	3.5%	4.2%	4.1%	9.8%	100.0%
CAS	5.8%	9.9%	45.9%	2.1%	8.2%	0.0%	0.0%	4.7%	0.0%	0.2%	9.1%	7.2%	7.0%	100.0%
ID	0.9%	7.1%	0.0%	0.0%	12.4%	0.0%	0.0%	77.9%	0.0%	0.0%	1.8%	0.0%	0.0%	100.0%
MT	3.4%	26.1%	0.3%	1.3%	11.5%	0.0%	0.0%	30.6%	0.0%	2.6%	2.3%	2.6%	19.3%	100.0%
NV	3.3%	18.8%	49.3%	1.1%	10.7%	0.2%	0.0%	0.0%	0.0%	4.7%	6.3%	0.7%	4.9%	100.0%
OR	2.2%	21.2%	38.0%	0.4%	3.1%	1.3%	0.0%	9.6%	0.0%	1.8%	9.2%	3.1%	10.0%	100.0%
WAE	7.6%	47.2%	7.9%	2.3%	2.7%	0.0%	0.0%	0.0%	0.0%	0.0%	22.3%	3.8%	6.2%	100.0%
WAW	2.4%	22.0%	46.3%	12.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	14.6%	2.4%	0.0%	100.0%

District courts were also asked to summarize their pro se case management procedures. A summary of the responses received is contained in Appendix G.

B. Recommendations

The circuit, through the judicial council, a committee of the judicial council, or the Office of the Circuit Executive, as appropriate, should:

1. Convene a pro se conference at least biennially. In addition to the pro se law clerk attendees, each district should designate one judge and/or one representative of the clerk of court to attend the conference. Topics should include trends in and best practices for both prisoner and non-prisoner pro se cases. A report of the proceedings of the conference should be made available to each district promptly after its conclusion.

2. Develop and maintain an electronic directory of pro se law clerks and an electronic message board to facilitate communication among pro se law clerks.

Each district should consider:

1. Designating one judge or committee charged with general administrative oversight of pro se cases, including the appointment of pro bono counsel, educational materials, and staffing innovations.

2. Reviewing the memoranda and proposed model local rules for vexatious litigants and early merit screening contained in Appendices C and D for their possible implementation.

3. Encouraging the development of mediation, early neutral evaluation, and other alternative dispute resolution methods in pro se cases. Assistance is available from the Ninth Circuit Standing Committee on Alternative Dispute Resolution, the Federal Judicial Center, and other sources.

4. Reviewing the prison ombudsman materials contained in Appendix F to determine whether such programs might be successfully initiated or expanded in its jurisdiction. In the absence of a circuit-wide conference on the subject, districts should involve prison officials, defense counsel, and public agencies in a dialogue on this subject.

5. Reviewing the pro se law clerk survey data and its own case statistics to determine whether staffing is adequate to process both prisoner and non-prisoner pro se cases in a timely manner. If appropriate, changes in the pro se law clerk staffing formula should be pursued.

6. Reviewing the pro se law clerk survey data, as well as the case management summaries contained in Appendix G, in connection with assessing whether the amount of judge time in screening pro se cases of all types could be reduced by adjusting staffing and case management procedures. Districts should periodically evaluate whether their pro se case loads are best served through elbow law clerks assigned to individual judges, elbow law clerks assigned to more than one judge, or a central pool of pro se law clerks working for all judges. Consideration should be given to having certain pro se law clerks specialize in particular areas, such as Social Security cases, habeas petitions, prisoner civil rights cases, and non-prisoner civil rights cases. Consideration

should also be given to assigning one or more pro se law clerks the responsibility for administrative tasks such as form preparation, development of rules and orders, and training, thereby enabling other staff to concentrate exclusively on individual case management. Where elbow law clerks are given responsibility for staffing non-prisoner pro se cases, districts should ensure that they receive adequate training in effective communication and case management techniques.

II. Appointment of Counsel

A. Subcommittee Activities

This section discusses the appointment of pro bono counsel to represent self-represented litigants in the district courts in the Ninth Circuit. The first part reviews the districts' current practices. The second part sets forth "best practices" recommendations. The proposed recommendations are of two types. First, the subcommittee makes certain recommendations designed to set forth the minimum that districts should be doing to ensure the availability of pro bono counsel where appointments are appropriate. Second, the subcommittee recommends certain additional approaches to pro bono appointment that, while not widely adopted, and in some cases wholly new ideas, may merit consideration by districts within the circuit. The subcommittee also comments on what might be done, at both the district and circuit levels, to ensure the effectiveness of existing pro bono appointment throughout the circuit.

The subcommittee also reviewed a memorandum from the Ninth Circuit Advisory Board and proposed local rule for the appointment of counsel for pro se litigants with meritorious cases. The Advisory Board proposal was based on local rules of the Northern District of Illinois. The subcommittee built on the Board's work, attempting to formulate a more concise proposal that could flexibly be adapted by districts without substantial modification. The subcommittee's proposal is contained in Appendix I. The subcommittee proposal does not address all issues covered by the Board, such as malpractice concerns of potential pro bono attorneys. The subcommittee has addressed the malpractice issue, however, later in this section of the Report.

While not all pro se litigants wish to be represented, in many cases they do wish to have representation but are unable to find counsel. Focusing only on the class of case in which pro se litigants wish to be represented, the subcommittee began from the premise that the best way for a court to handle these matters is to appoint pro bono counsel. In order to provide a baseline for discussion, this section of the memorandum describes what each of the districts within the Ninth Circuit is currently doing to provide pro bono counsel in cases where appointments are appropriate.

The districts within the Ninth Circuit take a wide variety of approaches to appointing counsel for pro se litigants. For example, some districts have formal programs and detailed local rules, while others appoint counsel on an ad hoc basis. Some districts appoint counsel to pro se litigants in all types of cases, while others appoint counsel only when a Title VII case or a habeas petition is filed. The source of reimbursement for costs generally is a district's nonappropriated funds, known variously as the Attorney Admission Fund or the Library Fund. Some districts work closely with local organizations, while others handle the appointment process on their own. The following section seeks to summarize the most salient features of each district's program. This summary is based upon the survey responses gathered by the Data Collection Subcommittee.[2]

[2]The District of the Northern Mariana Islands did not respond to the Data Collection Subcommittee's survey and its program is not discussed.

1. District of Alaska

Program: A pro se law clerk screens all pro se cases. The clerk automatically requests counsel for prisoner cases or when a litigant files an in forma pauperis ("IFP") petition. For other cases, the law clerk requests counsel only for "the most obviously meritorious cases." The requests go to the Alaska Legal Services Program of the Alaska Pro Bono Program.

Attorney Participation: Pro bono panels are seriously overburdened and the district has stated that it would be very helpful to receive the assistance of attorneys from outside the district.

Expenses: Counsel is reimbursed for expenses only in habeas cases.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: Yes.

2. District of Arizona

Program: The Federal Bar Association Volunteer Lawyer Program ("VLP") administers the pro se program for non-prisoner cases. Litigants apply to the program by filing a motion for appointment of counsel. Alternatively, a judge may refer a case to the program sua sponte if the judge believes the case is meritorious. Only civil rights and employment discrimination cases are eligible for the appointment of counsel. Prisoner cases are referred to a Criminal Justice Act ("CJA") panel attorney by the presiding judges on an ad hoc basis. A committee is considering adopting a pilot program, modeled on a District of Iowa program, that would assemble a panel of civil rights attorneys to handle prisoner cases.

Attorney Participation: VLP recruits lawyers through presentation to law firms, visits to law schools, press regarding successful cases and by honoring outstanding volunteers. The state bar association also sends a mailing to all attorneys. There are a large number of attorneys available to assist, but because 53% of cases involve at least one pro se litigant, the appointment program is not adequate to meet the need.

Expenses: Counsel is reimbursed up to $1,000. In addition, VLP has free services available, including court reporters and process servers.

General Order or Formal Guideline: Two general orders detail the procedures for obtaining reimbursement of expenses.

Counsel Appointed for Discrete Portions of Case: Occasionally counsel appointments are limited to motions or single issues. Late term appointment is disfavored.

3. Central District of California

Program: The district appoints counsel only in habeas and Section 1983 cases, but also has a pro bono mediation program and a Pilot Prisoner Mediation Program in place. Appointment of counsel for habeas cases is done through the Federal Public Defender or from the CJA list. Pro se Section 1983 cases are assigned to magistrate judges. After the denial of a dispositive motion (and,

occasionally before, if the magistrate judge so recommends), the magistrate judge contacts the magistrate judge who runs the district's appointment of counsel program. The magistrate judge appoints counsel from the district's panel.

Attorney Participation: The panel was created about five years ago and consists of about twenty large "downtown" law firms. Sometimes it is difficult to get firms to accept cases that involve substantial time commitments or that involve litigants who are incarcerated in far-away locations. The program has an annual awards dinner for panel members.

Expenses: Counsel is reimbursed up to $5,000 for a single plaintiff or $10,000 for multiple plaintiffs.

General Order or Formal Guideline: A general order provides procedures for the reimbursement of expenses.

Counsel Appointed for Discrete Portions of Case: It is not clear if counsel is ever appointed for discrete portions of a case.

4. Eastern District of California

Program: Upon a motion by a pro se litigant, the presiding magistrate judge screens cases for appointment of counsel. Occasionally, the presiding magistrate judge will screen a case sua sponte. If the presiding magistrate judge determines that the appointment is appropriate, the magistrate judge refers the case to one of several bodies: Prisoner civil rights cases are referred to the UC Davis Law School and, in the Fresno Division, to the San Joaquin College of Law. Habeas cases are referred to the Federal Public Defender, who either takes the case or locates counsel. About 30-40% of habeas petitioners are appointed counsel. Title VII cases are referred to a specialized district panel. To receive counsel, the litigant must show that he or she is a likely winner. There are one to two appointments per year. The district does not have a process in place for appointing counsel in other types of pro se cases.

Attorney Participation: The district's civil rights pro bono panel no longer exists due to the lack of an administration and difficulty recruiting counsel. Counsel for the Title VII panel were recruited by letter when the panel was formed. Because no recruitment has taken place since, it is sometimes difficult to find counsel willing to accept appointments. A survey respondent reported that the district could benefit from having a viable program of recruitment, training, and appointment. The respondent expressed concern, however, that even if the Task Force were to develop such a program the wherewithal to maintain it does not currently exist. Someone would be needed to administer the program. Because attorneys are involved in many other ways with the court, the respondent perceived a danger in overburdening the attorneys who were most likely to respond to the court's call to pro bono service.

Expenses: Some deposition costs can be defrayed through a state fund. Title VII attorneys can recover reasonable expenses with pre-approval.

General Order or Formal Guideline: A general order requires the court to maintain a *Bradshaw* panel, provide for reimbursement of expenses and provide procedures for withdrawal.

Counsel Appointed for Discrete Portions of Case: It is not clear if counsel is ever appointed for discrete portions of a case.

5. Northern District of California

Program: The district's last several chief judges, over the course of their respective terms, have recruited a panel from law firms willing to accept pro bono appointment in pro se cases. The list is managed by pro se law clerks, who assist the chief judge in screening and managing litigation, including the process of acting on requests for appointment of counsel (either sua sponte or by the litigants). Counsel is appointed only after the court rules on a dispositive motion. Appointment of counsel in Title VII cases is handled somewhat differently. In San Francisco, the city's bar association maintains a list of lawyers and makes appointments when cases are referred to it by a judge. The bar association receives a $1,000 fee each time it appoints counsel for a case. The program now also encompasses Section 1983 cases and other cases. In San Jose, the court has an arrangement with the Santa Clara bar association; this association does not receive a fee, however. The district has a pilot program for employment cases called the Assisted Mediation Project, which consists of a small panel of attorneys who represent litigants solely for purposes of mediation.

Attorney Participation: The list of pro bono counsel comprises approximately 60 law firms, many of whom are consistent "repeat customers." The Assisted Mediation Project has a panel of six to seven attorneys and about a dozen pro se litigants have been represented through the project. A magistrate judge has recently taken overall responsibility to promote the district's pro bono programs among lawyers who practice in the district. That magistrate judge recently held a meeting of all lawyers in firms who coordinate pro bono work within their firms. Once a year, the district holds a reception to thank firms that have taken pro bono assignments during the course of the year. Several years ago, the chief judge appeared at a press conference with the attorneys in pro bono work to emphasize the priority their courts place on this form of public service. In addition, the Bar Association of San Francisco used the occasion to launch a program under which it asked all major law firms in the Bay Area to sign a "Pro Bono Pledge" and commit to devote up to five percent of billable time to pro bono matters.

Expenses: Counsel are reimbursed up to $3,000.

General Order or Formal Guideline: Yes.

Counsel Appointed for Discrete Portions of Case: Yes, for mediation (pilot program in employment cases).

6. Southern District of California

Program: The San Diego Volunteer Lawyer Program ("VLP") administers the district-wide Federal Civil Rights Pro Bono Project. Litigants file motions for appointment and presiding judges do the screening. Civil rights, Title VII, FTCA, *Bivens*, age discrimination, ADA and Rehabilitation Act cases qualify for referral. Screening criteria include whether the plaintiff has demonstrated indigence and whether the claims are clearly not frivolous. Once the judge refers a case to the VLP, the VLP asks the litigant if the litigant wants the case reviewed for eligibility. If the litigant replies affirmatively, VLP conducts a thorough review of the case. Approximately two cases per month are referred to VLP, and VLP accepts one-third of these cases, *i.e.*, approximately eight per year.

Attorney Participation: The program recruits attorneys with presentations to large and medium-sized law firms and through MCLE programs, although attorneys recruited through MCLE programs are generally not experienced enough to take appointments. The participation level is high.

Expenses: Pre-approved expenses are reimbursed.

General Order or Formal Guideline: A local rule provides for administration of the program.

Counsel Appointed for Discrete Portions of Case: No.

7. District of Guam

Program: The district does not have a formal program. Instead, upon a litigant's motion, the court determines if the litigant is truly indigent and whether "exceptional circumstances" exist justifying appointment of counsel.

Attorney Participation: The court is familiar with the local bar and if exceptional circumstances exist, it refers cases to the Attorney Listing of the Guam Bar Association's Lawyer Referral Service. The court has appointed counsel to one case in the past several years.

Expenses: Counsel is reimbursed up to $200.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

8. District of Hawaii

Program: The district does not have a formal program. Instead, when a litigant moves for appointment of counsel, the presiding judge's law clerk screens the case. In prisoner cases, the pro se law clerk does the screening.

Attorney Participation: The pro se law clerk keeps a list of participating attorneys and individual judges may also keep lists.

Expenses: It is not clear if attorneys are reimbursed for their expenses.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

9. District of Idaho

Program: In 2001 the district created the Pro Se Pro Bono Program. Law clerks screen cases at every stage to determine whether appointment of counsel is appropriate. In addition,

plaintiffs can file for appointment of counsel at any time. Counsel is appointed when the case appears to have merit or when the plaintiff is mentally ill.

Attorney Participation: The program recruited attorneys through an invitation letter signed by the chief judge and the bar commissioner, which was marginally successful. Recruiting luncheons have been more successful. The district also refers cases to the University of Idaho Law School.

Expenses: Counsel is reimbursed up to $1,500. Additional funds are available in extraordinary circumstances and the chief judge may also authorize the appointment of an expert witness or special master.

General Order or Formal Guideline: A formal guideline details the program.

Counsel Appointment for Discrete Portions of Case: Yes, for example settlement conferences and mediation sessions.

10. District of Montana

Program: The district has a pro bono panel system for the appointment of counsel in civil cases. A motion for counsel from a litigant generally triggers the appointment process, though in cases requiring appointment to protect a litigant's due process rights the court will not await a motion. The presiding judge does the screening, taking into account the standard factors under 28 U.S.C. § 1915(e)(1) as well as the litigant's attempts to find counsel. A judge has written to all attorneys in the district's bar to ask them to participate on the pro bono panel.

Attorney Participation: For habeas cases, the district calls individual attorneys or contacts the Federal Defender. For cases other than habeas, the court has had some success with the panel system. Attorney participation on the pro bono panel has been limited, however, and several of the participant attorneys are conflicted out of the types of cases where appointment is most often contemplated. There is an as yet unfulfilled need for attorney training in areas such as civil rights litigation. Appointment remains rare.

Expenses: Reimbursement is permitted "to the extent possible in light of available resources[.]"

General Order or Formal Guideline: Local Rule 83.16 establishes the panel system and sets forth procedures for appointment, relief from appointment at the instance either of the attorney or the client, reimbursement for expenses, and compensation for services, as well as defining the duration of appointment. The local rule also calls for the establishment of educational panels for attorney training, which have not yet been formed.

Counsel Appointed for Discrete Portions of Case: Yes. On occasion, the court has appointed counsel to investigate a claim or to file a brief on a particular issue.

11. District of Nevada

Program: There is no formal program. In habeas cases where the petitioner faces the death penalty or a life sentence, the district appoints counsel regardless of the petition's merits. In other habeas cases, screening is based on the length of the sentence and the merits of the petition. Appointment in other cases is "very, very rare."

Attorney Participation: For habeas cases, the district contacts the Federal Public Defender, who either takes the case or recruits someone from the CJA panel. The district doubts that attorneys would participate in a formal program. In one case, the Ninth Circuit ordered appointment and the district initially could not find anyone to work on the case; ultimately it recruited students from UC Davis.

Expenses: No mechanism exists for reimbursement.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

12. District of Oregon

Program: The district's program provides for the appointment of counsel in prisoner and non-prisoner civil rights cases. Pro se law clerks screen in-custody cases and chambers screen out-of-custody cases. If the appointment of counsel is recommended, the clerk's office is notified and the clerk sends three attorneys from the district's panel a copy of the complaint. The attorneys then indicate whether they will accept the case, whether they have a conflict or whether they decline to accept because the case is not sufficiently meritorious.

Attorney Participation: The district has a panel of 53 attorneys, which the district considers sufficient to meet its needs. However, the district does not consider itself completely successful at appointing attorneys for the panel. Five or six cases per year are referred to panel attorneys, who accept approximately one case per year and reject the rest as not sufficiently meritorious.

Expenses: Counsel may be reimbursed up to $100.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

13. Eastern District of Washington

Program: The district does not have a formal program except for prisoner Section 1983 and habeas cases. Appointment of counsel is usually triggered by an IFP, although a judge may appoint counsel when the defendant files a dispositive motion. A magistrate judge usually screens IFPs for financial eligibility and the presiding judge usually screens on the merits.

Attorney Participation: There is no panel. Instead, the presiding judge chooses an attorney he or she knows to be knowledgeable on the subject matter or refers the litigant to Gonzaga Law School or the Spokane County Bar Association. The "supply is adequate to meet demand."

Expenses: In some instances, expenses are reimbursed from the district's non-appropriated (attorney admission) fund.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: Occasionally, for mediation and settlement conferences.

14. Western District of Washington

Program: This district has adopted a formal plan to handle pro bono appointments in all prisoner and non-prisoner civil rights cases where the court exercises its discretion to provide such representation. Administration of the plan is carried out, in part, by the Federal Bar Association's Pro Bono Panel of attorneys who are available for appointment.

Prisoner and non-prisoner cases are handled differently. When a law clerk identifies a prisoner civil rights case that may be appropriate for appointment for counsel and his or her judge agrees, the judge issues an order directing appointment of counsel from the panel. A staff person in the clerk's office provides the court with the name of an attorney from the panel. At his or her discretion, the judge may instead direct appointment of an attorney who is not a panel member.

In non-prisoner civil rights cases, the appointment process is triggered by the pro se litigant's filing of an application for court appointed counsel and a financial affidavit. The judge and his or her elbow law clerk review the application and affidavit to ensure that the documents are complete. If they are, the judge refers the non-prisoner case to the FBA Pro Bono Committee for screening. The committee then asks two practicing-lawyer members of the Screening Committee to review the complaint and any relevant supporting documentation. The Screening Committee lawyers determine whether the pro se litigant's claims appear to have merit and if the case would benefit from the appointment of counsel. They then inform the court of their recommendation. If appointment of counsel is warranted, the judge issues an order directing the appointment of counsel from the panel.

The district's formal plan also authorizes the establishment of panels to conduct educational programs for attorneys on the panel.

Attorney Participation: The FBA Pro Bono Committee has successfully worked with the chief judge and the court's staff to recruit attorneys for the panel. Attorneys are recruited through letters sent by the chief judge soliciting participation in the panel, advertisements and articles in local bar journals, and dissemination of informational pamphlets and applications. Law firms, as well as individual practitioners, may be panelists. The Pro Bono Committee Chair(s) approves all applications for appointment to this panel. The panel currently consists of approximately 40 attorneys, which meets the district's needs.

Expenses: The appointed attorney or law firm will be reimbursed for reasonable expenses from the Western District Court Civil Rights Litigation Fund, which was formed for this purpose. The reimbursable amount is currently $3,000. Counsel may also seek statutory attorney fees in case for which they are provided.

General Order or Formal Guidelines: Yes.

Counsel Appointed for Discrete Portions of Cases: Rarely

B. Discussion of Survey Results

The districts within the Ninth Circuit are diverse and many have successful and differing systems for appointing counsel for pro se litigants. As a result, a one-size-fits-all approach to handling pro se cases is not appropriate. On the other hand, each district should strive to ensure that its program includes certain minimum features. One approach would be the adoption of a formal program memorialized by local rule, general order, or some other form of formal guideline. The formal program description would be published in a manner calculated to be read by court users as frequently as possible (*i.e.*, on a website). Having a formal program would ensure that each district incorporated certain minimum practices such as maintaining mechanisms for screening cases, recruiting counsel, and reimbursing counsel for their reasonable expenses. A formal program would also offer continuity and the assurance that all litigants would have the same minimum guarantee of access to the federal court system. Reliance on an informal system not only creates inefficiencies and inconsistencies (the characteristics of any ad hoc approach to solving a recurring problem), but also suggests a lukewarm commitment to ensuring that pro se litigants who wish to be represented have an opportunity to seek appointment of counsel.

Each district should have a mechanism to screen all pro se cases. Effective recruitment of pro bono counsel requires screening, since it steers frivolous cases away from counsel and ensures that counsel will be devoting time only to cases in which their skills are truly needed. The mechanism should specify who screens the cases, at what stage cases are screened, and what criteria are used to screen cases.

Currently, many districts consider appointing counsel only in certain types of cases, such as civil rights cases. Other districts do not consider appointing counsel unless the self-represented litigant makes a formal request. Since every litigant should have the opportunity to access the court system, the districts should ensure that pro se litigants in every type of case have the opportunity to be considered for the appointment of counsel whether or not the litigants make a request. Districts should decide for themselves the most appropriate timing for screening cases. Currently, some districts screen when a case is filed, while others wait until a dispositive motion is brought. These varying approaches are appropriate since some districts might find it more useful to involve counsel early in the case, while others may find that waiting until a case develops aids the screening process.

Districts should also determine who is the most appropriate person to screen cases based on available staffing resources. Some districts refer pro se cases to a pro se law clerk who screens and monitors the cases. Other cases rely on a magistrate judge to do the screening. Still others rely on the assigned district judge to screen his or her own cases. Additionally, each district should articulate the screening factors that it uses in order to ensure that it takes a consistent approach. The subcommittee proposed such screening criteria in Appendix I, Section 6. A similar set of screening

criteria exists in the District of Montana and provides another possible model for consideration.[3]

The single most important thing a district could do to ensure that its pro bono program meets the needs of counsel who wish to participate and pro se litigants would be to appoint a "Pro Bono Coordinator." Only by making sure that one person takes responsibility for the program can a district be sure that it has a defined and workable program and that there is consistency in the program. This approach ensures that there is someone who institutionally knows what is going on and has a commitment to the process.[4] Further, all district coordinators could meet annually under the auspices of the circuit to share information, learn from each other, fine tune their programs, and help out those districts with special needs (*i.e.*, the need for lawyers from outside the district).

Districts could establish panels of pro bono attorneys willing to represent pro se litigants, either on their own or by means of an effective working arrangement with an outside group or entity, such as a bar association, a public interest law firm, a law school, or the lawyer representatives serving in the district. Many districts have reported difficulties in finding attorneys who are willing to accept pro bono assignments. The establishment of a sufficiently large panel of attorneys would help alleviate this problem. Districts that maintain their own panel would need to regularly attempt to recruit new members to ensure that the panel consists of active participants, and to request attorneys to specify their practice areas so that courts were best able to match attorneys to cases.

Each district would need to ensure that once it appointed a pro bono attorney, the attorney accepted the case. Experience shows that the likelihood of acceptance is highest if the chief judge or other designated judge personally writes or calls prospective counsel to offer an assignment in a case in which there is a need for pro bono counsel. There is no substitute for direct judicial involvement in the case placement process. Many districts place the responsibility for securing the attorney on external organizations, although placing cases through a partner tends to be less effective than if judicial officers do it directly. The Northern District of California has tried to improve the "yield" of cases accepted by providing an incentive for good results to its outside partner, the Bar

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[3]The pertinent part of Montana's Local Rule 83.16 (c)(4) states:

> The following factors will be taken into account in making the determination: (A) the potential merit of the claims as set forth in the pleadings; (B) the nature and complexity of the action, both factual and legal, including the need for factual investigation; (C) the presence of conflicting testimony calling for a lawyer's presentation of evidence and cross-examination; (D) the capability of the pro se party to present the case; (E) the inability of the pro se party to retain counsel by other means; (F) whether counsel is mandated by law; (G) the degree to which the interests of justice will be served by appointment of counsel; including the benefit the Court may derive from the assistance of appointed counsel; and (H) any other factors deemed appropriate by the Judge.

[4]One indication of the importance of centralizing the administration of pro bono recruitment and appointment is the difficulty the Task Force encountered in obtaining information. The Data Collection Subcommittee ultimately succeeded in obtaining a great deal of useful information, but some districts had trouble quickly compiling information on their own policies and procedures and the quality of the information they supplied varied tremendously.

Association of San Francisco. For each successful case placement, the Bar Association of San Francisco receives a $1,000 fee.

One key to success is making it easy for firms to accept cases; careful preparation of case background materials, training material, and a guaranteed stay of proceedings until counsel is ready to proceed, can all help to facilitate entry into a case. Whoever offers case assignments should be prepared to discuss the benefits of taking pro bono cases, such as training for young lawyers and the potential for success-based fee awards. It can help tremendously to cite examples of excellent experiences that law firms have had in pro bono cases. With law firms, there is often no better leverage than peer pressure ("X, Y and Z firms have taken cases; I see that your firm has not yet done so.")

Courts should acknowledge that reimbursement of expenses can be an incentive for attorneys both to volunteer and to provide the highest quality of counsel. Because the resources available to the districts differ and the expenses associated with litigating cases vary among districts, each district should determine an appropriate maximum reimbursement amount. In addition, each district should consider whether it is appropriate to require counsel to receive pre-approval in order to be reimbursed for an expense. Alternatively, districts may require counsel to receive pre-approval for an expense that exceeds a certain amount. For example, the Central District of California requires pre-approval for the reimbursement of an expense that exceeds $500. See Appendix I for suggested procedures.

Inevitably, circumstances will arise when withdrawal is appropriate, and, realistically, such circumstances will arise more frequently in cases in which pro bono counsel has been appointed than in other cases. Motions for withdrawal should be handled according to the procedures and ethical standards that apply to all cases, but, in addition, districts may wish to consider providing special rules governing appointed pro bono cases. By making clear at the outset that involuntary service is never required, special rules for withdrawal in appointed pro bono cases can ease concerns counsel may have in considering whether to accept an assignment.

Training is another area of importance in managing pro bono counsel programs. For any lawyer considering whether to accept a pro bono assignment, the most significant concern is often that the case requires substantive expertise outside of his or her field of practice. There are several ways to address this need. First, bar associations are in the business of providing continuing legal education courses, and courts might consider requesting that courses be offered periodically in areas specifically designed to support pro bono counsel. Since direct judicial participation in continuing legal education programs is often a very effective way to ensure maximum attendance, district judges or magistrate judges could consider appearing on a panel or teaching a course in areas designed to support pro bono counsel. Furthermore, district courts might consider forming a pro bono legal education committee, chaired either by a district judge or magistrate judge or by an attorney who has shown a particular leadership and dedication to pro bono recruitment in the district. A key mission of the committee would be to develop support systems for any lawyer who accepts a pro bono case, such as primer materials or ongoing consultation services with lawyers who have significant depth of experience in the specialty area in which the case arises.

Arrangements in which pro bono counsel provides representation only for discrete purposes have the potential to benefit both the court and the litigant. Input from the California Commission on Access to Justice supports this claim, according to its comment that limited scope

representation can often improve the quality of legal submissions from pro se litigants. The mediation phase of litigation is also an area in which limited representation can be effective. Because mediated resolution generally has clearly definable beginning and end points, and is, by definition, voluntary, mediation provides a unique opportunity for counsel to provide whatever guidance the client is willing to accept without much risk that counsel's advice might affect the litigation in a permanent way.[5]

Advisory counseling is another potentially useful activity that overlaps with the provision of self-help mechanisms that districts might establish to support pro se litigants (an area that is being addressed separately by the Pro Se Education Subcommittee). In requesting attorneys to undertake pro bono work for pro se litigants, district courts might offer attorneys the option of staffing self-help centers at designated times; drafting self-help manuals and forms and taking periodic responsibility for updating the manuals and forms; or agreeing to be available for advisory consultation with a pro se litigant short of an on-the-record appearance by the attorney.

Providing such counseling to common categories of pro se litigants could prove quite helpful to the districts in managing pro se cases that are particularly difficult to handle, because of the high volume of cases in that area or the issues that tend to be involved. The burgeoning prison litigation or immigration cases in some districts are examples. If pro bono lawyers were recruited specifically to staff self-help kiosks at prisons or INS offices, so that pro se litigants would have an initial source of legal advice advice which would cover the basic requirements for filing a case, and assistance with framing a pleading if the client decides to proceed with a claim - the district courts might find that many claims that might otherwise have been filed, would never be filed, and that for those claims that are filed, pleadings would be framed with better attention to threshold filing requirements.

All accredited law schools are required to offer clinical courses. As long as there is overall supervision by a member of the bar, clinical programs can provide an excellent source of representation in appointed cases. There are many logistical challenges to making this approach work well (such as continuity and scheduling, since case calendars do not generally match up well with the inherently transitory nature of legal education), but these problems are not insurmountable.

Districts may wish to consider drawing from the funds generated by attorney admissions to support pro bono appointments. Although expense reimbursement mechanisms are already widely available, courts could explore whether these funds might be used for support systems that reduce the cost of handling pro bono cases. The general rule of thumb is that non-appropriated funds cannot be used for services funded by appropriated funds, such as court reporters and interpreters. However, there may be a way for lawyer representatives to establish specific pro se

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[5] One member of the subcommittee has strongly held reservations about any form of "unbundling," which is the term that has been used in the academic literature for limited representation. Any artificially limited representation carries with it the risk that counsel will be unable to provide fully informed advice consistent with his or her ethical responsibilities. The majority of the subcommittee recognizes that that is a serious concern, but takes the view that there may be some circumstances (such as mediation) in which limited representations may be workable and should be considered.

translation or reporting services on retainer and to seek at least partial reimbursement from attorney admission funds if the court's pro bono program includes a lawyer training component.[6]

The problem of malpractice insurance in appointed pro bono cases is another area in which districts might facilitate appointments by making admissions funds available. Professional liability insurance designed specifically to cover appointed pro bono cases is available on a pooled-risk basis. The Volunteer Legal Service Program (VLSP), which is part of the Bar Association of San Francisco, has for many years purchased pooled-risk coverage for all attorneys who accept pro bono cases through VLSP. Because potential errors and omissions exposure is a common concern of attorneys considering pro bono appointments, VLSP has found that this blanket policy is a valuable recruiting tool.

To the extent that it is problematic for a district court, itself, to procure services or insurance in support of pro bono attorney-client engagements, it might be useful to have an outside entity (e.g., a bar association) handling at least some of the tasks of pro bono coordination for the court. In order to avoid having the court, itself, procure services or insurance in support of pro bono attorney-client engagements, an annual fixed contribution could be provided to an outside coordinator from attorney admission funds, with the funds earmarked for use in specified ways.

Admission to practice law is a privilege, whether granted in the form of a state-sanctioned license to practice law or permission to practice before a specific court or agency. Sometimes, lawyers fail to appreciate that they are officers of the court and that thus there is an inherent public service component to practicing law. Since the districts have broad discretion to set the rules of practice before them, each district might consider requiring members of their respective bars to undertake some minimal annual amount of pro bono service in cases pending before the court. That obligation could be fulfilled in different ways, many of which would not involve actually taking a case (thus, no one would be "forced" to take a pro bono case). First, it could be fulfilled each year, or perhaps for multiple years, by the acceptance of a single case. Second, it could be fulfilled by undertaking limited representations or doing advisory counseling, such as staffing self-help clinics, providing training to other attorneys who take pro bono cases, supervising law students, helping the court screen pro se cases, preparing or updating self-help materials or otherwise assisting the court with its administration of pro bono appointments. Or third, it could be fulfilled by an annual monetary contribution to a fund supporting pro bono cases in the district (an additional source of funding for such things as translation services, court reporting services, or insurance).

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[6]In all four California districts, the Certified Shorthand Board of the State of California is required by statute to provide free court reporting services in pro bono cases which are not "fee generating," as defined. See California Business & Professions Code § 8030.2. The Eastern District makes the requisite findings in the orders appointing counsel; the Northern District uses the Bar Association of San Francisco Pro Bono appointment process to meet the qualification requirements. It is unclear whether this issue is addressed in the Central District and the Southern District, but the subcommittee suggests that all California District Courts adopt mechanisms in their guidelines or procedures to assure that pro bono cases qualify for this service, consistent with appropriations authority.

The mandatory acknowledgment of, for example, alternative dispute resolution rules in conjunction with service of a complaint is an effective device for notifying litigants of a court's procedures and expectations. An analogous approach might be considered for pro bono service. Any applicant for admission to the bar of a district might be given a letter, signed by the chief judge, explaining the priority placed on pro bono service, attaching background materials concerning the district's pro bono appointment program, and requiring a signed acknowledgment from the applicant.

The most consistent problem reported by the districts is the difficulty experienced in finding counsel to accept pro bono representation. Strong leadership by the districts' judges can make a big difference. A district may have a well-conceived pro bono appointment program, but if the program does not have vigorous, high-profile support from the court itself - in the person of the chief judge, at least, and hopefully a number of other members of the court as well - attorneys will not step forward to take cases. Every lawyer in the district should have the clear impression that pro bono staffing of pro se cases is a priority of the court.

In some districts, the chief judge routinely sends letters to members of the district's bar encouraging them to join pro bono panels. Chief judges and other judges could meet with attorney groups in their district to encourage them to participate. When speaking to a group for a different purpose, judges could mention the district's panel and request the attorneys to join. Some districts hold annual dinners or luncheons to recruit new attorneys and honor participating attorneys. Organizations that partner with districts can provide further incentives to participate by publicizing successes attained by pro bono attorneys.

The annual district conference with lawyer representatives provides an excellent opportunity to address the issue of pro bono representation on a regular basis, with a captive audience of attorneys who, by virtue of their status as lawyer representatives - with the professional distinction and obligation of service that that entails - should themselves, by their example to other attorneys, be expected to share the leadership role in promoting the importance of volunteering for pro bono cases. Districts should consider making pro bono representation a standing agenda item at each conference.

Effective leadership is impossible without quality information about how things are actually working. Thus, the districts should consider establishing some ongoing mechanisms for collecting statistics and feedback from lawyers about pro bono appointive matters. In order to gauge performance and identify trends on an ongoing basis, it is necessary to collect statistics addressing the number of appointments each year, the types of cases in which they are made, the resolution of cases in which appointments are made, and the time and expenses devoted to each case. A periodic survey of attorneys who have accepted cases would also be helpful.

The Ninth Circuit must take steps to help the districts in their endeavors to provide better judicial access for pro se litigants. In forming the Task Force, Chief Judge Schroeder has already shown an understanding of the importance of leadership on the issue of handling pro se litigation. Going forward, it is our hope that Chief Judge Schroeder and all chief judges who succeed her will support the efforts of the districts to recruit pro bono counsel by speaking and writing periodically on the topic and generally making vigorous efforts to ensure that lawyers practicing throughout the circuit understand the high value the circuit places on pro bono service.

From an organizational standpoint, the chief judge might wish to consider a number of approaches to encouraging and promoting pro bono service. Appointing a standing committee comprised of one judicial officer and one attorney within each district might be helpful. Another alternative is the creation of a circuit-wide pro bono coordinator position. This employee would be available to assist district courts to create, promote and enhance their pro se pro bono appointment programs. The employee would help districts develop a formal rule and promote attorney participation. The employee also would help organize and publicize events, such as award ceremonies, luncheons and press conferences, and would provide support for articles and speeches to be given by the judge. The main idea behind the proposed pro bono coordinator position is that someone would take ownership of the issue and districts would have a ready source of expertise in the best practices of the districts. This person would be based at circuit headquarters, but would be available on a roving basis to all districts.

Some districts have indicated that they lack attorneys who have both the experience and willingness to accept pro bono appointments, while other districts appear to have an excess of suitable volunteers. As a result, the circuit should institute a process for inter-district appointments and, if possible, create a fund to reimburse counsel for travel expenses. In addition, there may be instances where a district has located an attorney who is willing to accept an appointment but who lacks the relevant experience to provide effective representation. The circuit could match these attorneys with more experienced attorneys from other districts who would mentor and advise the less-experienced attorneys.

C. Recommendations

The circuit, as defined in Section I(B), should:

1. Appoint a standing committee on pro bono representation (or charge any new pro se committee with oversight of pro bono representation) and a circuit-wide pro bono coordinator.

2. Explore development of a program for inter-district pro bono appointment of counsel.

Each district should consider:

1. Adopting a formal program for the appointment of pro bono counsel. The program should be published and include a screening mechanism.

2. Appointing a pro bono coordinator, based upon court size and workload, to be responsible for establishing and maintaining a pro bono panel, securing appointments, and related duties.

3. Working with judges, bar associations, and law schools to provide training and educational materials for pro bono counsel as needed, especially in substantive areas that tend to recur in pro se cases, such as civil rights, employment, Social Security, and immigration law.

4. Providing attorneys, upon acceptance of a pro bono assignment, with sample forms to facilitate case management, such as the sample Ninth Circuit Court of Appeals contract letter in Appendix H.

5. Utilizing all available resources, including the use of limited representation, advisory counseling, mediation programs, law students, and attorney admission funds to increase pro bono representation.

6. Providing for some form of reimbursement of pro bono attorneys' out-of-pocket expenses, and informing an attorney of the court's reimbursement policy before he or she takes a pro bono case.

7. Exploring ways to increase pro bono representation by the bar, including enhanced recruitment efforts through web sites, conferences, enhanced training, and recognition by the court of the service provided, among other methods.

8. Encouraging new admittees to participate in pro bono service and informing them of the various ways in which they can provide such service to the public and the courts.

III. Coordination with Prisons and Prosecutors

A. Subcommittee Activities

The subcommittee conducted a survey of all prisons in the Ninth Circuit. The prison officials who responded indicated that they have systems set up for the purpose of allowing inmates to grieve various prison decisions, as well as to file lawsuits in court. Most, if not all, provide assistance of paralegals to help inmates file their claims.

The legal system and prisoners' access to it, however, undoubtedly varies with each institution as to the type, quantity, and quality of help provided. Some grievance procedures are more cumbersome than others. The availability of legal materials and assistance also varies. The survey did not take into account the varying educational backgrounds and mental health conditions of inmates. These variables play a part in the effectiveness of an inmate's access to the legal system. Additional information about the grievance procedures and available resources is contained in Appendix J.

The courts' own pro se law clerks also provide a valuable resource in the orderly processing of prisoner claims. The review of pleadings by specialized staff results in claims that are understandable and that have already been reviewed to see if a cause of action is actually stated in the complaint. It is therefore important to point out to defendant agencies whenever possible that far more cases are screened out at the pleading stage than are allowed to proceed to service of process or discovery. Furthermore, in some districts an order goes out requesting waiver of service of process from counsel believed to represent the defendant(s) with the order requiring that the counsel inform the court if counsel does not represent the defendant(s).

Concerns were raised about the ability of prisoners to send and receive legal mail. This becomes more of a problem when prisoners are transferred from prison to prison and the mail has some difficulty catching up with them. The subcommittee did not determine a feasible solution to this problem.

Everyone agrees that to the extent possible typed pleadings are preferable to written ones. It should be noted that the use of the typewriter by most prisoners is prohibited because parts of the typewriter can be used as weapons. The suggestion was made that the use of computers as word processors, or eventually for e-filing, might solve this problem.

There is a divergence of views on the desirability of prisoner access to PACER and Case Management/Electronic Case Filing systems, and the districts vary widely in their approach to both prisoner and non-prisoner pro se electronic filing. Prisons understandably seek to restrict or limit access to the Internet, and some clerks fear possible CM/ECF tampering by pro se litigants. Nevertheless the Task Force believes that the subject is worthy of further discussion. In prisons, for example, Internet access could be restricted to court sites and appropriate safeguards could be developed. Alternatively, a legal assistant might be designated to handle electronic filing for prisoners and to obtain docket sheets and other case information electronically.

Also, on an ad hoc basis, members of the subcommittee spoke with various agencies regarding ways in which people in the legal system could be more helpful to each other. One proposal that the subcommittee reviewed and submits for the reader's consideration is a prison

ombudsman system suggested by Senior Circuit Judge and Task Force consultant Arthur Alarcón. The prison ombudsman concept is presented in Appendix F. Establishing a prison ombudsman program could potentially reduce court costs and unnecessary claims. In a viable program, the ombudsman is independent in fact and perception. Furthermore, the ombudsman concept is separate and distinct from the existing "adversarial" grievance process used in many prisons. A viable ombudsman would not be employed by the prison system that he or she serves, and would report directly both to the courts and to the correctional department. Although opinions can differ as to the viability of a prison ombudsman program, the subject should be discussed by correctional departments and the courts.

B. Recommendations

The circuit, as defined in Section I(B), should:

1. Convene a meeting of representatives from the Federal Bureau of Prisons and all state correctional departments within the circuit. The twin purposes of the conference would be to improve access to case information, legal materials, mail, assistance, and equipment; and to explore further development of prison mediation and/or ombudsman approaches in addition to existing grievance procedures.

2. Convene a similar meeting of representatives from all state Attorneys General and United States Attorneys within the circuit to discuss waivers of service of process and other procedures for reducing delay in prisoner cases.

3. Seek outside funding to convene the meetings, if necessary.

Each district should consider:

1. Exploring the use of court resources to develop its own ombudsman programs. For example, the Northern District of California is using a part-time magistrate judge to provide such a service in one prison in the district. Resources such as the Ninth Circuit Alternative Dispute Resolution Committee and the Federal Judicial Center should be consulted for possible assistance with such programs.

2. Convening meetings with local prison officials, prosecutors, defense counsel, and appropriate public agencies in the absence of circuit-wide conferences addressing prisoner litigation.

3. Utilizing representatives on state-federal judicial councils to facilitate meetings or conferences addressing prisoner litigation.

IV. Pro Se Education

A. Subcommittee Activities

The subcommittee on pro se education was formed in order to study and evaluate what self-help materials are currently available to pro se litigants in general, whether such materials are accessible and are being utilized, whether the use of such materials is helpful to the litigant or the court, and whether more or different materials would be beneficial. The mission was expanded to look at education available to judges and court staff as well.

The subcommittee considered whether the district courts within the Ninth Circuit currently provide or should be encouraged to provide written self-help materials to incarcerated pro se litigants in the areas of habeas corpus and civil rights. The subcommittee learned that some districts (in and outside the Ninth Circuit) do provide such materials in the form of a "pro se manual." The subcommittee reviewed several such manuals from various districts and presented two sample manuals to the Task Force for its review and consideration. The Task Force reviewed the contents of one manual related to habeas corpus litigation and another addressed to the area of civil rights. Both manuals contained information concerning procedural and substantive law. Many Task Force members expressed concern that the manuals appear to convey legal advice, and other Task Force members challenged the accuracy of statements about the law, noting that much of the cited case law is open to various interpretations. Other Task Force members felt that the language used in the manuals was too technical to be easily understood by non-lawyers and therefore would not be particularly helpful to pro se litigants.

After much discussion of the need to provide better education to pro se prisoner litigants, it became clear to the Task Force that individualized attention was needed in the area of habeas corpus. In light of the complexity of the substantive and procedural issues, the pace at which the law in this area changes, and the incarcerated status of habeas litigants, pro se habeas petitioners have challenges unique to their situation. Accordingly, the Task Force created a subcommittee to address these particularized concerns. The report of the subcommittee on pro se habeas education follows in the next section.

The tension between providing information and legal advice is apparent, and is experienced not only in the courtroom but at the intake counter of the clerks' offices. The California state courts have approved uniform signage to be posted in clerks' offices listing the kinds of assistance that can be provided by court staff. The text of the sign is contained in Appendix K. The California Administrative Office of the Courts has also developed extensive training materials for clerks and clerk supervisors on the distinction between legal information and legal advice. The materials, which include two videotapes and related guides containing hypotheticals and interactive exercises, encourage court staff to provide their "customers" with the maximum assistance possible within the confines of ethical constraints.

With respect to non-prisoner cases, the Northern District of California has completed a pro se manual entitled "Handbook for Litigants without a Lawyer." Although the court distributes the manual on a case-by-case basis, it also is available through the clerk's office and on the website for the Northern District of California. The subcommittee presented a condensed version of the manual to the Task Force for its review. The full text of the manual is contained in Appendix L. A list of other educational resources provided by courts in the circuit is contained in Appendix M.

The Task Force members discussed whether the comprehensiveness of the Northern District of California manual might be too complex for pro se litigants and whether a simpler, shorter handout would be more useful. The district subsequently reported that it also publishes discrete sections of its manual in the form of pamphlets. On the other hand, it was also felt that the completeness of the information would benefit pro se litigants. It was observed that a survey regarding pro se handouts and manuals issued by various districts throughout the federal system revealed a wide variety of approaches. No conclusion was reached.

The Task Force also reviewed a draft prepared by Magistrate Judge Wayne Brazil for the Circuit's Alternative Dispute Resolution Committee. It advises potential pro se litigants of alternatives to litigation and urges persons to consider these alternatives before filing. Members of the Task Force thought the draft was well written, thoughtful and very helpful. There was some concern, however, that the tone of the draft could be perceived as too discouraging to pro se litigants. One thought would be to have such a publication issued by an organization other than the court in order to mitigate that concern.

The subcommittee also surveyed the bankruptcy courts within the Ninth Circuit and determined that, although many bankruptcy courts have no specific programs for pro se litigants, in the wake of the Bankruptcy Law Reform Act courts are increasingly developing such programs. Such programs tend to be found in large urban districts or have been developed under the auspices of a specific judge or lawyer. These programs usually are administered by a public interest law firm that provides malpractice insurance. Administration by an entity outside the court avoids the potential problem of court staff being perceived as either giving advice or acting in their self-interest. Once a pro se litigant files in bankruptcy court, he or she is made aware of the appointed counsel program. Some legal services providers are publicizing recently created "modest means" programs where legal assistance can be obtained for a reduced fee. The Central District of California uses an annual award recognition luncheon, paid for from the attorney admission fund, to honor the volunteers. Unfortunately, pre-filers may still be vulnerable to unscrupulous bankruptcy petition preparers.

In order to determine whether existing self-help materials are adequate, the subcommittee gathered additional data on the nature and availability of self-help materials that currently exist within the circuit. See Appendix M for a summary of materials available from various courts. The Task Force also reviewed related forms available in certain courts and urges each court to consider their use.

The Task Force determined that apart from the need for greater availability of educational materials for pro se litigants, judges and court staff may also benefit from training in this area. In addition to providing training on the difference between legal advice and legal information, as is available for the California state courts, judges and their staff might benefit from instruction in methods of effective communication, both orally and in writing, with pro se litigants, as well as methods to diffuse tense situations and advance effective case management. Although judicial training resources are limited, many of these techniques appropriately fall within the category of improving court security and could be funded as such. In addition, judges and court staff might benefit from available state court resources, including the recent American Judicature Society monograph *Reaching Out or Overreaching - Judicial Ethics and Self-Represented Litigants*. This publication includes a discussion guide, training materials, and the American Judicature Society's

Proposed Best Practices for Cases Involving Self-Represented Litigants, a copy of which is attached to this Report as Appendix O.

B. Recommendations

The circuit, as defined in Section I(B), should:

1. Request the Federal Judicial Center to provide training for new and continuing judges and court staff on management and communication techniques in pro se litigation. Existing resources include state court training materials, model guidelines, and forms, which could be reviewed for possible adaptation for the federal courts.

Each district should consider:

1. Regularly reviewing and updating the educational materials and forms that are available to pro se litigants and evaluate whether they could be doing more to provide information about court procedures. The Table of Contents of the manual contained in Appendix L provides a useful checklist of topics suitable for information sheets or pamphlets. Wherever possible, such materials should be available on a court's website as well as in its clerk's office(s) or library (ies).

2. Encouraging local law schools and bar associations to develop educational materials for pro se litigants. Lawyer representatives and non-lawyers could also assist in the effort to translate forms into different languages and ensure plain, understandable English. Assisting in the preparation of educational materials is one means of discharging a lawyer's pro bono responsibilities.

3. Reviewing available information on service of process and appropriate methods of bringing matters to a court's attention. Each court should review the procedures its clerk's office utilizes in providing information and/or responding to requests for information from pro se litigants. The policies should be communicated to pro se litigants and followed by court staff.

4. Creating new positions, such as small claims court advisors employed in some state courts, to provide basic information and answer the questions of pro se litigants. District courts should examine the feasibility of providing similar resources through the auspices of a local law school or bar association.

5. Communicating to pro se litigants what legal information can and cannot be provided by court staff. For example, Appendix K is an example of signage used to define the distinction between legal information and legal advice.

6. Reviewing such state court initiatives as legal information kiosks, self-help centers, and forms for possible adaptation.

7. Authorizing clerks' offices to provide access to case management/electronic case filing (CM/ECF) and related training materials to pro se litigants.

V. Habeas Corpus Education

A. Subcommittee Activities

After much discussion on the need to provide better education to pro se litigants, it became clear to the Task Force that individualized attention is needed in the area of habeas corpus. In light of the complexity of the substantive and procedural issues, the pace at which the law in this area changes, and the incarcerated status of habeas litigants, pro se habeas petitioners have challenges unique to their situation.

The subcommittee considered various options on how to improve the availability of educational materials. The subcommittee discussed what materials already were available, whether self-help information should come from the court or a separate entity, at what stage of the proceedings distribution of material would be most effective, and whether it was appropriate for the Task Force itself to become involved in the promotion, creation, distribution or monitoring of such materials.

The subcommittee was cognizant of a concern expressed by a majority of the Task Force members that any information coming from a court, or appearing to come from a court, should not cross the line between presenting information and giving legal advice. Some members believed it would be difficult for a court to disseminate information without the perception of giving legal advice. Others expressed concern about the constant changes in the applicable law and the need to timely and consistently update educational materials. Due to the limited duration of the Task Force, some members questioned whether the Task Force should be involved in promoting, creating or facilitating self-help manuals of any kind.

The subcommittee considered the amount of information currently being provided to the pro se habeas petitioners. With respect to the most basic procedural aspects of habeas corpus litigation, there is a form petition annexed to the Federal Rules following 28 U.S.C. § 2254 that has been made available to prisoners as part of a form adopted by each district court. These forms contain sufficient information to allow a prisoner to successfully initiate a habeas action in the vast majority of cases. Additionally, that form, as well as the rules themselves, were amended effective December 1, 2004, as part of a general restyling of the rules to make them more easily understood. Moreover, the protections afforded pro se prisoners in the civil rights context have been extended to pro se habeas petitioners (specifically the requirement that notice of pleading defects and the opportunity to correct them be given prior to dismissal), thereby reducing the possibility that lack of education could result in dismissal of a potentially meritorious case.

Despite the form petition and court-afforded protections against premature dismissal, the subcommittee believes that pro se habeas petitioners could use additional assistance in the more complex procedural aspects of habeas litigation. These include the method of presentation of the claims both to the state courts for exhaustion purposes, and the federal courts for clarity, as well as the one-year time limitation.

The subcommittee considered the option of providing information to prisoners who might potentially file federal habeas petitions. The concept of distributing pre-filing information could benefit both the litigant and the court. For example, information on timeliness and exhaustion could be valuable to the pro se habeas petitioner prior to filing. In addition, potential defects in pleading

possibly might be cured prior to filing, thereby reducing utilization of court resources in dismissing petitions with leave to amend and/or issuing other interim and remedial orders.

The subcommittee presented examples to the Task Force members of notices sent to pro se habeas petitioners in the Southern District of California. It became clear that such notices by their nature must be updated and changed often, as new case law is frequently announced in these areas. Therefore, it was decided that it would be impractical to make a manual available in written form. Because the only practical method of making information available would be electronically, a medium typically not available to prisoners, the idea of a self-help manual did not appear to be a viable means of supplying habeas information to prisoners.

The subcommittee considered the viability of providing pro se habeas petitioners with information after they already have initiated an action by encouraging individual districts to adopt a standardized notice procedure similar to that of the Southern District of California. The pro se law clerks, however, previously attempted such an approach without success. The main problem is a lack of consensus with regard to not only the substantive meaning of relevant case law but also the timing of giving certain information to the pro se petitioners. Some people do not believe it is appropriate to present information to petitioners before it is necessary to do so, and there is a lack of consensus regarding case holdings with respect to what a district court is *required* to do as opposed to what it has the *discretion* to do. Because opinions on these subjects vary from district to district as well as within districts, and because the pro se law clerks have already made the individual districts within the Ninth Circuit aware of the types of notices that have been distributed to prisoners, no further action was contemplated by the subcommittee in this regard.

The subcommittee also considered the option of whether a self-help manual could be distributed and updated by an entity outside the court. The chair of the subcommittee approached the Post-Conviction Justice Project at the University of Southern California to determine whether it had any interest in preparing a self-help manual for habeas petitioners. Interest in the idea was expressed, but only upon the condition that there would be assurances that the manual would be made readily available to the prisoners.

B. Recommendations

The circuit, as defined in Section I(B), should:

1. Create a directory of information and make it available to prisons, perhaps electronically, in order to direct pro se habeas petitioners to educational materials that are already available.

Each district should consider:

1. Evaluating the information it currently provides to prisoners in the areas of procedure and pre-filing requirements and determining whether it can or should do more.

2. Enlisting law schools or bar associations to assist in the development and/or updating of self-help materials.

3. Addressing the subject of habeas educational materials at an appropriate district sponsored conference with prison wardens and/or prosecutors.

4. Asking state-federal judicial councils to explore a coordinated system of post-conviction relief in state and federal courts. Possible options include publication of a post-conviction relief manual for each state, and a regional state-federal conference devoted to a coordinated system.

VI. Data Collection

A. Subcommittee Activities

This subcommittee's mission was to gather data from each of the districts within the Ninth Circuit in order to better understand the issues posed by pro se litigation. Existing research on pro se litigants in the Ninth Circuit has largely been gathered by the Administrative Office of the United States Courts. While the Federal Judicial Center (FJC) has compiled reports on this data, the accuracy of their numbers is unknown; the statistics depend on how cases are reported and have not been checked for accuracy with the districts. Improved data tracking systems are critical to ensuring more reliable information. In order to educate the Task Force about this available data, a representative from the FJC presented related charts in July 2003 and the presentation materials are included in Appendix N. The number of pro se litigants involved in different case types are quantified for each district within the circuit. Updated data for 2003 counts 43,350 pro se civil cases in district courts, up from 41,174 in 2002.[7]

Beyond the statistical reports from the FJC, there was previously very little research on pro se issues in the Ninth Circuit. Accordingly, the subcommittee conducted interviews and surveys to assess (1) procedures for review of claims related to in forma pauperis applications, (2) district standards for appointment of counsel, and (3) pro se law clerk functions. The information that was gathered can be found in the relevant sections.

Due to the Task Force's limited resources, research on both the Court of Appeals and the Bankruptcy Courts was not extensive. The relevant information about pro se procedures for the Court of Appeals is included in Section I. Regarding the Ninth Circuit Bankruptcy Courts, some information about case processing is also included in Section I, and a survey was conducted by Bankruptcy Judge Vincent Zurzolo as well. The survey aimed to assess the availability of pro bono services, and revealed that, of 13 respondents, six courts have pro bono programs for pro se bankruptcy litigants. How these programs are administered varies by court.

The data that was gathered by the subcommittee is not an adequate substitute for reliable numbers generated from the case filings themselves. As noted above, the Administrative Office of the United States Courts maintains statistics on certain limited categories of pro se cases, such as prisoner petitions and prisoner civil rights complaints. Their data are based on "nature of suit" numeric codes entered into a SARD database. Certain other categories of pro se cases, such as non-prisoner employment discrimination or contract claims, do not have specific nature of suit codes. The ICMS civil system presently in use by some courts does not permit courts to generate pro se case data automatically; rather, it requires that a "flag" be set at the opening of the case to designate a party's pro se status and generate reports reflecting such information as to dates of filing and closure and whether the pro se party is a prisoner. The system requires certain scripts to be followed and depends entirely on accurate docketing of party field information by intake and docket clerks. Furthermore, there is currently no incentive to take these additional steps in order to obtain additional staffing, as courts presently receive no pro se law clerk staffing credit for non-prisoner pro se cases.

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[7]Tim Reagan, Statistics on pro se litigation provided to the Task Force on Self-Represented Litigants on September 22, 2004.

Some courts have converted to an electronic case management and electronic case filing system (CM/ECF) and other courts are in the process of making that transition. The initial case set-up permits court staff to click on a box indicating pro se status. However, at various points in a case counsel may be appointed or dropped, and defendants may file counterclaims or third party claims that result in the addition of pro se parties. Without careful training of those who are expected to file electronically, and careful oversight by court staff, the pro se statistics generated under CM/ECF may be only slightly more reliable than data captured under the ICMS system. Moreover, even where a court makes electronic filing "mandatory," some courts may exempt or even prohibit pro se litigants from using CM/ECF, at least initially. Thus, some courts will be operating under a hybrid system for some period of time.

The Task Force identified a concern of courts and other agencies with respect to identifying prisoners or other plaintiffs filing in forma pauperis who have brought three or more federal actions that were dismissed as frivolous, malicious, or failing to state a cause of action and thus subject to denial of in forma pauperis status pursuant to 28 U.S.C. § 1915(g). (For a fuller discussion of these screening mechanisms see Appendix D.) Court staff seeks to maintain lists of such "strikes" within their district, but because prisoners and other pro se plaintiffs often move or file actions in multiple districts, many such actions subject to immediate dismissal go unrecognized. Accordingly, a magistrate judge proposed the creation of either a national or, at the least, circuit-wide data base of such "strikes." The Task Force believes that such a proposal should be pursued, by means of seeking modification of the PACER docketing system and/or the CM/ECF system, to include for each "strike" event the plaintiff's name and any aliases, prison ID number if applicable, court, filing date, dismissal date, statutory authority for dismissal, and case number.

B. Recommendations

The circuit, as defined in Section I(B), should:

1. Request that the Administrative Office of the of the U.S. Courts, in conjunction with the courts, customize CM/ECF on a national basis so that standard reports can be generated that reflect all categories and types of pro se litigants, the status of each case, and the disposition by stage of proceeding. Case aging reports should be available on all pro se cases.

2. Request that the Administrative Office of the U.S. Courts develop a national or circuit-wide database of "strikes" recorded against individuals, to give effect to 28 U.S.C. § 1915(g) by facilitating sharing of information among districts.

Each district should consider:

1. Taking steps to ensure that clerks' offices receive adequate training and written instructions regarding the importance of collecting and maintaining data in pro se cases.

2. "Flagging" the status of pro se litigants under CM/ECF so that standard reports can be generated to track pro se cases (both prisoner and non-prisoner) by nature of suit and stage of disposition.

Task Force Report Conclusion

The recommendations formulated in this report offer courts a blueprint for improving access to justice in a variety of ways. As plans for progress are formulated, it is critical to assess the current trends in pro se litigation and the most effective ways to serve citizens. Recent legal and political changes have introduced new complexities to the reality of pro se litigation. Given the changing needs of pro se litigants, courts must consider those needs when evaluating the quality of service being provided and making necessary improvements.

Immigration law presents one area in which rising caseloads might require additional service provision. The number of appeals filed under the administrative agency category has more than tripled since 2001, largely due to the Board of Immigration's efforts to clear its backlog.[8] With rising immigration caseloads, some courts face a greater demand for specialized pro bono support. The Ninth Circuit Court of Appeals presents one model for providing pro bono lawyers with the opportunity to gain such specialized legal knowledge. Court officials helped to organize immigration law training through numerous private bar groups. Similar educational efforts can improve the legal knowledge base of pro bono lawyers, potentially increasing the number of pro bono attorneys who are trained to meet the changing needs of pro se litigants.

New strategies for assisting pro se litigants in bankruptcy court may also be necessary, given the pending implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This new legislation will impose complicated rules for determining eligibility, possibly making counsel more expensive and forcing more debtors to file cases pro se. In order to address the already growing need for pro se support, the bankruptcy court in Phoenix, Arizona has recently opened a self-help center for pro se bankruptcy litigants. Extra space and computers in the courthouse were allocated to aid the thirty percent of bankruptcy filers who do not have legal counsel. The center aims both to provide information about filing requirements and procedures, and to coordinate volunteer lawyers to offer advice on-site. This local initiative can provide an informative model to other courts about the logistics of implementation and the potential impact of similar support services.

Security issues have become central to considering court reforms, with recent incidents of violence aimed at judges, court staff, and even litigants' own counsel. The challenge is to ensure equal access to justice and appropriate treatment of litigants while protecting the court against those with mental instability or violent tendencies. With regard to pro se litigants, the variety of reforms that facilitate access to services and improve the litigant's perception of fair treatment could reduce the risk of violence in the courtroom. For instance, improved communication can be significant in some cases because more informative, understanding judges and court staff might alleviate a litigant's sense of frustration with the system. Considering the importance of security concerns, courts should consider ways that pro se reforms can support efforts to make the courts more secure.

While the work conducted by this Task Force provides a basis for understanding how pro se cases are handled and what reforms are most desirable, the critical next step is to implement new

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[8]Administrative Office of the Courts, *Judicial Facts and Figures 2004.* (accessed April 19, 2005) <http://www.uscourts.gov/judicialfactsfigures/contents.html>.

programs that can better support pro se litigants and improve the access to and quality of pro bono counsel. Accordingly, the Task Force's final recommendation is perhaps its most important one:

> The Chief Judge should discharge the Task Force on Self-Represented Litigants and, in its place, appoint a small working Pro Se Committee to consult with each district as to its needs and desires for improvements in its pro se litigation management, and to assist the districts in implementing those improvements, on either a pilot or a permanent basis. The Pro Se Committee should also assist the Chief Judge in implementing approved circuit-wide reforms, and serve as a clearinghouse of pro se case management information for judges, court staff, the bar, and the public.

LIST OF APPENDICES

APPENDIX A

Glossary of Terms

GLOSSARY OF TERMS

Many of these definitions are taken or adapted from the web site of the Federal Judicial Center. For additional definitions, see http://www.fjc.gov/federal/courts.nsf, and click on Definitions.

Active Judge - An Article III judge in full-time service with a court.

Administrative Office of the U.S. Courts (AO) - The federal agency responsible for the budget and the performance of administrative functions for federal courts, acting under the direction and supervision of the Judicial Conference of the United States.

Adversary Process - The traditional method used by courts to resolve disputes; each side in a dispute presents its case, subject to the rules of evidence, for a decision by independent fact finder (either a judge or a jury).

Alternative Dispute Resolution (ADR) - A process for settling a dispute outside the adversary process. ADR includes mediation, arbitration, early neutral evaluation, and settlement conferences. Most forms of ADR are not binding on the parties and involve referral of the case to a neutral party.

Answer - The formal written statement by a defendant in a civil case that responds to a complaint and sets forth the grounds for defense.

Appeal - A request, usually made after trial, that another court decide whether the trial court proceeding was conducted properly.

Arbitration - A process in which a neutral (the arbitrator) issues a judgment on the legal issues in a case after hearing presentations by the parties; it can be binding or non-binding on the courts, depending on the parties' prior agreement.

Article III Judge - A judge who exercises "the judicial power of the United States" under Article III of the U.S. Constitution. Article III judges are appointed by the President for life, and include circuit court and district court judges but not bankruptcy and magistrate judges.

Bankruptcy Judge - A federal judge appointed by the Court of Appeals to a fourteen-year term to serve on the U.S. Bankruptcy Court and hear matters that arise under the Bankruptcy Code.

Bivens - Short name for a Supreme Court case, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), that establishes a remedy for violation of civil rights under federal authority.

Case File - A complete collection of every document in a case.

Case Law - The law that is laid down in decisions of the courts, as opposed to in statutes or regulations.

Case Management - Techniques used to process cases from one stage of the proceeding to another, such as setting discovery deadlines or scheduling a series of pretrial conferences. Different approaches are used by judges, court personnel, and lawyers to move cases along in a cost effective manner.

Case Management/Electronic Case Filing (CM/ECF) - A new automated case management system for the federal courts that allows for electronic filing and management of court documents and storage in a fixed electronic format rather than on paper.

Chief Judge - The judge who has primary administrative responsibility for a given court, and who also continues to decide cases.

Circuit - The regional unit of federal appeals courts; there are twelve regional circuit, including the Ninth Circuit. Each circuit has a court of appeals to hear appeals from the district courts in the circuit, and a judicial council to oversee the administration of the courts of the circuit.

Circuit Court - Another name for a U.S. court of appeals.

Circuit Executive - A federal court employee appointed by a circuit's judicial council to assist the chief judge of the circuit and provide administrative support to the courts of the circuit.

Circuit Judge - A judge of a U.S. court of the appeals

Circuit Judicial Council - The governing body in each federal circuit, made up of the chief circuit judge and an equal number of circuit and district judges.

Civil Case - A lawsuit brought by a party (plaintiff) against another party (defendant) claimed that the defendant failed to carry out a legal duty and thereby caused damage to the plaintiff.

Clerk of Court - An officer appointed by the court to work with the chief judge and other judges in overseeing the court's administration, including managing the flow of cases through the court.

Complaint - A written statement by the person (plaintiff) starting a civil lawsuit, which details the wrongs allegedly committed against the plaintiff by another person (defendant).

Counsel - A lawyer or a team of lawyers.

Court - An agency of government authorized to resolve legal disputes.

Court Interpreter - A court employee who orally translates what is said in court from English into a foreign language, or vice versa.

Court Reporter - A person who prepares a word-for-word record of what is said in a court proceeding and produces a transcript on request.

Criminal Case - A case prosecuted by the government, on behalf of society at large, against

someone accused of committing a crime.

Defendant - In a civil suit, the person complained against; in a criminal case, the person accused of crime.

Deposition - A frequently used method of discovery in civil cases, in which an attorney or unrepresented party questions a party or witness under oath to obtain information about a case.

Discovery - In a civil case, the pretrial procedures by which the parties gather information about the issues by examining the witnesses, documents, and physical evidence.

District - A geographic region over which a particular U.S. district court has jurisdiction.

District Court - A federal court with general trial jurisdiction, in which motions and petitions are filed and trials are conducted.

District Judge - A judge of a U.S. district court.

Docket - A chronological list of court proceedings and filings

Early Neutral Evaluation (ENE) - A process in which an experienced, impartial attorney gives the parties a nonbinding evaluation of the merits of their positions in a case; the neutral may also assist with case planning and settlement.

Elbow Law Clerk - A lawyer employed by the court who works closely with a specific judge in the judge's chambers to assist with research and case management.

Evidence - Information in the form of testimony, documents, or physical objects that is presented in a case to persuade the fact finder as to how to decide a case.

Factfinder - The jury in a jury trial, or the judge in a bench trial, who weighs the evidence in a case and determines the facts.

Federal Courts - Courts established under the U.S. Constitution, including the Supreme Court, the U.S. courts of appeal, and the U.S. district courts.

Federal Judicial Center (FJC) - The federal judicial branch's agency for research and education.

Federal Rules - Bodies of rules developed by the federal judiciary that spell out procedural requirements. There are federal rules governing civil procedure, criminal procedure, bankruptcy procedure, appellate procedure, and evidence.

Habeas Corpus - A Latin phrase meaning "that you have the body." A prisoner may file a habeas corpus petition seeking release on grounds that he or she is being held illegally.

ICMS - The current federal judicial branch case data base. ICMS is being phased out in favor of case management/electronic case filing.

In Forma Pauperis - A Latin phrase meaning "as a pauper." A party unable to pay filing fees and court costs may request approval to proceed without payment.

Judge - A governmental official with authority to preside over and decide lawsuits in the courts.

Judgment - A final order of the court that resolves the case and states the rights and liabilities of the parties.

Judicial Conference of the United States (JCUS) - The federal courts' administrative governing body, presided over by the Chief Justice of the United States and operating through committees of judges.

Jurisdiction - The legal authority of a court to hear and decide a certain type of case; also the geographic area over which the court has authority to decide cases.

Jury - A group of citizens charged with weighing evidence fairly and impartially and deciding the facts in a trial.

Lawsuit - Any one of various proceedings in a court of law.

Litigants - Another name for the parties to a lawsuit.

Local Rules - Rules that govern practice and proceedings in a specific court. Local rules can supplement but not contradict the federal rules.

Magistrate Judge - A judge appointed by a federal district court for an eight-year term. Magistrate judges assist district judges in preparing cases for trial, and may conduct civil trials with the parties' consent.

Mediation - An informal process in which a neutral (the mediator) helps the parties negotiate a resolution of their dispute.

Motion - An application to the court for an order of some kind, as for dismissal of a case, partial or early judgment, or resolution of discovery requests.

Ninth Circuit - The regional federal judicial unit including the Districts of Alaska, Arizona, Central California, Eastern California, Northern California, Southern California, Guam, Hawai'i, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Eastern Washington, and Western Washington.

Ombudsman - Someone charged with investigating complaints against the government and assisting in resolving those complaints.

Order - A decision or direction from a judge, often in response to a motion.

Parties - The plaintiff(s) and defendant(s) in a lawsuit.

Plaintiff - The person who files a complaint in a civil lawsuit.

Pleadings - In a civil case, the written statements of the parties setting forth their positions about the case.

Pretrial Conference - In a civil case, a meeting of the judge and lawyers to decide what matters are in dispute, to review evidence and witnesses before trial, to set a timetable for the case, and to discuss settlement.

Pro Bono Publico (Pro Bono) - A Latin term meaning "for the good of the public." Some lawyers take on certain kinds of case pro bono, without expectation of payment.

Pro Se - A Latin term meaning "on one's own behalf." In courts, it refers to people who present their own cases without lawyers.

Pro Se Law Clerk - A lawyer employed by the court and assigned to one or more judges of the court for the specific purpose of processing habeas corpus and other prisoner petitions to the court. Some pro se law clerks also assist the court with non-prisoner complaints filed by parties who are not represented by counsel.

Relief - Money damages or any other remedy sought in a complaint.

Section 1983 - A federal statute, 42 U.S.C. §1983, that provides a remedy for violation of civil rights under color of state authority.

Section 2254 - A federal statute, 28 U.S.C. §2254, that permits state prisoners to petition the federal courts for a writ of habeas corpus.

Section 2255 - A federal statute, 28 U.S.C. §2255, that permits federal prisoners to petition the federal courts for vacation of their sentence.

Senior Judge - An Article III judge who has retired from active duty but continues to perform some judicial duties, including maintaining a reduced caseload.

Service of Process - Bringing a judicial proceeding to the notice of a person affected by it, by delivering a summons, or notice of the proceeding.

Settlement - An agreement between the parties to a lawsuit to resolve their differences without having a trial or getting a verdict in a trial.

Staff Attorney - A member of the central legal staff of the U.S. court of appeals.

State Courts - Courts established by various state governments, including county and local courts.

Sua Sponte - A Latin term meaning "on its own responsibility or motion." A sua sponte order is one issued by a court without prior motion by any party.

Summary Judgment - Under Federal Rule of Civil Procedure 56, a judgment as a matter of law, where the court determines that there is no dispute as to the facts in a case.

Supreme Court of the United States - The highest federal court in the United States.

Trial - The proceeding at which parties in a civil case present evidence for consideration by the factfinder in court, leading to a decision by the factfinder.

Unbundling - The separation of representation by a lawyer into separate and distinct tasks, such as discovery, argument of a motion, or cross-examination of witnesses, such that a lawyer undertakes some tasks but not an entire lawsuit.

Vexatious Litigant - Generally, a party who has filed a specific number of actions in a given period that have been determined against him or her, such that a court may conclude that the actions were frivolous, repetitive, harassing, or otherwise lacking any merit.

Writ of Habeas Corpus - A document commanding officials who have custody of a prisoner to bring the prisoner before the court, so that the court may determine whether the prisoner is being detained lawfully.

APPENDIX B

Legal Memorandum

MEMORANDUM

To: Hon. James Singleton, Chair, Ninth Circuit Task Force on Self-Represented Litigants
From: Prof. Richard Marcus
Date: Oct. 4, 2004
RE: Existing appellate directives on special notices or advice for pro se litigants from the Supreme Court and the Ninth Circuit

The purpose of this memorandum is to memorialize at least some of the existing directives from appellate courts that bear on the handling of pro se cases in district courts in the Ninth Circuit. The background is that our Task Force is charged with investigating better ways of addressing the challenges of litigation involving pro se litigants. One significant feature of that task is the extent to which existing caselaw directs judges to take special measures in cases in which a party is not represented by counsel.

At the outset, I must emphasize that this enumeration of contexts in which district courts may be called upon to take action to address the needs of pro se litigants is likely not to be complete. It is not a specialty of mine (or of many law professors, I suspect), so that the memorandum reflects items that have come to my attention somewhat as the result of happenstance. One very helpful source has been Ninth Circuit staff, who have identified a number of these situations. Below, I will try to set forth situations as to which I have found caselaw calling for district court action, or treating that action as not required. It is to be hoped that, during the comment period (or from other, more experienced, Task Force members) the listing can be made more complete.

A second point to be emphasized at the outset is that this memorandum does not attempt to provide a definitive statement of the nature or content of legal requirements for action in regard to pro se litigants. To be frank, my limited review of the area indicates that there may be areas of considerable uncertainty. Accordingly, the goal of this memorandum is not to provide a manual for judges (or others) in determining what should be provided to pro se litigants. Indeed, it may be that, on some subjects, firm conclusions about how much a district court must provide would be hard to draw because these topics remain in flux and are hotly debated on the appellate courts. This memorandum does not purport to draw those conclusions. But it can alert district courts and others to some areas in which this concern warrants attention.

Accordingly, the manner of proceeding will be to identify litigation contexts in which the question of special treatment of pro se litigants has arisen, and to provide at least a starter treatment of caselaw regarding those contexts.

(1) "MIXED" HABEAS CORPUS PETITIONS

Pliler v. Ford, 124 S.Ct. 2441 (2004), reverses the ruling of a divided Ninth Circuit panel that held a district judge had erroneously failed to give proper notice to a habeas corpus petitioner about the options he had in light of the fact that his petition raised some claims on which he had exhausted and others on which he had not. Under Rose v. Lundy, 455 U.S. 509 (1982), the district court had to dismiss the "mixed" petition containing both exhausted and unexhausted claims. Under the Antiterrorism and Effective Death Penalty Act, there is a one-year statute of limitations for habeas petitions. Given the time required for the district court to process an average habeas petition, and the time thereafter required to exhaust as to claims on which exhaustion had not occurred, it would rarely be possible for the petitioner to come back to federal court with the newly-exhausted claims in time to present the claims on which there had already been exhaustion at the time the original petition was filed. Accordingly, although dismissal would nominally be "without prejudice," in all likelihood it would in operation preclude further assertion of those claims.

A number of courts have, in light of these circumstances, developed various practices to deal with the problem. In this case, the pro se petitioner had the foresight to seek a stay at the same time that he filed his petition in order to provide time to deal with the problem of unexhausted claims. In reaction, the magistrate judge provided petitioner three options: (1) dismissal without prejudice, (2) dismissing the unexhausted claims only, and proceeding with the exhausted claims, or (3) contesting the magistrate judge's decision that some claims were not exhausted. When petitioner contested the decision, the district court dismissed all claims without prejudice. When later petitioner refiled after exhausting, the district court dismissed the petition as untimely.

The Ninth Circuit held that the district judge had erred in failing to advise the petitioner that he could adopt the second route mentioned above -- dismissing the unexhausted claims only, and proceeding with the exhausted claims -- and then renew his request for a stay until the unexhausted claims had been exhausted. The Ninth Circuit panel concluded that the district judge's failure to provide this notice deprived petitioner of a "fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits." Ford v. Hubbard, 330 F.3d 1086, 1100 (9th Cir. 2003).

The Supreme Court held that there was no obligation on the district court to provide this notice, reasoning as follows:

> District judges have no obligation to act as counsel or paralegal to *pro se* litigants. In McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1984), the Court stated that "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure" and that "the Constitution [does not] require judges to take over chores for a *pro se* defendant that would normally be attended by trained counsel as a matter of course." See also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 162 (2000) ("[T]he trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out"). Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring a district court to advise a *pro se* litigant in such a manner would undermine district judges' role as impartial decisionmakers.

124 S.Ct. at 2446.

Although this language is quite strong on whether judges need make such notice efforts, the decision was a 5-4 decision, and there were dissents arguing forcefully for giving notice. See Id. at 2448 ("If the stay and abeyance procedure was a choice respondent could have made, then the Magistrate Judge erred in failing to inform respondent of that option.") (Ginsburg, J., dissenting).

(2) RECHARACTERIZING FED. R. CRIM P. 33 MOTIONS AS 28 U.S.C. § 2255 MOTIONS

Pro se prisoners sometimes file motions under Fed. R. Crim. P. 33 (and perhaps otherwise) that contain issues not cognizable under Rule 33 but cognizable under 28 U.S.C. § 2255. A number of courts developed a practice of recharacterizing these motions as § 2255 motions before ruling on them. The potential problem with this practice is that under the AEDPA there are limitations on filing another § 2255 motion by a prisoner who has already filed one.

In Castro v. United States, 124 S.Ct. 786 (2003), the Court did not directly rule on the

propriety of such recharacterizations. But it did hold that notice to the pro se litigant must be given for the AEDPA limitations to apply later:

> The limitation [on the district court's recharacterization power] applies when a court recharacterizes a *pro se* litigant's motions as a first § 2255 motion. In such circumstances the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. If the court falls to do so, the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions.

Id. at 792.

Justice Scalia, joined by Justice Thomas, concurred in the judgment but expressed grave doubts about the whole process of recharacterization: "In my view, this approach gives too little regard to the exceptional nature of recharacterization within an adversarial system, and neglects the harm that may be caused *pro se* litigants even when courts do comply with the Court's newly minted procedure." Id. at 794. Justice Scalia viewed this practice as "a paternalistic judicial exception to the principle of party self-determination." Id.

In Pliler v. Ford, discussed under heading (1) of this memorandum, the Court, speaking through Justice Thomas, distinguished Castro v. United States:

> *Castro* dealt with a District Court, of its own volition, taking away a petitioner's desired route -- namely a Federal Rules of Criminal Procedure 33 motion -- and transforming it, against his will, into a § 2255 motion. *Castro*, then, did not address the question whether a district court is required to explain to a *pro se* litigant his options before a *voluntary* dismissal and its reasoning sheds no light on the question we confront.

124 S.Ct. at 2447.

(3) SUMMARY JUDGMENT MOTIONS AGAINST PRISONER PRO SE PLAINTIFFS

Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968), held that prisoner pro se litigants should be notified of the requirements of a motion for summary judgment when confronted with one. In Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), the court notes that "[t]his circuit has approved the *Hudson* rule and discussed the particular difficulties faced by incarcerated pro per litigants in *Jacobsen v. Filler*, 790 F.2d 1362, 1364 & n.4 (9th Cir. 1986)." 849 F.2d at 411.

The basic holding in Jacobsen, however, was that there was no requirement that non-prisoner pro se litigants be similarly notified of the requirements of summary judgment procedure. In her majority opinion, Judge Rymer noted the difficulties such an extension of a notice requirement would entail:

> First and foremost is that *pro se* litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he falls to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently. In both case, the remedy to the party injured by his representative's error is to move to reconsider or to set aside; it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant.
>
> Imposing an obligation to give notice of Rule 56's evidentiary standards would also invite an undesirable, open-ended participation by the court in the summary judgment process. It is not sensible for the court to tell laymen that they must file an "affidavit" without at the same time explaining what an affidavit is; that, in turn, impels a rudimentary outline of the rules of evidence. Unlike the conversion of a 12(b)(6) motion into a motion for summary judgment, which only requires notice of what the motion now is, Jacobsen's proposal requires advise as to what the motion must *mean*. To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee.

790 F.2d at 1364-66.

Judge Reinhardt dissented, emphasizing his belief that "our previous cases recognize the rights of *all pro se* litigants to the procedural protection of the court, [which] serves the interest not only of the litigants but also of the court itself." Id. at 1367. He rejected the majority's conclusion that a pro se litigant makes a choice to proceed without counsel because "such status

is most often the result of necessity." "Given the disparity in legal skills and knowledge that exists between a layman and a lawyer, few litigants will 'choose' to prosecute or defend a suit without representation if they are able to hire a lawyer." Id. at 1367-68. He also rejected the majority's more general concerns about the judicial role:

> The majority's fear that the impartiality of the district court would be compromised were it to notify, or require notification to, *pro se* litigants of the written response requirements of Fed. R. Civ. P. 56 is wholly without merit. A court may legitimately assume that the attorneys who appear before it have been trained in legal procedure, and may just as legitimately assume that lay litigants have not. Courts, no less than parties to a dispute, have an interest in the quality of justice. In assuring that notice is given a *pro se* litigant of the requirements of summary judgment procedure, the court merely redresses a categorical disparity between the parties' abilities to obtain a just resolution of their dispute. The court does not thereby "becom[e] a player in the adversary process," but rather ensures that the adversary process functions properly. . . .
>
> The majority's concern that a notice requirement would "invite an undesirable, open-ended participation by the court in the summary judgment process" is also without merit. Other circuits have trusted district courts to evaluate what form of notice is proper in light of a *pro se* litigant's capacities. This court has no reason not to likewise trust the courts below to exercise their discretion in this area appropriately.

Id. at 1369-70.

Defendants in Klingele v. Eickenberry, supra, conceded that the D.C. Circuit's rule applied because the plaintiff was a prisoner, but urged that the rule should be changed because many prisoner pro se litigants were actually in a better position to defend themselves than nonprisoner pro se litigants. Instead, defendants suggested, the court could dispense with notice in cases in which the prisoner was capable of dealing with court procedures (which they claimed was true of this plaintiff). The court noted that there were reasons in the record to conclude that this prisoner did not have a sufficient understanding of summary judgment procedure, and refused to retreat from the requirement:

> The district court did not explain its failure to advise Klingele of the requirements of Rule 56. If it thought Klingele was aware of the Rules' requirements and knew how to

> comply it was clearly erroneous. If the district court relied simply on the fact that Klingele had the time and ability to figure out what he should do to comply with Rule 56 requirements, it erred in not advising Klingele of the Rule's requirements. We decline appellees' invitation to erode the *Hudson* rule by allowing district courts to avoid giving the required advice based on a determination that a prisoner has the requisite sophistication in legal matter. District courts are obligated to advise prisoner pro se litigants of Rule 56 requirements.

849 F.2d at 411-12.

Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), addressed the continued viability of the notice requirement and resulted in a 6-5 decision that the requirement continued to apply, but that the notice could come from the moving party rather than from the court. The panel decision in Rand held that remand was required because the moving parties rather than the district court had given the notice. The en banc court, speaking through Judge Tashima, ruled that the notice could be given by the defendants, although it found the actual notice given by defendants in the case insufficient. (Defendants' notice is quoted by the court, see 154 F.3d at 954 n.2.) Presumably Rand means that a court that does not itself give notice must examine the notice given by defendants and determine that it is sufficient.

The majority emphasized that it was not writing on a clean slate, and that there were three decades of experience under the requirement since it was first announced by the D.C. Circuit, citing Planned Parenthood v. Casey, 505 U.S. 833 (1992), regarding the importance of adhering to existing precedent even if it is controversial. See 154 F.3d at 955. It began evaluating the rule by acknowledging "the uniqueness of the summary judgment motion," id. at 956, and noted that it "requires the pro se prisoner to confront a myriad of challenges." Id. at 957. Their experience with the criminal justice system provides prisoners with no analogy to the summary judgment motion. "Unschooled in the intricacies of civil procedure, the lay litigant's intuition is that his or her claim will proceed to trial regardless of the outcome of a 'summary judgment motion.'" Id. at 957. "The concern for meaningful access for the pro se litigant provides a basis for the fair notice rule, but it is not sufficient itself to justify its application." Id. Rather, prisoners operate under the special handicaps of incarceration, which keeps them from seeking out representation and limits their access to legal materials. The majority also stressed that the notice rule had proven practical and workable, noting that the state's attorney had acknowledged during oral argument that the notice is "routinely and easily given in all the

district courts before which he practices." Id. at 959. The majority opinion appended a form that could be used to give notice. See 154 F.3d at 962-63.

Judge Thomas, joined by Judge Hawkins, joined in the majority's decision, but wrote separately to express the view that if he were writing on a clean slate he would not adopt the notice requirement:

> I find no defendable distinction to be made between prisoner pro se litigants and those whose economic circumstances prevent them from obtaining legal counsel. The reasons traditionally advanced for providing prisoners with procedural notices apply with equal force to non-prisoner pro se litigants, who have more or less successfully labored without a *Klingele* notice since *Jacobsen v. Filer*, 790 F.2d 1362 (9th Cir. 1986). Indeed, many prisoners have greater access to law libraries and legal assistance than do those without financial means, providing inmates a greater ability to apprise themselves of procedural rules. Thus, at least a portion of the rationale which underlay *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968), has dissipated over the course of the last thirty years.

Id. at 964.

Judge Kleinfeld and four others (including the author of Jacobsen v. Filler) dissented, arguing that the Klingele rule was beyond the power of the court because it effectively amended Rule 56 without using the proper amendment procedure. The dissent raised questions about how widely the rule had been accepted by other circuits, and invoked recent actions by Congress suggesting impatience with prisoner petitions. See id. at 966-67. Moreover, in the dissenters' view, Rule 56 as presently written "is about as clear as the form the majority opinion appends, and considerably more complete." Id. at 968.

> This is not to suggest that we should expand our form, or send prisoners to school to learn better how to sue people. We are not supposed to be advocates for a class of litigants, and it is hard to help pro ses very much without being unfair to their adversaries. Appendix A [to the majority's opinion] is no worse than any other boilerplate form we are likely to devise. The problem is that no such form is likely to do much good. Sending prisoners copies of Rule 56 would be better.

Id. The dissent concludes that "[t]here is no justification for treating prisoners' complaints with

special solicitude that we do not give to other pro se complaints." Id. at 968-69.

This section indulges in much quotation of the views of various judges of the Ninth Circuit because this subject appears to be especially vigorously debated, and as result to present especially uncertain terrain for district judges.

(4) CONVERSION OF RULE 12(b)(6) MOTION TO SUMMARY JUDGMENT

Lucas v. Department of Corrections, 66 F.3d 245 (9th Cir. 1995), holds that "[w]hen the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings, and must afford a reasonable opportunity to present all pertinent material." Id. at 248. This requirement evidently applies whether or not the pro se litigant is a prisoner.

In Anderson v. Angelone, 86 F.3d 932 (9th Cir. 1996), the district court granted a motion to dismiss in an action brought by a prisoner pro se, but relied on materials attached to the moving papers. Under Rule 12(b), the court's reliance on these material effectively converted the proceeding to summary judgment, and the court held that the requirement that the prisoner be given notice of the nature of summary judgment also applied:

> While it is true that no case has yet held that *Klingele* applies to a district court purporting to grant a motion to dismiss but actually granting summary judgment, we conclude that it must. If it did not, the protection afforded by *Klingele* would evaporate whenever a district court failed to recognize that it had converted a defendant's motion to dismiss into one for summary judgment by relying on material outside the pleadings. We will not allow *Klingele* to be applied only to those pro se litigants whose district court judges recognize the significance of their actions.

Id. at 935.

(5) LOOKING BEYOND THE PLEADINGS WITHOUT CONVERTING THE MOTION TO ONE FOR SUMMARY JUDGMENT

Wyatt v. Terhune, 315 F.3d 1108 (9th Cir.), cert. denied, 124 S. Ct. 50 (2003), holds that

failure to exhaust administrative remedies, see 42 U.S.C. § 1997e(a), is an affirmative defense. As such, it is nonjurisdictional, and the defendant has the burden of raising and proving it. In discussing how the defendant raises the defense and how the district court adjudicates it, the Wyatt court identified another context to which the Rand notice must be adapted. Additionally, the Wyatt court suggested, perhaps for the first time, that subsequent events in a case could render an early Rand warning ineffective.

To determine the proper procedural mechanism for raising the exhaustion defense, the court drew on a line of cases holding that "failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." Id. at 1119 (citing cases). The distinction between the two forms of motion is that summary judgment goes to the merits, while failure to exhaust nonjudicial remedies does not. Id. (Both Lucas and Anderson, discussed in the previous section, involved decisions on the merits.) The Wyatt court observed:

> In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact. If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice.

Id. at 1119-20 (internal citation omitted).

Recalling its discussion of Rand earlier in the opinion, the court then noted:

> [I]f the district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to exhaust – a procedure closely analogous to summary judgment – then the court must assure that [the pro se prisoner] has fair notice of his opportunity to develop a record.

Id. at 1120 n.14. The Wyatt court summarized Rand's requirements as follows. The bracketed language is added here to show what is required by Wyatt.

> *Rand* requires that the prisoner be informed of his or her right to file counter-affidavits or other responsive evidentiary materials and be alerted to the

> fact that failure to do so might result in the entry of summary judgment against the prisoner [or dismissal without prejudice]. The pro se prisoner must be informed of the effect of losing [the motion] . . . . The notice also should state that if the pro se prisoner fails to controvert the moving party with opposing counter-affidavits or other evidence, the moving party's evidence might be taken as the truth, and final judgment [or dismissal without prejudice] may be entered against the prisoner without a trial.

Id. at 1114 n.6 (internal quotation marks and citations omitted). The court also pointed out that the warning must be "phrased in ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations." Id. at 1114.

In addition to extending Rand into a new context, the Wyatt court also observed that "A *Rand* notice is ineffective when a subsequent order injects renewed uncertainty and complexity into the . . . procedure, creating the potential for those harms that our fair notice rule strives to avoid." Id. at 1115. This statement suggests that courts have an ongoing obligation to assess the efficacy of a previously issued Rand or Rand-type notice in light of each case's changing circumstances.

(6) GRANTING LEAVE TO AMEND WITH AN EXPLANATION BEFORE DISMISSING UNDER RULE 12(b)(6

In Noll v. Carlson, 809 F.2d 1226 (9th Cir. 1987), the district court dismissed a prisoner pro se's complaint without leave to amend or advising plaintiff in what respects the complaint was deficient. The court of appeals reversed because "[a] pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" Id. at 1448, quoting Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980). The court explained its ruling as follows:

> The requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of the deficiencies, the pro se litigant will likely repeat previous errors. . . . Amendments that are made without an understanding of

underlying deficiencies are rarely sufficient to cure inadequate pleadings.

> We are nevertheless mindful that courts should not have to serve as advocates for pro se litigants. A statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs. Rather, when dismissing a pro se complaint for failure to state a claim, district courts need draft only a few sentences explaining the deficiencies.

809 F.2d at 1448; accord, Eldridge v. Block, 832 F.2d 1132 (9th Cir. 1987).

In Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc), the court held that the directive of the Prison Litigation Reform Act that a district court "shall dismiss" an in forma pauperis complaint if it determines that the complaint fails to state a claim does not compel dismissal without leave to amend.

(7) NOTICE REGARDING A MOTION TO EXCUSE BELATED DISCLOSURE

In Fonseca v. Sysco Food Services, 374 F.3d 840 (9th Cir. 2004), a pro se plaintiff failed to disclose one of his witnesses at the time disclosure was required by the district court's order. The district court held that this failure justified a discovery sanction of refusal to consider an affidavit from this witness in opposition to defendant's summary judgment motion. The court of appeals held that this was improper. It invoked the principle that "[d]istrict courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involving summary judgment proceedings." Id. at 846, quoting Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984), and explained:

> The district court did not consider whether the late disclosure was harmless or justified, because Fonseca, a pro se plaintiff, did not file a motion to show good cause for the late disclosure. However, the district court had instructed Fonseca regarding the good cause motion in a confusing manner: "If you wish to file a motion to show cause . . .

[this] new witness will *not* be permitted to be called at trial." (emphasis added)

Id. The appeals court concluded that the district court "did not give Fonseca proper notice that the Mendoza declaration would be excluded unless Fonseca filed a good cause motion." Id.

(8) NOTICE REGARDING CONSENT TO PROCEEDING BEFORE A MAGISTRATE JUDGE

In Anderson v. Woodcreek Venture Ltd., 351 F.3d 911 (9th Cir. 2003), the court held that the record did not show that pro se plaintiffs voluntarily consented to proceeding before a magistrate judge. After plaintiffs filed their suit, the district court clerk's office issued a "Notice to Counsel Regarding Assignment of Presiding Judicial Officer" that indicated the case had been assigned to a magistrate judge, and that the parties were encouraged to consent to trial before that judicial officer. In their first filing, plaintiffs said in their caption that they denied the magistrate judge's jurisdiction, but they continued to participate in proceedings before the magistrate judge and, when they became anxious that the case would remain inactive in the absence of consent, they filed consent forms, albeit somewhat reluctantly. After a jury trial, the magistrate judge entered judgment consistent with the verdict in favor of defendant, leading to the appeal.

The court of appeals found the record insufficient to show voluntary consent even though it contained signed consent forms and the Supreme Court had held in Roell v. Withrow, 538 U.S. 580 (2003), that consent could be implied from participation in proceedings before the magistrate judge in some circumstances. The court explained:

> The initial factor leading us to question the voluntariness of Anderson's consent is the Notice Form. The notice is not to the parties but to "counsel" and, of course, Anderson had none and could not be expected to understand the notice as would its designated recipient: "counsel." Its relevant clause bears repeating in full: "The above referenced case has been assigned to the presiding judicial officer shown below *for disposition, to include the conduct of trial and/or entry of final judgment"* (emphasis added). This

provision, standing alone, permits only one reading: that the magistrate judge assigned to the case is to dispose of it, including entry of final judgment. But that cannot be ordered without *prior* consent. How does the Notice Form attempt to circumvent this obvious reading? The somewhat contradictory paragraph at the bottom of the page tempers the language's conclusiveness . . . by averring that "with the consent of the parties, the conduct of the trial and/or entry of final judgment" will be administered by the assigned magistrate judge. The reference to Rule 73(b) of the Federal Rules of Civil Procedure also attempts to modify the Notice Form's plain statement that the magistrate judge is assigned to make the final entry of judgment in the case, although a naked citation without the Rule's actual text does so indirectly. But then, it is specifically stated to be a notice to counsel who presumptively knows what Rule 73(b) says.

Read as a whole, the paragraph at the foot of the page does not completely clarify the Notice Form's earlier unqualified assignment of Anderson's case for full and final disposition. At the very least, the Notice Form is ambiguous as to whether the assignment is partial and unclear on whether full magistrate judge jurisdiction is contingent upon the parties expressing their voluntary consent.

Id. at 915-16.

Finding that "the magistrate judge, as well as the district court, did not mitigate any confusion the Notice Form may have sparked," id. at 916, the court of appeals rejected the possibility of implied consent in light of plaintiffs' repeated objections to proceeding before the magistrate judge.

(9) NOTICE OF INTENTION TO FILE VEXATIOUS LITIGANT ORDER

In DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990), the court held that the district judge acted improperly in entering a vexatious litigant order regarding a pro se plaintiff without first giving the plaintiff notice and a right to be heard on the proposed entry of the order. Such

notice is required by due process. Although the due process requirement would apply equally to a represented litigant, it is likely that this decision is important principally in cases involving pro se litigants.

(10) DEALING WITH THE POSSIBLE INCOMPETENCE OF AN UNREPRESENTED PARTY

In Krain v. Smallwood, 880 F.2d 1119 (9th Cir. 1989), the district court dismissed eight suits brought pro se by plaintiff after he failed to provide adequate information in response to an order directing him to show that he was competent to proceed pro se. Noting that Fed. R. Civ. P. 17(c) says that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person," the appellate court held that the judgments should be reversed:

> We hold that when a substantial question exists regarding the competence of an unrepresented party the court may not dismiss with prejudice for failure to comply with an order of the court. . . . The district court has discretion to dismiss the cases without prejudice, appoint a lawyer to represent Krain, or proceed with a competency determination.

Id. at 1121.

(11) GENERAL DUTY TO CONSTRUE PRO SE LITIGANT'S PAPERS LIBERALLY

In general, federal courts have a general duty "to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). This obligation lies behind some of the specific situations identified above, and may also call for special efforts in other situations.

An example is Hadsell v. Commissioner of Internal Revenue, 107 F.3d 750 (9th Cir. 1997). Plaintiff in that case was proceeding pro se, seeking redetermination of defendant's claims that he owed additional taxes in a proceeding before the tax court. Without tendering mileage and witness fees, he asked the court to obtain the attendance of three witness and direct them to bring with them some documentation that he claimed would support his position. The tax court did not do so, and the court of appeals vacated and remanded:

> When Hadsell, an incarcerated party who was litigating this case pro se, requested to proceed in forma pauperis with the subpoenas, the tax court should have read his request liberally and determined more precisely what it was that Hadsell sought. *See Maisano v. Welcher*, 940 F.2d 499, 501 n.2 (9th Cir. 1991) (recognizing that courts read pro se papers liberally). According to the record before us, the tax papers that Hadsell subpoenaed were his, seized in a search of his home unrelated to this tax proceeding. Hadsell was convicted of the crime related to the search and seizure, and is currently in the Oregon State Penitentiary. Presumably, the Newport Police Department has no further use for his tax records. With his tax records in hand, Hadsell would not have needed to subpoena Detective Menzies to appear at his trial and thus would not need to tender witness fees.
>
> . . . [T]he tax court could have attempted to acquire these records in at least two ways. By relying on Federal Rule of Evidence 614(a), the court could have, on its own accord, called Detective Menzies and ordered him to bring with him Hadsell's tax records that were still in the possession of the Newport Police Department. . . . Alternatively, it could have granted Hadsell a continuance with the suggestion that he seek the return of the documents directly from the City of Newport, either through administrative channels or an action in state court.

Id. at 753.

CONCLUSION

Undoubtedly the foregoing is incomplete in that it leaves out other situations in which

districts are expected under current caselaw to take special measures because litigants are self represented. Equally undoubtedly, it is unduly sketchy in describing some of the situations identified. During the public hearing period, some of these deficiencies may be called to our attention and corrected. For the present, this memorandum at least serves to identify a number of the situations in which such special judicial effort is expected, or in which judges might be more attentive to the needs of pro se litigants, and to feature a number of the arguments that the Supreme Court or the Ninth Circuit has considered in reaching decisions about these matters.

APPENDIX C

Proposed Model Local Rule on Vexatious Litigants

To: **Ninth Circuit and District Courts in the Ninth Circuit**
From: **Ann Taylor Schwing and Ninth Circuit Advisory Board**
Date: **July 2001** (updated and re-shepardized as of mid-August 2004)
Re: **Proposed Model Local Rule on Vexatious Litigants**

While discussing 2000 Circuit Conference Resolution 1, the members of the Ninth Circuit Advisory Board also discussed the problem of vexatious pro se litigation and the need to provide a mechanism for the courts to address frivolous and vexatious litigation. California has a statute providing a procedure for controlling vexatious litigation, and the Central and Eastern Districts of California have local rules that have been used successfully for a number of years. The California statute has survived a number of constitutional challenges and has been construed in a number of decisions. The Advisory Board provides the following explanatory materials and a proposed model rule so that other courts that wish to do so may more easily adopt a local rule to govern the matter in their own jurisdictions.

Local Rule 27A (83-27A) of the Central District of California

The Central District local rule provides as follows:

> **27A.1 (83-27A.1) Policy.** It is the policy of the Court to discourage vexatious litigation and to provide persons who are subjected to vexatious litigation with security against the costs of defending against such litigation and appropriate orders to control such litigation. It is the intent of this rule to augment the inherent power of the Court to control vexatious litigation and nothing in this rule shall be construed to limit the Court's inherent power in that regard.
>
> **27A.1 (83-27A.2) Orders for Security and Control.** On its own motion or on motion of a party, after opportunity to be heard, the Court may, at any time, order a party to give security in such amount as the Court determines to be appropriate to secure the payment of any costs, sanctions or other amounts which may be awarded against a vexatious litigant, and may make such other orders as are appropriate to control the conduct of a vexatious litigant. Such orders may include, without limitation, a directive from the Clerk not to accept further filings from the litigant without payment of normal filing fees and/or without written authorization from a judge of the Court or a Magistrate Judge, issued upon a showing of the evidence supporting the claim as the judge may require.
>
> **27A.3 (83-27A.3) Findings.** Any order issued under Rule 27A.2 shall be based on a finding that the litigant to whom the order is issued has abused the Court's process and is likely to continue such abuse, unless protective measures are taken.
>
> **27A.4 (83-27A.4) Reference to State Statute.** Although nothing in this rule

shall be construed to require that such a procedure be followed, the Court may, at its discretion, proceed by reference to the Vexatious Litigants statute of the State of California, Cal. Code Civ. Proc. §§ 391-391.7.

Local Rule 65.1-151 of the Eastern District of California

The Eastern District vexatious litigant rule appears as subdivision (b) of Local Rule 65.1-151 governing security.

> **(b) Security for Costs.** On its own motion or on motion of a party, the Court may at any time order a party to give security, bond or undertaking in such amount as the Court may determine to be appropriate. The provisions of Title 3A, part 2, of the California Code of Civil Procedure, relating to vexatious litigants, are hereby adopted as a procedural rule of this Court on the basis of which the Court may order the giving of security, bond or undertaking, although the power of the Court shall not be limited thereby.

California Vexatious Litigant Law

The California law, title 3A, part 2, of the California Code of Civil Procedure provides as follows:

> **§ 391. Definitions.** As used in this title, the following terms have the following meanings:
>
> (a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.
>
> (b) "Vexatious litigant" means a person who does any of the following:
>
> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
>
> (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
>
> (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
>
> (4) Has previously been declared to be a vexatious litigant by any state

or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

§ 391.1. Motion for order requiring security; grounds. In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

§ 391.2. Scope of hearing; ruling not deemed determination of issue. At the hearing upon such motion the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.

§ 391.3. Order to furnish security; amount. If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.

§ 391.4. Dismissal for failure to furnish security. When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.

§ 391.6. Stay of proceedings. When a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10

days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine.

§ 391.7. Prefiling order prohibiting the filing of new litigation; contempt; conditions.

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of such an order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk shall not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without such an order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of such a notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of such notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of any such order.

(d) For purposes of this section, "litigaton" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to such prefiling orders and shall annually disseminate a list of such persons to the clerks of the courts of this state.

Analysis of California and Federal Law on Vexatious Litigants

Section 391 of the California Code of Civil Procedure provides a procedure for

controlling vexatious litigation in the California courts.[1] The statute was adopted in 1963 on recommendation of the State Bar Association following a suggestion for its enactment by a California appellate court, Stafford v. Russell, 201 Cal.App.2d 719, 722 (1962, 2d Dist.), cert. denied, 372 U.S. 946 (1963). It was patterned after the provisions governing motions for security for costs in shareholder derivative actions.[2] Despite challenges, the statute has been found constitutional.[3]

A person can fall within the definition of a vexatious litigant in several ways. Section 391(b)(1) defines a vexatious litigant as one who

> [i]n the immediately preceding 7-year period has commenced, prosecuted or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person; or (ii) unjustifiably permitted to remain pending at least 2 years without having been brought to trial or hearing . . . .[4]

The term "litigation" is defined as "any civil action or proceeding, commenced, maintained or pending in any state or federal court."[5] The definition originally read "court of this state,"

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[1] CCP §§ 391 et seq. See generally First Western Development Corp. v. Superior Court, 212 Cal.App.3d 860, 867–70 (1989, 2d Dist.) (purpose of vexatious litigant statutes is to deal with persistent and obsessive litigants who constantly have pending numerous groundless lawsuits which abuse judicial process); In re Fillbach, 223 F.3d 1089 (9th Cir. 2000) (litigant found vexatious in bankruptcy court cannot file in district court to avoid order); 3 Witkin, California Procedure Actions §§ 262-63 (3d ed. 1985); 2 California Civil Procedure Before Trial §§ 36.54–36.60 (C.E.B. 3d ed. 1990); Recommendation Relating to Security for Costs 14 Cal. L. Rev. Comm'n Reports 319 (1978); Note, The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?, 72 So. Cal. L. Rev. 275 (1998); Note, The Vexatious Litigant, 54 Cal. L .Rev. 1769 (1966); Note, California's Vexatious Litigant Legislation, 52 Cal. L. Rev. 204 (1964). The procedure has been adopted into some federal courts through their local rules. E.g., E.D. Cal. Local Rule 65.1-151(b); C.D. Cal. Local Rule 83-27A; see 4 C. Wright & A. Miller, Federal Practice and Procedure § 1025 (2d ed. 1987); 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2671 (2d ed. 1983).

[2] Taliaferro v. Hoogs, 236 Cal.App.2d 521, 525-26 (1965, 1st Dist.), citing Stafford v. Russell, 201 Cal.App.2d 719, 722 (1962, 2d Dist.), cert. denied, 372 US 946 (1963).

[3] Wolfgram v. Wells Fargo Bank, 53 Cal.App.4th 43, 48 (1997, 3d Dist.), cert. denied, 522 U.S. 937 (1997) (upholding statute against challenges based on constitutional right to petition government, prohibition on prior restraint); In re Whitaker, 6 Cal.App.4th 54, 56 (1992, 1st Dist.); First Western Development Corp. v. Superior Court, 212 Cal.App.3d 860, 867–70 (1989, 2d Dist.), and Muller v. Tanner, 2 Cal.App.3d 445, 450-54 (1969, 1st Dist.), following Taliaferro v. Hoogs, 236 Cal.App.2d 521 (1965, 1st Dist.).

[4] CCP § 391(b)(1). This definition is not arbitrary and unreasonable. Muller v. Tanner, 2 Cal.App.3d 445, 453 (1969, 1st Dist.).

[5] CCP § 391(a) (prior to the 1994 amendment, the section referred to "any state or federal court of record"). Small claims courts are not courts of record. Banks v. State of California, 14 Cal.App.4th 1147, 1149 (1993, 4th Dist.).

which was interpreted to exclude the federal courts located in California,[6] resulting in amendment of the definition. The broad definition of "litigation" also encompasses writ petitions and appeals.[7] The 7-year period is measured from the date of the filing of the motion under section 391, not the filing of the litigation, and includes actions commenced, prosecuted, or maintained during that period.[8]

Section 391(b)(2) alternatively defines a vexatious litigant as one who,

> [a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants[9] as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination[10] against the same defendant or defendants as to whom the litigation was finally determined.[11]

A person is also a vexatious litigant if, in any litigation while acting in propria persona, the person "repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." CCP § 391(b)(3). Finally, a person who "[h]as previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence" is

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[6] Roston v. Edwards, 127 Cal.App.3d 842, 848 (1982, 4th Dist.) (had statute spoken of "court in this state," federal court litigation would have been included).

[7] McColm v. Westwood Park Ass'n, 62 Cal.App.4th 1211, 1215-16 (1998 1st Dist.).

[8] Stolz v. Bank of America, 15 Cal.App.4th 217, 224-25 (1993, 3d Dist.).

[9] The term "defendant" is defined to mean "a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained." CCP § 391(e). Although the code uses the terms "plaintiff" and "defendant," the provisions have equal applicability to cross-complainants and cross-defendants. Taliaferro v. Hoogs, 237 Cal.App.2d 73 (1965, 1st Dist.).

[10] The term "final determination" means a determination as to which all avenues of direct review have been exhausted. Childs v. Paine Webber Inc., 29 Cal.App.4th 982, 993 (1994, 5th Dist.).

[11] CCP § 391(b)(2); Tokerud v. Capitolbank Sacramento, 38 Cal.App.4th 775 (1995, 3d Dist.), cert. denied, 518 U.S. 1007 (1996) (action that was filed then voluntarily dismissed by allegedly vexatious litigant is prima facie determined adversely to that litigant despite ability to refile it; litigant may rebut with contrary proof). This definition is not superfluous on the theory that relitigation is precluded by the doctrine of res judicata. Muller v. Tanner, 2 Cal.App.3d 445, 453 (1969, 1st Dist.). See also First Western Development Corp. v Superior Court, 212 Cal.App.3d 860, 867–70 (1989, 2d Dist.) (plaintiff was a vexatious litigant under section 391(b)(2) based on repeated attempts to relitigate issues already finally determined and was properly required to post a bond).

a vexatious litigant.[12] There is no requirement that the court of record declaring the person to be a vexatious litigant be in California.

A person is not a vexatious litigant unless one of these statutory definitions is satisfied, even if the person is a frequent litigant.[13] The definitions refer to prior actions brought in propria persona; the fact that the plaintiff has found an attorney to appear in the action in which the vexatious litigant motion is made is not a basis on which to avoid the statute.[14] Unlike the California statute, the Central District's Local Rule applies to all frivolous and vexatious litigation, whether the plaintiff is represented by counsel or not. Given the availability of remedies against attorneys under Rule 11 and 28 U.S.C. §1927 and the usually-applicable professional and financial restraints that temper frivolous impulses of attorneys, application of the vexatious litigation rules to all actions filed by attorneys may not be necessary as a practical matter, although there is a symmetry in having the rule apply to all plaintiffs. The vexatious litigant order itself operates only on the plaintiff, not the attorney for the plaintiff.[15]

Pursuant to section 391.1, a defendant may move the court in any litigation pending in any California court at any time prior to the entry of final judgment for an order requiring the plaintiff to furnish security "based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant." CCP § 391.1. Judicial notice is an appropriate and economical means of establishing the relevant facts concerning the other litigation filed by the plaintiff.[16] Notice of the motion and an opportunity to be heard are essential to the effectiveness of an order restricting a vexatious litigant's right to file actions; the trial court should require an adequate record for its decision and make adequate

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[12] CCP § 391(b)(4); Devereaux v. Latham & Watkins, 32 Cal.App.4th 1571, 1581 (1995, 2d Dist.) (construing term "substantially similar" to require proceedings to arise from substantially similar facts, with no requirement that parties be same).

[13] Roston v. Edwards, 127 Cal.App.3d 842, 847 (1982, 4th Dist.).

[14] Muller v. Tanner, 2 Cal.App.3d 438, 444 (1969, 1st Dist.), followed in In re Shieh, 17 Cal.App.4th 1154, 1166 (1993, 2d Dist.), cert. denied, 511 U.S. 1052 (1994), and in Camerado Insurance Agency, Inc. v. Superior Court, 12 Cal.App.4th 838, 842 (1993, 3d Dist.) (statute applies "to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past"). The statute does not unconstitutionally discriminate against persons who litigate in propria persona or who are too poor to afford attorneys. Taliaferro v. Hoogs, 236 Cal.App.2d 521, 527 (1965, 1st Dist.).

[15] Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999) (research failed to reveal any court in the Ninth Circuit to have imposed a vexatious litigant order on an attorney acting as such).

[16] Stolz v. Bank of America, 15 Cal.App.4th 217, 221-22 & n.5 (1993, 3d Dist.); In re Luckett, 232 Cal.App.3d 107 (1991, 4th Dist.).

substantive findings.[17] If the court is satisfied with the showing after hearing the evidence on the motion,[18] the court must order the plaintiff to furnish security for the benefit of the moving party in an amount set by the court.[19] The trial court need not make findings on the issues presented by the motion.[20] If the motion is filed prior to trial, the litigation is stayed and the moving defendant need not plead until 10 days after the motion is denied or, if the motion is granted, 10 days after the security is furnished and the defendant is given written notice thereof. CCP § 391.6. If the motion is filed at any other time, the litigation is stayed for such period after denial of the motion or the furnishing of the security as the court determines. CCP § 391.6.

The "security" that may be required is defined as

> an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

CCP § 391(c). This definition is not unconstitutionally vague.[21] The court cannot simply pull the amount of security from the air, but must base it on an evaluation of the character of the litigation and the time and expense that will be required to resolve it.[22] The plaintiff's ability to post the security is not a consideration in setting the amount.[23]

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[17] De Long v. Hennessey, 912 F.2d 1144, 1147 (9th Cir. 1990), cert. denied, 498 U.S. 1001 (1990) (requiring adequate notice to the alleged vexatious litigant, trial court identification of specific cases that form the basis for vexatious litigant status, trial court findings as to frivolous or harassing nature of cases, and narrow orders tailored to remedy litigant's specific abuses).

[18] The plaintiff is not entitled to a jury trial on the issues leading to the determination of vexatiousness. Muller v. Tanner, 2 Cal.App.3d 445, 450-51 (1969, 1st Dist.).

[19] CCP § 391.3. At the hearing, the court shall consider "such evidence, written and oral, by witnesses or affidavit, as may be material to the ground of the motion." CCP § 391.2. Evidence of litigation in small claims court and of litigation outside the statutory 7-year period is inappropriate for consideration by the trial court. Roston v. Edwards, 127 Cal.App.3d 842, 847 n.2 (1982, 4th Dist.). The court's determination of the motion is not a determination of any issue in the litigation or of the merits of the litigation. CCP § 391.2.

[20] Muller v. Tanner, 2 Cal.App.3d 445, 463 (1969, 1st Dist.). Rule 232 requiring a statement of decision in certain circumstances is inapplicable in this instance because it applies to "the trial of a question of fact." Cal Rules of Court 232(a). The trial court may elect to adopt an order which sets forth the court's conclusions and reasoning if it finds such an order appropriate.

[21] Muller v. Tanner, 2 Cal.App.3d 445, 452-53 (1969, 1st Dist.).

[22] Devereaux v. Latham & Watkins, 32 Cal.App.4th 1571, 1588 (1995, 2d Dist.) (vexatious litigant's means do not bear on amount of security); Muller v. Tanner, 2 Cal.App.3d 445, 465 (1969, 1st Dist).

[23] McColm v. Westwood Park Ass'n, 62 Cal.App.4th 1211, 1219 (1998 1st Dist.).

If the court orders that the plaintiff furnish security, and security is not furnished in accordance with that order, then "the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished." CCP § 391.4. An appeal may be taken from that judgment or order of dismissal, but the order requiring the plaintiff to furnish security is not directly appealable.[24] If the plaintiff does furnish the security and ultimately does not prevail, the security is not automatically forfeited to the moving defendant. Instead, the court determines the time, effort and expense in defending the action at that time.[25]

A plaintiff who has been required to furnish security in one action cannot avoid the force of the order by filing a new complaint, even if the plaintiff finds an attorney and does not appear in propria persona in the new action.[26] Any alternative would encourage vexatious litigation. The court considering the new action can properly dismiss it outright and order that no further proceedings be had on it.[27] Similarly, a plaintiff who has been required to furnish security cannot escape the requirement by forming a corporation to sue as alter ego on the same causes of action.[28] When a litigant continues to file actions following the initial finding of vexatious litigant status, collateral estoppel may be applied based on earlier determinations, so long as the requirements are satisfied as to litigation within the periods specified by the statute.[29]

Additional protection against vexatious litigants was provided by the 1990 addition of section 391.7 that permits the court to enter a prefiling order prohibiting a vexatious litigant from filing any new litigation in propria persona without prior leave of the presiding judge.[30] Leave shall be granted if the litigation appears to have merit and is not intended for purposes of harassment or delay; leave may be conditioned on the furnishing of security for the benefit of defendants. CCP § 391.7(b). Violation of the prefiling order is punishable by

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[24] Childs v. PaineWebber Inc., 29 Cal.App.4th 982, 985 n.1, 988 n.2 (1994, 5th Dist.).

[25] Muller v. Tanner, 2 Cal.App.3d 445, 466 (1969, 1st Dist.).

[26] Muller v. Tanner, 2 Cal.App.3d 438, 444 (1969, 1st Dist.).

[27] Id.

[28] Say & Say v. Castellano, 22 Cal.App.4th 88, 94 (1994, 2d Dist.); Say & Say, Inc. v. Ebershoff, 20 Cal.App.4th 1759, 1769-70 (1993, 2d Dist.), cert. denied, 510 U.S. 1116 (1994).

[29] Stolz v. Bank of America, 15 Cal.App.4th 217, 221-22 & n.5 (1993, 3d Dist.).

[30] CCP § 391.7; Devereaux v. Latham & Watkins, 32 Cal.App.4th 1571, 1586-87 (1995, 2d Dist.) (pre-filing order permitting action to be filed does not bar litigant from moving for security on ground of vexatious litigation); In re Shieh, 17 Cal.App.4th 1154, 1167 (1993, 2d Dist.), cert. denied, 511 U.S. 1052 (1994) (barring actions whether in propria persona or by attorney without prefiling court approval); Andrisani v. Hoodack, 9 Cal.App.4th 279 (1992, 2d Dist.); In re Whitaker, 6 Cal.App.4th 54, 57 (1992, 1st Dist.); In re Luckett, 232 Cal.App.3d 107 (1991, 4th Dist.); see DeNardo v. Murphy, 781 F.2d 1345, 1348 (9th Cir. 1986), cert. denied, 476 US 1111 (1986) (affirming injunction barring future suit on particular subject without leave of court).

contempt, and the clerk is prohibited from filing litigation presented by a vexatious litigant absent leave granted by the presiding judge.[31] A procedure is prescribed for litigation inadvertently permitted to be filed and for the Judicial Council to maintain and disseminate a list of vexatious litigants. CCP § 391.7(c), (d). Prefiling orders serve a valuable purpose in the small number of cases in which they are appropriate. Absent a prefiling order, the process of the courts is available to private litigants with no restriction other than the recognition that unpleasant things can happen after abuse of that process. Litigants who are properly restrained by prefiling orders are not inhibited by the risk of post-abuse penalties. They may refuse to see their actions as abuse, rejecting doctrines of res judicata and collateral estoppel and other defenses which may bar their actions; they may be unable to restrain their actions; they may be judgment proof. Whatever the reason, by the time the need for the prefiling order is apparent, these litigants have already burdened their chosen defendants with numerous lawsuits and years of harassment. At that point, the courts and society as a whole can better bear the continuing burden imposed by vexatious litigants without requiring their defendants to make further motions. As of 1997, the California courts had issued 344 prefiling orders: 30 in the appellate courts, 261 in superior courts, 53 in municipal courts.[32]

There is no federal parallel to the California statute, but there are specialized statutes and rules imposing similar restrictions in limited circumstances and the federal courts have recognized an inherent power of the federal courts to control vexatious litigation. The United States Supreme Court restricts the right of litigants to file future in forma pauperis petitions under Supreme Court Rule 39 when a number of frivolous or vexatious actions and proceedings have been filed by a particular litigant.[33] Various Circuits including the Ninth Circuit have upheld pre-filing screening restrictions imposed on litigious plaintiffs.[34]

A federal statute worthy of note is the Prison Litigation Reform Act, 28 U.S.C. § 1915(g), prohibiting successive actions in forma pauperis absent immediate danger of serious physical injury by prisoners who have brought three earlier actions while incarcerated that

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[31] CCP § 391.7(c); Wolfgram v. Wells Fargo Bank, 53 Cal.App.4th 43, 44, 59-61 (1997, 3d Dist.), cert. denied, 522 U.S. 937 (1997) (Judicial Council regularly publishes list of vexatious litigants to assist court clerks; prefiling requirement is not unlawful prior restraint or due process violation).

[32] Note, The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?, 72 So. Cal. L. Rev. 275, 289 n.86, 290 (1998) (at 309 n.190: only four litigants have ever been removed from the list).

[33] E.g., Shieh v. Kakita, 517 U.S. 343 (1996) (order directing clerk not to accept further petitions for certiorari in noncriminal matters without payment of docketing fee and compliance with petition requirements based on his filing of ten patently frivolous petitions in less than three years); see Annot., When Will Supreme Court Restrict Litigant's Right to File Future in Forma Pauperis Proceedings in Supreme Court, 130 L.Ed.2d 1155 (1999) (collecting many examples).

[34] E,g., Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999); Martin-Trigona v. Shaw, 986 F.2d 1384, 1387 (11th Cir. 1993) (collecting cases on point).

were dismissed as frivolous, malicious or failing to state a claim for relief. This statute has been held constitutional in the Ninth Circuit[35] and in other Circuits.[36] These decisions clearly support a finding of constitutionality for the proposed model rule on the same reasoning: judicial resources are scarce and restrictions on multiple lawsuits by individuals who have brought numerous frivolous lawsuits in the past are rationally related to preservation of the rights of all individuals to have their day in court for hearing of legitimate disputes.

The decisions upholding the constitutionality of the Prison Litigation Reform Act also provide guidance on the implementation of the model rule should it be adopted, namely, may frivolous lawsuits filed before the effective date of the rule be counted in determining whether a litigant is vexatious. A number of litigants argued that the three strikes under the Prison Litigation Reform Act could not include frivolous lawsuits filed before the effective date of the Act, asserting various arguments against retroactive legislation and ex post facto laws. The Ninth Circuit[37] and a number of other courts to consider these arguments have held that lawsuits dismissed before the effective date of the Act could properly be counted.[38] Another issue is whether the Act could be applied to litigation pending as of the Act's

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[35] Rodriguez v. Cook, 169 F.3d 1176, 1178-82 (9th Cir. 1999) (appeal from District of Oregon) (seven Circuits have held that requiring prisoners to pay a filing fee does not deny them effective access to the courts; Supreme Court has prospectively denied in forma pauperis status as to prisoners who filed numerous frivolous petitions

[36] White v. Colorado, 157 F.3d 1226, 1232-35 (10th Cir.), cert. denied, 526 U.S. 1008 (1999); Murray v. Dosal, 150 F.3d 814, 817-19 (8th Cir. 1998), cert. denied, 526 U.S. 1070 (1999); Wilson v. Yaklich, 148 F.3d 596, 602-06 (6th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); Christiansen v. Clarke, 147 F.3d 655, 658 (8th Cir.), cert. denied, 119 S. Ct. 554, 142 L.Ed.2d 461 (1998); Rivera v. Allin, 144 F.3d 719, 725-31 (11th Cir. 1998), cert. dism'd, 524 U.S. 978 (1998); Tucker v. Branker, 142 F.3d 1294, 1297-301 (D.C. Cir. 1998); Nicholas v. Tucker, 114 F.3d 17, 19-21 (2d Cir. 1997), cert. denied, 523 U.S. 1126 (1998); Carson v. Johnson, 112 F.3d 818, 820-22 (5th Cir. 1997); Witzke v. Hiller, 972 F.Supp. 426 (E.D. Mich. 1997). But see Ayers v. Norris, 43 F. Supp.2d 1039, 1044-51 (D. Ark. 1999) (Prison Litigation Reform Act found unconstitutional as not narrowly tailored to meet problem to be solved); Lyon v. Vande Krol, 940 F.Supp. 1433 (S.D. Iowa 1996), vacated & appeal dism'd, 127 F.3d 763 (8th Cir. 1997) (district court held unconstitutional as violation of equal protection a provision in Prison Litigation Reform Act, 28 U.S.C. § 1915(g), prohibiting successive actions in forma pauperis absent immediate danger of serious physical injury by prisoners who have brought three earlier actions while incarcerated that were dismissed as frivolous, malicious or failing to state a claim for relief; Eighth Circuit vacated the decision for lack of standing). See generally Annot., Validity and Construction of "Three Strikes" Rule Under 18 U.S.C.A. § 1916(g) Barring Prisoners from In Pauperis Filing of Civil Suit After Three Dismissals for Frivolity, 168 A.L.R. 433 (2001).

[37] Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th Cir. 1997), followed in Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

[38] E.g., In re Ibrahim v. District of Columbia, 208 F.3d 1032, 1036 (D.C. Cir. 2000) (collecting many cases on point); Welch v. Galie, 207 F.3d 130, 132 (2d Cir. 2000); Altizer v. Deeds, 191 F.3d 540, 544-45 (4th Cir. 1999); Wilson v. Yaklich, 148 F.3d 596, 602-04 (6th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998), cert. dism'd, 524 U.S. 978 (1998); Green v. Nottingham, 90 F.3d 415, 419-20 (10th Cir. 1996).

effective date; the Ninth Circuit[39] and other courts have held that it could not,[40] based on the language of the Act that a prisoner within its terms may not "bring" an action. Had the Act used the terms "bring or maintain," the courts' analysis would not have required the result they reached.

The Prison Litigation Reform Act applies only to litigation commenced by prisoners in forma pauperis. Given the existence of the Prison Litigation Reform Act, cases that fall within its scope are specifically excepted from the proposed model rule. The proposed model rule encompasses a much broader scope because it applies to lawsuits by all litigants or by all individuals proceeding in pro se, and it applies to lawsuits filed by those who can and are willing to pay the filing fee, not just to those who seek leave to proceed in forma pauperis.

There are be certain limited categories of litigation that should not be subject to the vexatious litigation rule. One exception may be a petition for habeas corpus.[41] Another may be petitions and other filings in criminal cases.[42] A third may be a petition for writ of mandamus specifically and only to compel the district court to act as required by law.[43] Other very limited exceptions may exist if denial of a judicial forum would impair a fundamental

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[39] Canall v. Lightner, 143 F.3d 1210, 1212-13 (9th Cir. 1998).

[40] E.g., Altizer v. Deeds, 191 F.3d 540, 544-47 (4th Cir. 1999); Gibbs v. Ryan, 160 F.3d 160, 162-64 (3d Cir. 1998); Chandler v. District of Columbia Dep't of Corrections, 145 F.3d 1355, 1358 (D.C. Cir. 1998); Garcia v. Silbert, 141 F.3d 1415, 1416-17 (10th Cir. 1998) (Act provides that prisoners who have previously filed three frivolous lawsuits may not "bring" a civil action in forma pauperis; statutory use of the term "bring" precludes a finding that the Act applies to actions already pending at the time of its enactment or effective date); Church v. Attorney General, 125 F.3d 210, 212-14 (4th Cir. 1997) (collecting cases on point). Some courts held that the three-strikes provision in the Act could be applied to pending actions. Mitchell v. Farcass, 112 F.3d 1483, 1486-87 (11th Cir. 1997); McFadden v. Parpan, 16 F. Supp. 2d 246, 247 (E.D.N.Y. 1998).

[41] 28 U.S.C. §§2254, 2255. Compare Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997) (habeas petition need not comply with Prison Litigation Reform Act); Santana v. United States, 98 F.3d 752, 754-56 (3d Cir. 1996) (same; habeas cases are hybrids, independent civil dispositions of completed criminal proceedings, and are not governed by the Act); In re Bittaker, 55 Cal.App.4th 1004 (1997, 1st Dist.) (habeas corpus filings are unaffected by vexatious litigant finding), with Van Doren v. Mazurkiewicz, 935 F. Supp. 604, 605 (E.D. Pa. 1996) (Act does apply to habeas petition); Wolfgram v. Wells Fargo Bank, 53 Cal.App.4th 43, 57, 60-61 (1997, 3d Dist.), cert. denied, 522 U.S. 937 (1997) (dictum that bar of vexatious litigant statute can apply to habeas corpus). The problem of repetitive habeas petitions was addressed in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacted two days before the Prison Litigation Reform Act, so there is little need to address vexatious habeas litigation in any event.

[42] Rodriguez v. Cook, 169 F.3d 1176, 1180 (9th Cir. 1999) (Constitution requires waiver of filing fees in criminal cases), citing Mayer v. Chicago, 404 U.S. 189, 195-96 (1971), and Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

[43] In re Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (petitions for mandamus or prohibition predicated on underlying civil claims are governed by the Act; petitions for habeas corpus are not); Madden v. Myers, 102 F.3d 74, 76-79 (3d Cir. 1996) (litigant may not mask an action subject to the Act by improperly styling it as mandamus). This decision is limited to writs of mandamus to compel the district court to act as required by law; the exception does not extend to other mandamus petitions.

human interest. To date, such fundamental interests have been recognized only with respect to the termination of parental rights or the ability to obtain a divorce.[44] The right of access to the courts, fundamental though it may be, is not absolute.[45] The model rule does not impose an absolute or permanent bar to access to the federal courts. It is not triggered until after the individual has already abused the right on a number of occasions, and it is not absolute even when triggered because the individual may post the security or the proposed complaint may survive pre-filing review. To avoid any question, the model rule excepts habeas and criminal proceedings and mandamus petitions seeking to compel district court action and includes a requirement that the court consider, on request, whether the litigation concerns fundamental rights to such a degree that the pre-filing security should not be required in a particular case.

Model Local Rule on Vexatious Litigation

(a) Definitions. As used in this Local Rule, the following terms have the following meanings:

(1) "Litigation" means any civil action or proceeding, including cross-claims and counterclaims, commenced, maintained or pending in any state or federal court excepting only (i) actions under 28 U.S.C. §2241 et seq., (ii) petitions for mandamus or prohibition seeking solely to compel or prohibit specific acts or omissions by a district judge or magistrate judge, (iii) prisoner's actions governed by the Prison Litigation Reform Act, 28 U.S.C. §1915(g), and (iv) actions that must be heard because denial of a judicial forum would impair a fundamental human interest.

(2) "Vexatious litigant" means a person who does any of the following:

(i) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) have been unjustifiably permitted to remain pending at least two years without having been brought to trial or evidentiary hearing.

(ii) After a litigation has been finally determined against the person, relitigates or attempts to relitigate, in propria persona, either (A) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (B) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(iii) In any litigation while acting in propria persona, repeatedly files plainly unmeritorious motions, pleadings, or other papers, conducts wholly unnecessary discovery, or engages in other tactics that are legally frivolous

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[44] M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971).

[45] United States v. Kras, 409 U.S. 434, 450 (1972).

or vexatious or are solely intended to cause unnecessary delay.

(iv) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(3) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(4) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona. The term includes a counter-claimant or cross-claimant.

(5) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

(b) Motion for order requiring security; grounds. In any litigation pending in this Court, at any time until final judgment is entered, a defendant may move the Court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that the plaintiff will prevail in the litigation against the moving defendant.

(c) Scope of hearing; ruling not deemed determination of issue. At the hearing upon such motion the Court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. The Court may take judicial notice of prior litigation by the plaintiff. See F.R.E. 201. No determination by the Court in ruling on the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.

(d) Order to furnish security; amount. If, after hearing, the Court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the Court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the Court shall fix.

(e) Dismissal for failure to furnish security. If security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.

(f) Stay of proceedings. When a motion under this Local Rule is filed before trial, the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion is denied, or, if granted, until 10 days after the required security is furnished and the moving defendant is given written notice thereof. When a motion is made at any time thereafter, the litigation shall be stayed as the court shall determine.

(g) Prefiling order prohibiting the filing of new litigation; contempt; conditions. (1) In addition to any other relief provided in this Local Rule, the Court may, on its own motion or the motion of any party, enter a prefiling order that prohibits a vexatious litigant from filing any new litigation in this Court without first obtaining leave of the Chief Judge. Disobedience of such an order by a vexatious litigant may be punished as a contempt of court.

(2) The Chief Judge shall permit such new litigation to be filed only if the litigation has merit and has not been filed for the purposes of harassment or delay. The Chief Judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants.

(3) The clerk shall not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the Chief Judge permitting the filing. If the clerk mistakenly files the litigation without such an order, any party may file and serve a notice that the plaintiff is a vexatious litigant subject to a prefiling order. The filing of that notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff obtains an order from the Chief Judge permitting the filing of the litigation within 10 days of the service of the notice. If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect until 10 days after the defendants are served with a copy of that order.

(4) The clerk shall maintain a record of all prefiling orders indexed by the names of all plaintiffs subject to a prefiling order and shall provide information as to the identity of the plaintiffs on request.

(5) Once entered, a prefiling order shall remain in effect until rescinded by further order of the Court. Plaintiffs subject to a prefiling order may move the Chief Judge to rescind the order no more frequently than once every three years.

APPENDIX D

Early Termination of Non-Meritorious Cases

To: Task Force Members

From: Ann Taylor Schwing

Date: August 2003; updated and re-shepardized as of mid-August 2004

Re: Early Termination of Non-Meritorious Cases

To compliment efforts to ensure that litigants with potentially meritorious claims who want counsel can have appointment of counsel to represent or assist them, the district courts should dismiss complaints filed by self-represented litigants (or all litigants) whose complaints cannot survive minimal scrutiny when dismissal is authorized. Except in the most egregious circumstances, the initial dismissal must be with leave to amend and with sufficient explanation of the basis for the court's action and reasons for the dismissal to enable the litigant to understand and, if possible, file an amended complaint that can proceed.[1] If attempts at amendment fail, as is often the case, the complaint can then be dismissed without leave to amend. The number of attempts a litigant may enjoy depends on the nature and quality of the initial and amended complaints and whether the amendments tend to improve the complaint's compliance with requirements imposed by law. A litigant who has corrected half of the defects in a first amendment, for example, may be able to correct the remainder in a second or third effort, so leave to amend is normally appropriate. A litigant who has added as many new defects as have been eliminated may not warrant the same opportunity.

The timing of the dismissal depends on several factors. The court is empowered to dismiss fatally defective complaints filed by litigants proceeding in forma pauperis and complaints filed by prisoners sua sponte, even before service of the complaint on the defendants. As to other litigants, the court may raise fatal flaws and certain defects requiring amendment of the complaint sua sponte at the initial status conference, by minute order or order to show cause why the complaint should not be dismissed, or at other appropriate occasion early in the case. The nature of the court's power in these cases varies modestly depending on the basis for dismissal. Although the court may act with notice to the plaintiff even before the defendants have been served in these cases, the plaintiff who is not proceeding in forma pauperis may effect service before the court acts to raise the defects and potential dismissal.

The following materials address the rules affecting prisoners[2] first, then the in forma pauperis statute, and then the court's power to raise the defect sua sponte in cases filed originally

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[1] To avoid unnecessary appeals and remands, the court should make every reasonable effort to explain its actions and reasoning, the relevant authorities, and nature of the required amendments, for the benefit of the litigants as well as any reviewing courts. E.g., Rand v. Rowland, 154 F.3d 952, 957-61 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999) (if opposing party does not do so, court must explain requirements of Rule 56 to pro per prisoner when summary judgment motion must be made or opposed).

[2] The term "prisoner" is used in the sense intended in the various statutes discussed in this memorandum, typically in the sense commonly understood by most people. There may be points of controversy at the margins as to whether a particular individual is a prisoner or not. E.g., Agyeman v. Immigration & Naturalization Service, 296

in federal court and in removed cases. A local rule might be proposed that would give notice of the court's handling of defects that may or must be raised sua sponte. Although adoption of such a rule is not a prerequisite to sua sponte dismissals, a rule may be valuable to explain the court's action to litigants and the appellate court and to obviate appeals or arguments on appeal in some cases. Finally, there is a chart depicting the differing circumstances for each of the kinds of sua sponte dismissals.

I. Dismissal of Prisoner In Forma Pauperis Cases After the Third Dismissal

Until a litigant's filings rise to the vexatious level,[3] there is no restriction on the number of in forma pauperis cases a nonprisoner may bring, but prisoners who have brought three or more actions in a court of the United States that were dismissed as frivolous, malicious or failing to state a cause of action are barred from bringing additional actions in forma pauperis unless the prisoners are in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). Section 1915(g) provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The Ninth Circuit has upheld the constitutionality of the differing treatment of prisoners, Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th Cir. 1997), followed in Rodriguez v. Cook, 169 F.3d 1176, 1178-82 (9th Cir. 1999), as have numerous other courts. E.g., Lewis v. Sullivan, 279 F.3d 526, 528-31 (7th Cir. 2002); Annot., Validity and Construction of "Three Strikes" Rule Under 28 U.S.C. § 1915(g) Barring Prisoners from in Pauperis Filing of Civil Suit After Three Dismissals for Frivolity, 168 A.L.R.Fed. 433 (2001).

Section 1915(g) alone does not bar prisoners from bringing dozens or even hundreds of frivolous actions. The section bars actions brought in forma pauperis when at least three frivolous actions have previously been dismissed. 28 U.S.C. § 1915(g); Rodriguez v. Cook, 169 F.3d 1176, 1178-82 (9th Cir. 1999). One or more of the three dismissals can predate the enactment of section 1915(g). Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th Cir. 1997). Section 1915(g) does not apply to bar in forma pauperis habeas corpus proceedings. Naddi v.

F.3d 871, 886-87 (9th Cir. 2002) (alien detainee who faces no criminal charges and proceeds in forma pauperis is not subject to the Prison Litigation Reform Act).

[3] After filing a number of actions, a litigant deemed to be vexatious may be barred from filing additional actions absent pre-filing review by the court, the posting of a bond or the imposition of another protection against abusive and vexatious litigation. E.g., Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999); Martin-Trigona v. Shaw, 986 F.2d 1384, 1387 (11th Cir. 1993) (collecting cases on point); De Long v. Hennessey, 912 F.2d 1144, 1147 (9th Cir.), cert. denied, 498 U.S. 1001 (1990); DeNardo v. Murphy, 781 F.2d 1345, 1348 (9th Cir.), cert. denied, 476 U.S. 1111 (1986); Cal. Code Civ. Proc. § 391; Note, The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?, 72 So. Cal. L. Rev. 275, 289 n.86, 290 (1998). Once subject to a vexatious litigant order in one court, the litigant cannot file a new action in a different court to circumvent the order. In re Fillbach, 223 F.3d 1089, 1091 (9th Cir. 2000). A proposed rule and explanatory memorandum prepared for the Advisory Board has been distributed to the Task Force.

Hill, 106 F.3d 275, 277 (9th Cir. 1997), aff'd mem. after remand, 152 F.3d 928 (9th Cir.), cert. denied, 525 U.S. 970, 978 (1998).[4]

This 1996 provision and others enacted before and with it discussed below have markedly reduced the filing of prisoner civil rights and other civil actions. One study concluded that the total state and federal inmate population had increased from 357,292 in 1970 to 503,586 in 1980, to 1,148,702 in 1990, to 1,955,705 in 2001, while the civil rights filings per 1000 inmates had increased from 6.3, to 25.9, to 20.9, and to 11.4 in the same time. Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1583 (2003). The peak of the filings per 1000 inmates was 29.3 in 1981, id., so some might argue whether the legislation was necessary. Over the same time, the total annual civil rights filings increased steadily from 2267 in 1970 to 13,047 in 1980, to 24,004 in 1990, to a peak of 39,008 in 1995, and to 22,206 in 2001. Id.

II. Dismissal of Other Prisoner Cases Unrelated to In Forma Pauperis Status

An additional provision for initial screening and dismissal of prisoner complaints applies to all complaints, whether or not the prisoner seeks to proceed in forma pauperis, **if** the prisoner seeks relief from a government entity or employee. 28 U.S.C. § 1915A; Diaz v. Terhune, 173 F. Supp. 2d 1026, 1028 (N.D. Cal. 2001). Section 1915A provides for court review before docketing or as soon as practicable after docketing of all actions in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. The court shall identify cognizable claims or dismiss part or all of the complaint if it

> (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b). For all their similarities, there are significant differences between section 1915(e)(2) and 1915A, as set out in the chart at the end of this memorandum.

Dismissal may be ordered under section 1915A without service of process and without providing the prisoner/plaintiff an opportunity to be heard. Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) (joining Second, Fifth, Sixth and Seventh Circuits); Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999). In determining whether to dismiss a complaint for failure to state a claim, the court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff, liberally construing pro se pleadings. Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000), following Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1988).

III. Dismissal of Prisoner Cases Challenging Prison Conditions

[4] With the enactment of section 1915(g), Congress also required that all prisoners who file in forma pauperis must pay the full filing fee, over time if they cannot pay in one lump sum. 28 U.S.C. §1915(b). Thus, in Taylor v. Delatoore, 281 F.3d 844 (9th Cir. 2002), the plaintiff was ordered to pay the fee with the $6.62 to start, paid within 30 days, and the rest in monthly installments. The constitutionality of this provision has been upheld. Id. at 848-51 (collecting other cases on point).

Suits by prisoners are also governed by 42 U.S.C. § 1997e. Section 1997e(c)(1) provides:

> The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions[5] under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seems monetary relief from a defendant who is immune from such relief.

Perhaps because the section is relatively new, is directed to a specific category of cases and affirmatively states that the court may act sua sponte, relatively few cases discuss the circumstances under which the court may act. Enacted as part of the same Act as sections 1915(g) and 1915A, this section should receive a similar interpretation.

Section 1997e(a) requires exhaustion and is mandatory, providing that no action shall be brought until administrative remedies have been exhausted. Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). Nine Circuits including the Ninth Circuit have held the section 1997e(a) requirement for exhaustion is mandatory, almost all affirmatively requiring exhaustion before the filing of the complaint. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (collecting the cases). This exhaustion requirement offers a further basis for sua sponte dismissal without prejudice of complaints that do not comply. As exhaustion is mandatory, the plaintiffs ultimately are benefitted by prompt dismissal so that they may complete exhaustion and proceed with their complaints if they wish. The Ninth Circuit has held, however, that exhaustion is an affirmative defense and that sua sponte dismissal for failure to exhaust is appropriate only when the failure to exhaust is evident from the face of the complaint. Wyatt v. Terhune, 315 F.3d 1108, 1117-20 (9th Cir.), cert. denied, 124 S.Ct. 50, 157 L.Ed.2d 23 (2003).

IV. Dismissals Under 28 U.S.C. § 1915—In Forma Pauperis Cases Generally

Many self-represented litigants seek and receive leave to proceed in forma pauperis.[6] Leave to proceed is granted or denied in the discretion[7] of the court under 28 U.S.C. § 1915.[8]

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[5] Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12, 26 n.6 (2002) (upholding section 1997e's exhaustion requirement applicable to all prisoner suits about prison life, from general circumstances to specific episodes); see Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

[6] We are discussing only natural persons. Section 1915 treatment is available only for natural persons. Rowland v. California Men's Colony, 506 U.S. 194, 209-12 (1993). Corporations and other artificial persons cannot appear in propria persona. Id. at 202; D-Beam Ltd. Partnership v. Roller Derby Skates, Inc., 366 F.3d 972, 973-74 (9th Cir. 2004); In re Bigelow, 179 F.3d 1164, 1165 (9th Cir. 1999); In re America West Airlines, 40 F.3d 1058, 1059 (9th Cir.1994) (per curiam) (partnership); United States v. High Country Broadcasting Co., 3 F.3d 1244, 1245 (9th Cir.1993), cert. denied, 513 U.S. 826 (1994) (nonattorney may not represent corporation and may not intervene to represent interests of corporation); Annot., Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not an Attorney, 8 A.L.R.5th 653 (1992).

[7] In re McDonald, 489 U.S. 180 (1989) (denying leave to petitioner who had made 73 filings in forma pauperis between 1971 and 1989).

[8] Section 1915(e)(1) first provides that the court may request an attorney to represent any person unable to afford counsel. Appointment of counsel is discretionary. United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir. 1995) (counsel may be designated only in "'exceptional circumstances'" considering likelihood of success and ability to articulate the claims in pro se in light of the complexity of the legal issues), quoting Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). The court cannot require an unwilling attorney to represent an indigent

A. Governing Law

As amended in 1996, section 1915(e)(2) provides:

> Notwithstanding any filing fee, or any portion there, that may have been paid, the court shall dismiss the case at any time if the court determines that—
>
> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal—
>
> (i) is frivolous or malicious;[9]
> (ii) fails to state a claim on which relief may be granted;[10] or
> (iii) seeks monetary relief against a defendant who is immune from such relief.

This provision is a significant expansion over the pre-1996 version of the law, under which the district court could "dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. §1915(d) (1994).

Section 1915(e) applies to all cases under the in forma pauperis statute, filed by both prisoners and nonprisoners. It does not authorize dismissal of actions described in (B)(i) through (B)(iii) that are not filed under the in forma pauperis statute. O'Brien v. United States Department of Justice, 927 F. Supp. 382, 385 (D. Ariz. 1995), aff'd mem., 76 F.3d 387 (9th Cir. 1996).

At least until the 1996 amendments, the payment of a partial filing fee precluded dismissal of an in forma pauperis complaint. Butler v. Leen, 4 F.3d 772, 773 (9th Cir. 1993); Hake v. Clarke, 91 F.3d 1129, 1131 n.2 (8th Cir. 1996). Whether that rule continues to apply following the amendment of section 1915 and the addition of the opening "notwithstanding" language has not been determined in the Ninth Circuit. Other amendments to section 1915 provide that prisoners may file suits without prepayment of fees, but that they must pay the fees over time from their prison trust fund accounts if they have any assets in the accounts or otherwise. 28 U.S.C. § 1915(a)(2), (b). As a result, prisoners are no longer truly in forma pauperis in the same way that nonprisoners are.

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party under section 1915(e)(1). Mallard v. United States District Court, 490 U.S. 296 (1989); Annot., Appointment of Counsel, in Civil Rights Action, Under Forma Pauperis Provisions, 69 A.L.R.Fed. 666 (1984). Few appointments are made except on appeal.

[9] "When a case may be classified as frivolous or malicious, there is, by definition, no merit to the underlying action and so no reason to grant leave to amend." Lopez v. Smith, 203 F.3d 1122, 1127 n.8 (9th Cir. 2000) (en banc). This view may be somewhat overbroad as a complaint may be frivolous as to certain claims but not others or as to certain defendants but not others.

[10] The constitutionality of this provision has been drawn into question by one Circuit Judge in the Eleventh Circuit, Mitchell v. Farcass, 112 F.3d 1483, 1491 (11th Cir. 1997) (Lay, J., concurring), but upheld by the majority, Id. at 1489, and in the Eighth Circuit. Christiansen v. Clarke, 147 F.3d 655, 658 (8th Cir.), cert. denied, 525 U.S. 1023 (1998) (affirming dismissal sua sponte, without leave to amend before service of process), both cited in Rodriguez v. Cook, 169 F.3d 1176, 1178 n.2 (9th Cir. 1999) (not reaching the issue), and discussed at some length in the majority, concurring and dissenting opinions in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc)

B. Notice and Leave to Amend

The district judge has a variety of options following the determination that the plaintiff is entitled to proceed in forma pauperis. At one end of the spectrum, the judge may dismiss the complaint sua sponte with prejudice without prior notice to the plaintiff or service or other notice to the defendants. "A district court may sua sponte dismiss an in forma pauperis litigant's complaint and abstain before service of process has been delivered to all defendants." Martinez v. Newport Beach City, 125 F.3d 777, 780 (9th Cir. 1997), overruled on other grounds in Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir.), cert. denied, 533 U.S. 966 (2001); accord, Curley v. Perry, 246 F.3d 1278, 1283-84 (10th Cir.), cert. denied, 534 U.S. 922 (2001) (upholding constitutionality of sua sponte dismissal without notice). Moving to the middle ground, the judge may dismiss with leave to amend with an explanation of the defects in the existing complaint. Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc) (statute's language that court "shall dismiss" does not interfere with court's discretion to dismiss with or without leave to amend as appropriate to the case). If these defects are cured or diminished in an amended complaint, the judge may and normally should authorize service of process on some or all of the defendants. At the other end of the spectrum, the judge may authorize service of process automatically on all in forma pauperis complaints after granting in forma pauperis status and allow the defendants to raise whatever grounds for dismissal they may wish to raise. These options can be enumerated as follows:

- dismiss without leave to amend sua sponte, before service of process, no prior notice to plaintiff;[11]
- dismiss without leave to amend sua sponte, before service of process, with prior notice to plaintiff and opportunity to oppose dismissal;
- dismiss with leave to amend sua sponte, before service of process, no prior notice;[12]
- dismiss with leave to amend sua sponte, before service of process, with prior notice to plaintiff and opportunity to oppose dismissal;
- order service of process and question the existence of subject matter jurisdiction or other defect appropriate to be raised sua sponte, effectively inviting motion to dismiss on particular grounds;
- order service of process on all defendants and permit them to respond to the complaint as they elect.

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[11] E.g., Boag v. Boies, 455 F.2d 467, 468-69 (9th Cir.), cert. denied, 408 U.S. 926 (1972) (affirming dismissal sua sponte without prior notice to plaintiff). This option treats in forma pauperis plaintiffs differently from other plaintiffs who would be granted leave to amend in all but the most extraordinary cases, a treatment that has been criticized in many appeals. E.g., Neitzke v. Williams, 490 U.S. 319 (1989) (under former section 1915(d)); Lopez v. Smith, 203 F.3d 1122, 127-28 (9th Cir. 2000) (en banc) (collecting cases).

[12] E.g., McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (complaint dismissed with leave to amend before service of process); Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1369 (9th Cir. 1987) (plaintiff must be given leave to amend unless it is absolutely clear that the deficiencies cannot be cured by amendment).

These options exist for all defendants or for any of the defendants individually. For example, a judge might dismiss a complaint without leave to amend insofar as it names "Almighty God" as a defendant but order service of process on the Social Security Administration and the individual named defendants.

Litigants who face dismissal of their complaints under section 1915 are entitled to notice and leave to amend unless the amendment would be wholly futile. The fact that a complaint fails to state a claim does not automatically mean that the complaint is frivolous. Neitzke v. Williams, 490 U.S. 319, 330-31, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). As the plaintiffs noted in Neitzke, many paying plaintiffs with attorneys file initial complaints that fail to state a claim. Thus, the Court held that in forma pauperis plaintiffs should receive opportunities for responsive pleadings commensurate to the opportunities accorded similarly situated paying plaintiffs. Id. at 330. Neitzke was decided under the earlier version of section 1915, but its reasoning that in forma pauperis litigants should not be denied leave to amend in circumstances in which other litigants would be given leave continues to be cited. E.g., Mitchell v. Farcass, 112 F.3d 1483, 1491 (11th Cir. 1997) (Lay, J., concurring). To the extent Neitzke can be read to hold that former section 1915(d) did not authorize sua sponte dismissal for failure to state a claim, amended section 1915(e)(2) was intended to overrule that position. Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) ("section 1915(e) not only permits but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim").

The court may take judicial notice when appropriate to the determination whether to dismiss under section 1915. Denton v. Hernandez, 504 U.S. 25, 32-34, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992), on remand, 966 F.2d 533 (9th Cir. 1992); Minetti v. Port of Seattle, 152 F.3d 1113, 1115 (9th Cir. 1998) (per curiam) (two prior actions had same allegations and same parties, supporting dismissal based on res judicata); Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1369 (9th Cir. 1987) (dismissal of complaint seeking review of another action before the court in which a default judgment had been entered but no final judgment had been entered); Diamond v. Pitchess, 411 F.2d 565, 566 (9th Cir. 1969) (judicial notice of court's own records to decide in forma pauperis).

Dismissal may be entered sua sponte, before service of process and before responsive pleadings are filed. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) ("Section 1915(e)(2)(B)(ii), even under our reading, allows a district court to dismiss, sua sponte and prior to service of process, a complaint that fails to state a claim"); Martinez v. Newport Beach City, 125 F.3d 777, 780 (9th Cir. 1997), overruled on other grounds in Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc). The dismissal can even be without leave to amend in the most extreme cases in which the complaint cannot be amended to cure the defects. McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991); Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1369 (9th Cir. 1987) (plaintiff must be given leave to amend unless it is absolutely clear that the deficiencies cannot be cured by amendment); Stotts v. Salas, 938 F. Supp. 663, 666 (D. Hawaii 1996).

A complaint is legally frivolous if it embraces an "'inarguable legal conclusion'" and factually frivolous if the facts alleged "'rise to the level of the irrational or the wholly incredible.'" Id. at 666, quoting Denton v. Hernandez, 504 U.S. 25, 33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). The Seventh Circuit has held that a complaint with allegations that are

fantastic can be dismissed without taking evidence. Bontkowski v. Smith, 305 F.3d 757, 760 (7th Cir. 2002), following Gladney v. Pendleton Correctional Facility, 302 F.3d 773 (7th Cir. 2002), cert. denied, 538 U.S. 910 (2003). The standard of review on appeal in cases in which a complaint was dismissed as factually frivolous is abuse of discretion. Id. at 774-75.

The Supreme Court declined to address whether notice and an opportunity to amend was mandatory in every case in Denton v. Hernandez, 504 U.S. 25, 34, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). As it may so hold in a future case, the better overall course is to grant leave to amend and identify or explain the most prominent of the defects at least once either in every case or in all cases except thse involving unquestionably delusional or wholly fanciful allegations.[13] Individual judges may differ in determining whether a particular complaint warrants sua sponte dismissal, and the standard of review on appeal may be de novo depending on the issues that are appealed and their posture on appeal. Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1369 (9th Cir. 1987). The investment of one judge's time and attention in granting leave to amend once before dismissing is relatively small compared to the investment of the time of three judges and clerk's office staff at both district and appellate level if the case is appealed and then remanded because the Ninth Circuit concludes that leave to amend was required. Although granting leave to amend will not prevent one appeal on the merits, it can eliminate an initial appeal and remand requiring leave to amend, followed by another dismissal and appeal.

Dismissal with leave to amend after an initial review of the complaint does not mean that the complaint has been served on the defendants. Dismissal before service of process when the complaint is frivolous, malicious or plainly unable to state a claim for relief has the benefit of not using taxpayers' money and the offices of the court to burden defendants. Williams v. White, 897 F.2d 942, 943-44 (8th Cir. 1990); Boag v. Boies, 455 F.2d 467, 468-69 (9th Cir.), cert. denied, 408 U.S. 926 (1972), explained in Crawford v. Bell, 599 F.2d 890, 893 (9th Cir. 1979).

V. Dismissal of Any Case, including Non-Prisoner, Non-In Forma Pauperis Cases

There are a variety of grounds the court may raise sua sponte, provide notice and opportunity for the parties to brief the matter, and dismiss if the facts and law support the dismissal. These grounds apply to support dismissal in prisoner cases and in in forma pauperis cases but are not limited to such cases.

The following bullets gather the law relating specifically to particular defects that have been held suitable for the court to raise sua sponte.[14]

- dismissal for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3); Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804, 806-07 (9th Cir. 2003); Cook v. City of Pomona, 884 F. Supp. 1457, 1461 (C.D. Cal.), aff'd mem., 70

[13] Examples include the complaint alleging that plaintiff was "frozen with anesthesia gas" through the vent in his dentist's waiting room so that documents establishing the truth about President Kennedy's assassination could be stolen from the trunk of his car, the recurring complaints about radio waves beamed at plaintiff's head for various purposes, and the complaint alleging that the crop circles are created by tall green men from Mars. A recent study indicates that these sorts of complaints are far less frequent than commonly believed. Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555 (2003).

[14] Note that "raise sua sponte" does not mean dismiss without advance warning and without an opportunity to brief the issue.

F.3d 1277 (9th Cir. 1995). Even on this ground, the court should give the parties an opportunity to be heard before entering a dismissal as the defect may be remedied, E.g., 28 U.S.C. § 1653 (authority to grant leave to amend to cure defective allegations of jurisdiction); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 393 n.6 (9th Cir.1979) (waiver of excess of prayer for jurisdiction under Tucker Act, 28 U.S.C.A. § 1346(a)(2)), or may be inadvertent and able to be corrected, as might occur with a transposition of $75,000 into $57,000;

- dismissal for lack of standing, Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 475 (9th Cir. 1994), overruled on other grounds in WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (standing is an essential element of federal jurisdiction and can be raised sua sponte, even on appeal);

- dismissal or stay based on abstention, Bellotti v. Baird, 428 U.S. 132, 143 n.10, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976) (Pullman-type abstention); Richardson v. Koshiba, 693 F.2d 911, 915 (9th Cir. 1982) (Pullman-type abstention); AFA Distributing Co. v. Pearl Brewing Co., 470 F.2d 1210, 1213 (4th Cir. 1973) (Burford-type abstention); Urbano v. Board of Manager, 415 F.2d 247, 254 n.20 (3d Cir. 1969), cert. denied, 397 U.S. 948 (1970) (Burford-type abstention);

- dismissal for failure to join an indispensable party, sometimes said to be a jurisdictional issue. CP Nat'l Corp. v. Bonneville Power Administration, 928 F.2d 905, 911-12 (9th Cir. 1991) (even court of appeal may raise issue sua sponte); McShan v. Sherrill, 283 F.2d 462, 464 (9th Cir. 1960). Dismissal would be appropriate only if the plaintiff failed to add the party within a reasonable time, and the action was one that could not proceed in the absence of that party. Fed. R. Civ. P. 19, 21;

- dismissal for failure to comply with Rule 4(m), requiring service on defendant within 120 days or extended time as granted by the court, Hason v. Medical Board, 279 F.3d 1167, 1174 (9th Cir.), rehearing en banc denied, 294 U.S. 1166 (9th Cir.), cert. granted, 537 U.S. 1028 (2002), cert. dism'd, 538 U.S. 958 (2003); Walker v. Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994); Bann v. Ingram Micro, Inc., 108 F.3d 625, 626 (5th Cir. 1997) (dismissal cannot be with prejudice);

- dismissal based on suit against person entitled to absolute immunity;

- dismissal based on res judicata; a court that is on notice that it has previously decided the issue presented may dismiss the action sua sponte, even if the issue has not been raised. Arizona v. California, 530 U.S. 392, 412 (2000). This approach is consistent with the policies underlying res judicata, based on the defendant's interest in avoiding relitigation of the issue and on the court's interest in avoiding judicial waste. Id., citing United States v. Sioux Nation,

448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). This point may be raised sua sponte when federal law provides the rule of decision. If the claim for relief is governed by state law, however, the court's power to raise the issue must be determined under the relevant state law;

- dismissal for unreasonable failure to prosecute, Hernandez v. City of El Monte, 138 F.3d 393, 400 (9th Cir. 1998); McKeever v. Block, 932 F.2d 795, 797 (9th Cir. 1991).

Other issues are not appropriate for the court to raise sua sponte, typically because the defect is waivable.

- lack of personal jurisdiction, Fed. R. Civ. P. 12(g), (h); O'Brien v. R.J. O'Brien & Associates, Inc., 998 F.2d 1394, 1399 (7th Cir. 1993) (court is powerless to dismiss for lack of personal jurisdiction when defendant has waived insufficient process and submitted to jurisdiction); Zelson v. Thomforde, 412 F.2d 56, 58-59 & n.8 (3d Cir. 1969) (per curiam); P & E Electric, Inc. v. Utility Supply of America, Inc., 655 F. Supp. 89, 91 (M.D. Tenn. 1986);

- improper venue, Catz v. Chalker, 142 F.3d 279, 284-85 (6th Cir. 1998), amended, 243 F.3d 234 (6th Cir. 2001); see Stich v. Rehnquist, 982 F.2d 88, 89 (2d Cir. 1992) (extraordinary circumstances may support dismissal for improper venue, as here, when plaintiff sued individual members of the U.S. Supreme Court and others after having been held a vexatious litigant and barred from filing new suits on the same facts by the Ninth Circuit); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3826 (2d ed. 1986);

- improper or insufficient service, Chute v. Walker, 281 F.3d 314, 319-20 (1st Cir. 2002) (error to dismiss when insufficiency of service of process had been waived by defendant); Pardazi v. Cullman Medical Center, 896 F.2d 1313, 1317 (11th Cir. 1990) (once defendant has waived objection to insufficient process, court may not dismiss on its own initiative for lack of personal jurisdiction or insufficient process);

- statute of limitations, Zelson v. Thomforde, 412 F.2d 56, 59 (3d Cir. 1969) (per curiam), following Wagner v. Fawcett Publications, 307 F.2d 409, 412 (7th Cir. 1962), cert. denied, 372 U.S. 909 (1963) (district court may not raise statute of limitations sua sponte when defendant had waived defense); see Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686-87 (9th Cir.1993), cert. denied, 510 U.S. 1093 (1994) (collecting cases on point).

VI. Removed Cases

Although not necessarily involving self-represented litigants, another group of cases suitable for sua sponte review is removed cases. Removal is often not properly done, and remands are frequently required for lack of subject matter jurisdiction. District court review of

all removed cases promptly following their removal would eliminate other work expended on improperly removed cases relating to subjects other than jurisdiction. U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 388-89 (3d Cir. 2002).

Not all defects in removal support a sua sponte identification of the defect and remand. Removal defects that implicate subject matter jurisdiction should be raised by the court at the earliest opportunity. Other defects may be raised by the plaintiff or waived by the plaintiff and, accordingly, should not be identified by the court. The following defects go to subject matter jurisdiction:

- Lack of diversity when there is no federal question,
- Lack of federal question when there is no diversity,
- Insufficient amount in controversy for jurisdiction, and
- Sovereign immunity.

The following defects do not implicate subject matter jurisdiction:

- Failure to conform to the 30 day filing requirement in 28 U.S.C. § 1446(b). Maniar v. FDIC, 979 F.2d 782, 784-85 (9th Cir. 1992),
- Failure of all defendants to join in the notice of removal as required in 28 U.S.C. § 1446(a), and failure of the removing party to explain the absence of a defendant in the notice of removal. Prize Frize, Inc. v. Matrix, Inc., 167 F.3d 1261 (9th Cir. 1999), and
- After the 30 day motion to remand time prescribed in 28 U.S.C. § 1447(c) has expired, all defects other than lack of subject matter jurisdiction. Vasquez v. North Country Transit District, 292 F.3d 1049 (9th Cir. 2002); Maniar v. FDIC, 979 F.2d 782, 784-85 (9th Cir. 1992) ("motion to remand" in section 1447(c) includes a district court's sua sponte remand); 14C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3739 (1998).

Other than defects peculiar to the removal itself, removed cases are like all other cases with respect to the court's power to raise defects sua sponte and dismiss when appropriate after notice to the parties and opportunity to respond.

VII. Implementation of Early Review

Some courts have been routinely sending in forma pauperis cases out for service of process and have been waiting for defendants to make motions to dismiss instead of sending out minute orders directing the plaintiff or the parties to brief issues implicating subject matter jurisdiction and other grounds for dismissal. These courts will undoubtedly encounter a short term increase in workload if they alter their practice to examine all complaints and to dismiss or remand complaints that are not properly before the court. The increased workload should be limited in time to the transition period, however, and should ultimately result in a reduction in

the total workload. If cases that are not properly filed in federal court are dismissed or remanded promptly, then those cases will not require hearings on discovery disputes, settlement and status conferences, law and motion hearings unrelated to the flaw requiring dismissal and the like. If the cases that are most clearly inappropriate for federal court (or any court) are dismissed before service of process, then numerous defendants will not be served at taxpayer expense and required to defend actions or claims that have no hope of success. Those defendants unlucky enough to have attracted the attention of an aggressive pro se litigant receive little justice when they are required to respond multiple times to a "complaint" that sets out broken and garbled allegations or presents a collage of letters, clippings and assorted papers.

Early review of complaints as they are filed or removed can be accomplished by a single chambers or by a district as a whole. In either case, some economies of time can be achieved by having the work done by a smaller number of people so they can develop expertise. Especially in the area of the Prison Litigation Reform Act, there are multiple cases to follow at various levels of finality. This memo is almost certainly out of date on one point or another before it can be distributed to the Task Force.

VIII. Chart Depicting the Information

	28 U.S.C. § 1915(e)(2)	28 U.S.C. § 1915(g)	28 U.S.C. §1915A	42 U.S.C. §1997e	Subject Matter Jurisdiction	Removal Jurisdiction
parties affected	any in forma pauperis (only humans)	just prisoners (only humans)	just prisoners (only humans)	just prisoners (only humans)	any plaintiff (human or artificial)	any removing defendant (human or artificial)
timing of dismissal	"at any time"	after third dismissed action	before docketing or as soon as practicable	any time, w/o requiring exhaustion	any time	any time
dismissal with or w/o prejudice	without, as plaintiff can pay & proceed[15]	with prejudice to refiling as prisoner in forma pauperis	with prejudice to refiling as prisoner	with prejudice to refiling as prisoner	without, plaintiff can sue elsewhere	remand don't dismiss; case can proceed on remand
type of action or defendant	any appeal, criminal or civil action	any appeal or civil action after 3d one	action for redress from gov't or gov't employee	action re prison conditions	any appeal, civil or criminal action	any appeal, civil or criminal action
dismiss if frivolous or malicious?	yes	yes	yes	yes 1997e(c)(1)	no	no
dismiss for failure to state claim	yes	yes	yes	yes 1997e(c)(1)	no	no
dismiss for lack of exhaustion	no	no	yes	yes 1997(a)	no	no
dismiss if seek $ from immune defendant	yes	no	yes	yes	no	no

[15] Denton v. Hernandez, 504 U.S. 25, 34 (1992); Bator v. State of Hawaii, 39 F.3d 1021, 1026 (9th Cir. 1994).

MODEL RULE 16-___

SUA SPONTE REVIEW

(a) After a civil action has been filed, the assigned Judge or Magistrate Judge may conduct a sua sponte review of the complaint and other papers that may be in the file. If that review reveals apparent jurisdictional defects or other flaws appropriate for the Court to raise sua sponte, the Court may raise these matters upon the filing of the complaint, prior to service, or at the pretrial scheduling conference, issue an order requiring briefing relating to the matter, or take other action appropriate to the circumstances.

(b) The following list is illustrative of the matters that may be raised sua sponte in actions filed in the first instance in District Court or in actions removed to the District Court from state court. This list is not exhaustive and is not intended to bar or discourage any party from raising one or more of these or other issues on the party's own motion:

(1) Apparent filing of an action over which the Court lacks subject matter jurisdiction including lack of diversity when there is no federal question, lack of federal question when there is no diversity, and insufficient or excessive amount in controversy (e.g., 28 U.S.C. §§ 1331, 1332, 1346(a)(2), 1653; Fed. R. Civ. P. 12(h)(3));

(2) Apparent filing of an action by a plaintiff that lacks standing to sue;

(3) Apparent filing of an action as to which the Court should abstain;

(4) Apparent filing of an action without joinder of an indispensable party (Fed. R. Civ. P.19, 21);

(5) Apparent filing of an action against a person entitled to absolute immunity;

(6) Apparent filing of an action barred by res judicata

(7) Apparent filing of an action in violation of an order finding the plaintiff to be a vexatious litigant and barring further filings

(8) Apparent filing of an in forma pauperis action (other than a habeas corpus action) by a prisoner who is not under imminent danger of serious physical injury after dismissal of three or more such actions on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted (28 U.S.C. § 1915(g));

(9) Apparent filing of an action (other than a habeas corpus action) by a prisoner seeking relief from a government entity or employee that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. (28 U.S.C. § 1915A);

(10) Apparent filing of an action (other than a habeas corpus action) by a prisoner with respect to prison conditions that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. (28 U.S.C. § 1997e(c)(1));

(11) Apparent filing of an action (other than a habeas corpus action) by a prisoner with respect to prison conditions without attempting to exhaust administrative remedies. (28 U.S.C. § 1997e(a));

(12) Apparent filing of an action seeking to proceed in forma pauperis if the allegation of poverty is untrue or if the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief (28 U.S.C. § 1915(e)(2));

(13) Apparent failure to comply with service of process requirements (Fed. R. Civ. P. 4(m));

(14) After the action has been on file for a sufficient period of time, apparent unreasonable failure to prosecute.

APPENDIX E

Alternative Dispute Resolution Programs

The Assisted Mediation Program

The court offers mediation as an alternative to formal litigation. In mediation, the parties meet with a neutral third party - the mediator - who helps the parties attempt to negotiate a settlement of the case. The mediator is not a judge and has no authority to impose a resolution. The mediator does not represent either side; his or her role is to help the parties communicate and to assist them in understanding whether it makes more sense to proceed with the lawsuit or to accept a negotiated settlement.

It is often difficult for parties who are not represented by counsel (pro se litigants) to participate effectively in mediation because they have no one to advise them and to assist them through the process. Pro se litigants also frequently have problems preparing for mediation without legal counsel. As a result, the court has established the Assisted Mediation Program. In this program, volunteer attorneys assist pro se litigants, but the assistance is limited to mediation in the court's Mediation Program.

At this time, the Assisted Mediation Program is only open to plaintiffs filing employment discrimination cases. If you are interested in the program, you should fill out the application materials provided to you by the ADR Program. This application asks you to describe the case in a bit more detail. You should submit the application form and the related materials to the ADR Program. The ADR Program will file these materials with the Clerk's Office and forward them to the assigned judge for review. Please be advised that participation in the program is in no way guaranteed and is at the discretion of the assigned judge.

The assigned judge will determine whether this is a case that would benefit from mediation and would also benefit from the assignment of counsel to assist you with the process. If your case is accepted into the program, the judge will issue an order assigning your case to the program. Shortly thereafter, the judge will issue a separate order appointing a particular volunteer attorney to assist you. Once this occurs, the volunteer attorney will contact you to help prepare you for the mediation and also will go with you to the mediation.

UNITED STATES DISTRICT COURT
Northern District of California

_____
_
Plaintiff in Propia Persona,

v.

_____
_
Defendant(s).
_____
___/

No. C ____ - _____

APPLICATION FOR ASSISTED MEDIATION

I am the plaintiff in the above-entitled employment discrimination action. I request that the court refer this case into the Assisted Mediation Program. In support of this request, I provide the following information:

A. SUMMARY INFORMATION ABOUT BASIS OF THE CASE

(1) I filed an employment discrimination case in the court against the above-named defendant on: _____.

(2) I filed this case because the defendant harmed me by (circle any applicable):

a. failing to employ me.

b. firing me.

c. eliminating my position.

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d. failing to promote me.

e. demoting me.

f. disciplining me without reason.

g. harassing me (or allowing others to harass me) so that working conditions became intolerable.

h. paying me differently than others doing similar work.

i. providing different terms, conditions or privileges of employment than others received doing similar work.

j. other actions (specify): _____.

k. taking action/retaliating against me because I complained about any of the above harms.

(3) For each item that you circled in question #2, above, give one example of when and how the defendant took an action that harmed you:

Item	When	How did defendant do it? (If more space is needed, add additional sheet.)

(4) The defendant took action that harmed me, as I identified in question #2 above; the defendant did so because of (circle any applicable):

1. my race or color.
2. my religion.

///

3. my sex.

4. my national origin.

5. my disability.

6. my age.

7. other (specify): _____.

(5). Give an example of how a harm that you suffered, as you indicated in question #2, is related to any discriminatory reason that you marked in question #4. Do this for each item you mark in questions #2 and #4:

Harm (Q2)	Discriminatory Reason (Q4)	How do you know that Q4 is the reason defendant did Q2? (If more space is needed, add additional sheet.)

B. REASONS FOR SEEKING MEDIATION

(6) Have you read the materials on ADR and on Assisted Mediation provided by the Clerk, when you filed the case, or by the court? Yes ____ No ____

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(7) I am seeking mediation of this complaint because I hope the process will (circle any applicable):

a. improve communication between me and the defendant.

b. help me explain to the defendant the harm the defendant has caused me.

c. help the defendant explain to me the reason for the actions the defendant took which harmed me.

d. help me understand the strengths of my case and the defendant's case.

e. help me understand the weaknesses of my case and the defendant's case.

f. help me and the defendant understand if there is anything we agree upon in this dispute.

g. help me and the defendant explore any creative solutions to this dispute which the court might not be able to impose if we go to trial.

h. help me preserve or improve what remains of my personal or business relationship with the defendant.

i. provide confidentiality in coming to a resolution of this dispute.

j. tone down the hostility between me and the defendant.

k. help me and the defendant get to the core of the case and sort out the issues in dispute.

l. help us settle all or part of the dispute.

m. other reason (specify): _____

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C. WHY I NEED AN ATTORNEY TO ASSIST ME IN THIS MEDIATION

(8) Have you been unable to find an attorney willing to represent you in this case on terms you can afford? Yes ____ No ____

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(9) I have made a reasonable effort to obtain an attorney to represent me and contacted the following attorneys for this purpose (include additional sheets if necessary):

Attorney Name	Address	Phone Number

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____ _____

Date Signature

_____

Name (Printed)

UNITED STATES DISTRICT COURT

Northern District of California

_____
_

Plaintiff in Propia Persona,

v.

_____
_

Defendant(s).

_____

___/

No. C ____ - _____

DECLARATION IN SUPPORT OF APPLICATION FOR ASSISTED MEDIATION

I, _____, am the plaintiff in this case and apply for placement of this case into the court's Assisted Mediation program. In support of this application, I declare as follows:

1. REPRESENTATION. I am not represented by an attorney and no attorney has made an appearance for me in this case.

2. INFORMATION. I have read and considered materials provided about the court's Assisted Mediation Program. I understand the Program involves the court's reference of this case into court-annexed mediation as part of the court's Multi-Option ADR Program.

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3. MEDIATION. I have decided to seek court-annexed mediation in this case in order to seek a mutually satisfactory agreement resolving all or part of the dispute underlying this case, by exploring not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities. I understand this exploration of litigant needs and interests may be formally independent of the legal issues in controversy in this case. I believe my participation in mediation would be facilitated if I received assistance in participating in such mediation.

4. ASSISTED MEDIATION. I understand that if this case is referred into Assisted Mediation, I will be offered the assistance of mediation counsel to help me prepare for, participate in, and pursue follow-up to, a court-annexed mediation session. I also understand that the role of mediation counsel is only to educate and assist my preparation for, participation in and follow-up to the mediation session.

5. LIMITED ASSISTANCE. I understand that mediation counsel may only help my participation in mediation by educating and assisting me. Accordingly, I:

a. Understand that mediation counsel will provide no other service of any kind in this case, without prior written authorization by the court to do so.
b. Agree that the scope of mediation counsel's duties to me will extend no further than is necessary to educate me and assist me to prepare for, participate in, and follow up on the court-annexed mediation.
c. Acknowledge that mediation counsel's responsibility to help educate me about the process will not involve any control of the case or the mediation.
d. Acknowledge and agree that mediation counsel will not analyze my overall legal needs, conduct independent investigation of my case, or represent me in such matter.

e. Understand that mediation counsel will not advise me about the need to contact other counsel for purposes of obtaining legal advice.

6. PRO SE STATUS. I acknowledge that I continue to provide my own representation in this case and in the mediation, and that mediation counsel will only assist and educate me in this endeavor.

7. NO CONTRACT. I understand and agree that I have no contractual relationship with mediation counsel for legal or other services, and that I will enter no contract with mediation counsel during the time this case is in the Assisted Mediation Program, absent a written order by the court permitting such a contract.

8. NO FORESEEABLE HARM. I have assessed the prospect of mediation and acknowledge that there is no foreseeable harm that I will suffer in the failure of the mediation to resolve the case, improve case management, enhance party satisfaction or understanding of the case, or to achieve any other goals of mediation.

9. EVALUATION. I agree to participate in the evaluation of the Assisted Mediation Program, and to allow any person authorized by the court to evaluate the Program to attend the mediation session, all court proceedings concerning the Assisted Mediation Program, and any preparatory or follow-up meetings for the mediation. I further consent to mediation counsel's responding to any inquiries about the case from any such person authorized by the court to evaluate the Program.

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10. I confirm that I have carefully considered the limited assistance provided by the Assisted Mediation Program and confirm that my decision to apply to enter the program is made knowing the limited role to be played by mediation counsel is to provide only education and assistance in the mediation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____	_____
Date	Signature
	_____
	Name (Printed)

UNITED STATES DISTRICT COURT

Northern District of California

_____
_

Plaintiff in Propia Persona,

v.

_____
_

Defendant(s).

_____
___/

No. C ____ - _____

ORDER ASSIGNING CASE TO ASSISTED MEDIATION PROGRAM

Plaintiff in this case has applied to participate in the court's Assisted Mediation Program. Based on the court's review of plaintiff's Application for Assisted Mediation, Declaration in Support of Application for Assisted Mediation and additional application materials, and plaintiff's acknowledgment that s/he has reviewed the description of the Assisted Mediation Program, wishes to participate in the Program, and understands and agrees to the limited representation to be provided by Special Mediation Counsel,

IT IS HEREBY ORDERED:

1. That the case be assigned to the Assisted Mediation Program and be mediated in accordance with the Alternative Dispute Resolution Local Rules of this court, except for Rules 6-3(b) and 6-3(c);

2. That Special Mediation Counsel be appointed for the limited purpose of representing plaintiff in the preparation for and mediation of this case; and

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3. That the mediation shall be completed no later than _____.

IT IS SO ORDERED.

_____ By: _____

Dated

United States District Judge

UNITED STATES DISTRICT COURT

Northern District of California

_____

_ Plaintiff in Propia Persona,

v.

_____

_ Defendant(s).

_____

___/

No. C ____ - _____

ORDER APPOINTING SPECIAL MEDIATION COUNSEL

The court having ordered that this case be assigned to the Assisted Mediation Program, and plaintiff having requested and being in need of counsel to assist him or her in the mediation, and a volunteer attorney willing to be appointed for the limited purpose of representing plaintiff in the mediation having been located by the court,

IT IS HEREBY ORDERED THAT:

COUNSEL'S NAME is appointed as Special Mediation Counsel. This appointment shall be pursuant to the terms of the Application and Declaration of plaintiff to participate in the Assisted Mediation Program. This appointment and limited representation shall end upon the completion of the mediation and any follow-up activities agreed upon by the parties and the mediator, unless terminated earlier by the court.

Special Mediation Counsel shall notify the court promptly upon the completion of the mediation and any follow-up activities. The court shall then issue an order relieving the Special

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Mediation Counsel from HIS OR HER limited representation of the plaintiff. Thereafter, the attorney who has served as Special Mediation Counsel will only be permitted to represent the plaintiff upon order of the court if there is a signed written agreement under which the attorney agrees to provide such legal services.

IT IS SO ORDERED.

_____ By: _____

Dated

United States District Judge

UNITED STATES DISTRICT COURT

Northern District of California

_____
_

Plaintiff in Propia Persona,

v.

_____
_

Defendant(s).

_____

___/

No. C ____ - _____

ORDER TERMINATING ASSISTED MEDIATION

The above-entitled action was placed in the Assisted Mediation Program. Upon the application by the Pro Se Plaintiff, Special Mediation Counsel was designated to educate and assist the Pro Se Plaintiff in preparation for, participation in, and follow up to a mediation in this case.

The Mediator recently informed the court that the mediation has concluded and that no further session or follow-up is contemplated. Accordingly, the court now removes this case from the Assisted Mediation Program. This terminates any further responsibilities of Special Mediation Counsel in this case.

The court extends its thanks to the Mediator and to Special Mediation Counsel for their efforts in the Assisted Mediation Program, furthering the administration of justice in the Northern District of California.

IT IS SO ORDERED.

_____ By: _____

Dated

United States District Judge

MEMO

TO: Cam Burke, Clerk of Court

FROM: Denise M. Asper
ADR Program Director

DATE: August 4, 2004

RE: ADR in Pro Se Cases in the District of Idaho

In the District of Idaho, the number of pro se cases filed over the past several years has consistently been at or near thirty-three percent (33%) of our overall civil filings. Over the past year, the District Court and Magistrate Judges have ordered selected pro se cases to mediation. For example, prisoner lawsuits that survive summary judgment or appear to have merit once summary judgment motions have been filed have been ordered to participate in mediation. The Court typically appoints an attorney for the limited purpose of representing the pro se litigant at the mediation. The majority of pro se prisoner mediation sessions have been conducted by a visiting district court judge. The visiting judge has been able to settle 90% of the prisoner cases referred to him for mediation.

We have also referred a small number of non-prisoner pro se cases to private mediators when the pro se litigant can afford to pay for the mediation. The private mediators have experienced some difficulty in obtaining the cooperation of the pro se litigants when it comes to scheduling the session and advancing the costs of the mediation. The success rate for the pro se mediation sessions with private mediators is approximately 50%.

In November of 2004, we are planning a settlement week during which select pro se cases will be referred to mediation sessions with members of our Pro Bono Mediator Panel. The Judges have been asked to select pro se cases they believe are amenable to the mediation process and issue an order referring the case to mediation. Then the mediators will use our court facility to conduct the mediation sessions. We are hopeful that a session with an experienced attorney mediator will facilitate settlement in several pending pro se cases.

It appears that mediation in our pro se cases has been a successful ADR option. The pro se litigants have expressed satisfaction with the process because they feel that their concerns and issues have been heard and fairly addressed in the mediation session.

APPENDIX F

Prison Ombudsman Programs

M E M O R A N D U M

Date: June 22, 2004

To: Judge James Singleton
Judge Thelton Henderson

cc: Robin Donoghue

From: Judge Alarcón

Re: Ninth Circuit Task Force on Self-Represented Litigants

During our break at our last meeting, Judge Henderson and I discussed the desirability of including a recommendation regarding the use of the ombudsman concept to receive and investigate state prisoner's claims of mistreatment or denial of medical services by prison officials. I agreed to do some research on this question. This is what I have discovered in my preliminary and cursory inquiry.

I

There is an existing prison ombudsman program in California. It was created in 1997 as an agency within the California Department of Corrections ("CDC"). The ombudsman works for and reports to the Director of the CDC. The Ombudsman's office was specifically created to assist "the Director of the CDC." Among the duties of the Ombudsman's office is to assist persons nominated to the position of warden in the confirmation process before the California Legislature. See Attachment 1. The ombudsman program in California is a creature of the CDC, however, and lacks operating independence. It does not comply with the American Bar Association ("ABA") standards or those of the United States Ombudsman Association ("Association"). It also appears to be underfunded and understaffed in view of California's burgeoning prison inmate population.

There are seven ombudsman positions in the CDC. One ombudsman for each of six prisons, and one for all of the women's prisons. As of June 9, 2004, there were 163,255 inmates housed in the CDC's thirty-two prison facilities. (That works out to approximately one ombudsman for 23,322 prisoners.)

In 1998, the California Legislature enacted Penal Code § 5066. It reads as follows: "The Director of Corrections shall expand the existing prison ombudsman program to ensure comprehensive deployment of ombudsmen throughout the state prison system with specific focus in the maximum security institutions."

Prior to the enactment of § 5066, ombudsmen were assigned to the California State Prison, Corcoran, and Pelican Bay State Prison in response to allegations of prison guard misconduct. After § 5066 became effective, four more ombudsman positions were created.

II

Within the Ninth Circuit, four other states have an ombudsman program. Each of these agencies, however, was created by the state legislature and is structurally independent of the director of corrections.

The Hawaii Legislature created the nation's first independent Office of Ombudsman in 1967. The Hawaii Legislature appoints the ombudsman for a six-year term. The Hawaii Ombudsman investigates complaints against state and county agencies including prison inmates. See Attachment 2. It is a legislative entity and is independent of any other executive agency.

The bulk of the complaints received by the Hawaii Ombudsman come from prison inmates. We were informed that the department of corrections personnel readily resolve many inmate complaints after a telephone call from the Hawaii Ombudsman. See Attachment 3.

The Alaska Legislature created the Office of the Ombudsman in 1975. See Attachment 4. It is part of the legislative branch of the state. The ombudsman is nominated by a committee composed of three members of the Alaska Senate and three members of the Alaska House of Representatives. The appointment becomes effective if the nominee is approved by a roll call vote of two-thirds of the members of the legislature sitting in joint session. The Office of Ombudsman is charged with the responsibility of receiving, processing, and investigating complaints against any government agency.

In 1977, the Oregon Legislature enacted Or. Rev. Stat. § 423.400. It provides that "[t]he Office of Corrections Ombudsman is established in the Office of the Governor. The Governor shall appoint the Corrections Ombudsman." See Attachment 5. After Ted Kulongoski, the current Oregon Governor, was elected, he declined to fill the vacant ombudsman position or to provide state funds for the program because of budgetary concerns.

The Arizona Legislature created the Office of Ombudsman-citizens Aide in 1995. See Attachment 6. The ombudsman-citizens aide has the duty of investigating the administrative acts of state agencies and to make an annual report of its activities to the governor, the legislature and the courts.

The ombudsman-citizens aide is appointed by a selection committee consisting of two members appointed by the president of the senate from each political party, two members appointed by the speaker of the house of representatives from each political party, a public member appointed by the president of the senate and one appointed by the speaker, and three members appointed by the governor. The nominee of the selection committee must receive a two-third's vote of each house. The funds for the operation of the office come from the monies appropriated for the legislature council. It should be noted that the Arizona ombudsman-citizens aide is expressly precluded from investigating complaints filed by prison inmates. See A.R.S. 41-1377D. ("The ombudsman-citizens aide shall refuse to investigate complaints filed by a person in the custody of the state department of corrections.)

III

The ABA has endorsed Standards for the Establishment and Operation of Ombusdmen Offices. See Attachment 7. It provides that the ombudsman should be independent and "free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or a person who may be the subject of a complaint or inquiry." It also expressly provides that anyone subject to the ombudsman's jurisdiction should not be able to "(a) . . . control or limit the ombudsman's performance of assigned duties, or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombudsman, or (3) reduce the budget or resources of the office."

The Association adopted its own standards for Governmental Ombudsman Offices on October 14, 2003. See Attachment 8. It also stresses that an ombudsman "should be free from outside control or interference." The Association recommends that the position of ombudsman should be "creat[ed] by legislation through statute or ordinance." It also notes that "[c]reation by administrative fiat such as an executive order, administrative rule, or formal policy contains potential temporal limitations subject to changes in the mandating authority's term or whim."

The Association's standards also recommend that "the Ombudsman should be appointed by an agency not subject to the Ombudsman's jurisdiction." They further recommend that "(a) Appointment by a legislature body is the preferred means to ensure independence, and (b) An Ombudsman who is appointed by an executive should seek operational and administrative independence from the entity over which the Ombudsman has jurisdiction."

IV

I have not researched the number of law suits filed by California prison inmates complaining about mistreatment or denial of medical services, or the cost savings that result from dealing with prisoner complaints before they escalate into a Civil Right's Action in federal court. Mr. Ken Hurdle, California's Lead Ombudsman, informed us that his office has saved the state approximately one million dollars since it was established. He illustrated the cost savings that can be effected with the following example: An inmate at Corcoran State Prison had a problem with the prison not recognizing his religion and refusing to provide him with a specific type of sesame seed that he needed for a religious ritual once a month. After the inmate tried to resolve the problem within the prison to no avail, he filed a court action. The court contacted the prison ombudsman office because it felt the inmate had a valid claim and it was contemplating an award of punitive damages of $500,000. The case settled after the prison ombudsman investigated and found that the inmate had belonged to a religious sect before going to prison that, in fact, used sesame seeds in a monthly ritual. The ombudsman located a source of these seeds and notified prison officials they must provide these seeds when the inmate needs them. The seeds are kept at the Corcoran prison ombudsman office and distributed when required by the inmate.

CALIFORNIA

OMBUDSMAN'S OFFICE

The Ombudsman's Office was specifically created to assist you, the Director. In the past, some Directors have used the office extensively, and others have not. Regardless of the use of our office in the past, we are keenly aware of the relevance of our office today and tomorrow. At the last Wardens' meeting, Secretary Hickman said, "This isn't your grandfather's department." We believe this to be a call to correctional employees to meet new expectations that new leadership has placed on the Department. We look forward to assisting you in implementing your vision as it relates to this new direction.

PROGRAM DESCRIPTION

Our office was established for two primary reasons. First, to keep the Director informed regarding the events that occur at the institution. Second, to proactively address issues and concerns that arise within the Department. An Ombudsman works directly for the Director. He or she works independently of other administrator, division or office at both headquarters and the institution. The Ombudsman is an additional resource for the wardens and serves on the local executive staff.

CURRENT POSITIONS

The initial positions at California State Prison, Corcoran and Pelican Bay State Prison were created in 1997 through departmental initiative following allegations of staff encouraging "gladiator" fights and the Madrid v. Gomez case, respectively. After further legislative concern, the Legislature passed Senate Bill 1913 (Ayala) in 1998, which added Penal Code Section 5066, mandating that the Department expand the existing prison ombudsman program to ensure the comprehensive deployment of ombudsmen throughout the State prison system with specific focus on the maximum security institutions. Since enactment of Penal Code Section 5066, the Department, in addition to Corcoran and Pelican Bay, has assigned Ombudsmen specifically to

- High Desert State Prison
- Women's Institutions
- Salinas Valley State Prison
- California State Prison, Sacramento
- California Correctional Institution

The Ombudsmen are assigned to secondary prisons as well. The Ombudsmen assist the secondary prison on an as needed basis. "As needed basis" may include legislative interest, Departmental request, warden's request, pending confirmation, or information that issues may need to be addressed at that institution.

WHO WE ARE

Our usefulness to the Director comes from our history, diversity of experiences, current efforts and our relationship with the Capitol, headquarters, the public and the prisons.

Ken Hurdle, Ombudsman, California State Prison, Sacramento

- October 2000 to present
- Lead Ombudsman
- Ombudsman, CSP-Corcoran (A) – October 2000 to present
- Ombudsman, Women's Institutions (A) – October 2003 to present
- Ombudsman, California State Prison, Corcoran, June 1997 – October 2000
- Fifteen years legislative experience to include, Senior Consultant, Senate Office of Research, Criminal Justice Issues, June 1988 – June 1997
- Bachelor of Arts, Psychology, California State University, Sacramento
- Juris Doctorate, Lincoln Law School

Chris Weaver, Ombudsman, High Desert State Prison

- January 1999 to present
- Ombudsman, California Correctional Institution (A) – October 2000 to present
- Ombudsman, Pelican Bay State Prison, November 1997 to January 1999
- First Lieutenant, Judge Advocate, California Army National Guard
- Legislative Analyst, Legislative Liaison's Office
- Legislative Assistant, Governor Pete Wilson
- Bachelor of Arts, Political Science, University of California, Riverside
- Juris Doctor, McGeorge School of Law
- Member, California Bar

Domingo Uribe, Ombudsman, Salinas Valley State Prison

- April 2001 to present
- Department Service 21 years, including 18 years Peace Officer Classification
- Administrative Assistant, Northern Region-Institutions Division
- Assigned to numerous institutions and classifications
- Associate of Arts Degree, Liberal Studies

Duncan Fallon, Ombudsman, Pelican Bay State Prison

- August 2001 to present
- California Department of Transportation (1999 to 2001)
  Labor Relations, Chief of Field Operations
- California Department Of Corrections (1995 to 1999)
  Labor Relations and Institution Division and Transportation's ERO
- California Department Of Corrections (1992 to 1995)
  ERO Sierra Conservation Center and Calipatria State Prison
- Prison Industry Authority (Correctional Training Facility)
- Associates of Arts Degree, Labor Studies and Human Resources

VACANT, Ombudsman, Women's Institutions

- Since October 2003

VACANT, Ombudsman, California State Prison, Corcoran

- Since October 2000

VACANT, Ombudsman, California Correctional Institution

- Since October 2000

DUTIES OF THE OMBUDSMAN

- Researches complaints from staff, inmates and the public and submits recommendations to the appropriate administrator.
- Monitors administrative decisions to ensure the institution's compliance with departmental policies.
- Alerts the Director and Warden of possible problematic issues that may arise.
- Facilitates information between parties to foster understanding.
- Inspects areas of the institution to ensure safe workplace for staff and proper living conditions for inmates and assists in day-to-day operations.
- Develops and reviews policy for the Department and the institutions.
- Assists State and Federal legislators advocacy groups, and the public with concerns to include understanding departmental policies and operations.
- Identifies systemic issues to avoid litigation.
- Provides fresh "eyes and ears" for the Director.

HOW WE DO THE JOB

- Gather all of the facts.
- Talk and meet with staff and inmates.
- Review letters and complaints.
- Review Use of Force and other policies.
- Establish and maintain lines of communication.
- Publish in the IST Bulletin.
- Receive confidential mail and correspondences.
- Meet with the unions, court monitors, etc.
- Exchange information between the institutions and headquarters.
- Resolve the issue.
- All Ombudsmen are members of their institution's Executive Staff.

PUBLIC INQUIRIES

- At the request of the Director
- Direct calls to the Director and calls and correspondences to the Ombudsman's Office from family members, legislators, public interest groups and others.
- Inquiries concerning all institutions and parole regions.
- Limited to inmate/parolee issues.
- Monthly reporting to the Director.
- Inmate mail is not included.

Currently, we are working on an automated system to track public inquiries. The following is a brief overview of the inquiries received.

Legislative and Public Contacts -- 6/01/03 to 12/30/03

Legislative	17
Public	145
Total	162

Subject

Appeals	1
Classification	10
Disciplinary	6
Issue not ID'd	1
Mail	1
Medical	37
Miscellaneous	24
Parole	3
Property	6
Safety	10
Staff Complaint	9
Transfer	29
Visiting	25
Work Furlough	0
Total	**162**

Institution

AVE	9	HDSP	2
CAL	8	LAC	8
CCC	5	MCSP	5
CCI	1	Other	6
CCWF	6	PBSP	16
CEN	3	PVSP	3
CIM	4	RJD	3
CIW	1	SAC	7
CMC	1	SATF	9
CMF	7	SCC	1
COR	17	SOL	4
CRC	10	SQ	2
CTF	5	SVSP	9
DVI	4	VSPW	1
FSP	4	WSP	1
		Total	**162**

WARDEN CONFIRMATIONS

An important duty of the Ombudsman's Office is to assist the Wardens in the confirmation process. We are dedicated to their success. While it is important to have a successful tour and hearing, our crux has expanded from getting them ready for the confirmation to improving the prison, notwithstanding the confirmation. A successful confirmation is a by-product to the high standard the institution achieves to get ready for the confirmation.

Here are a few examples of how we prepare the Wardens for confirmation.

- We meet with the Wardens soon after their appointment to explain the process.
- We do a pre-tour tour. On this tour we talk about the cleanliness of the prison, the need to update posted policies, and ask the Wardens questions about recent policies and issues that affect the prison and CDC.
- We keep the Wardens informed about issues that affect the Department. We send them news articles of interest, inform them of pertinent legislation and court cases, inform them of legislative hearings, and let them know how other Wardens are progressing through the confirmation process.
- We monitor the institutions. We walk-and-talk with staff and inmates, read appeals, review policies, and meet with the Inmate Advisory Councils. In this way we can inform the Wardens about issues that may affect their institutions like mail, visiting, packages, food, and other condition-of-confinement issues.
- We provide training to the Wardens. We recently incorporated a half-day training session where we take newly-appointed Wardens to the Capitol to meet with Senate staff, discuss issues that affect the Department, discuss controversial transcripts from recent hearings, and provide professional responsibility/ethics training.
- We assist the Wardens in developing informational materials that represent their institutions like the confirmation book.
- We tour with the Wardens and Senate Rules staff to support the Wardens, assist the Wardens in providing information to the staff, and to provide follow-up to the staff on issues that arise during and after the tour.
- We provide liaison between the Department and the Senate Rules staff.
- We support the Wardens in preparing for the Senate Rules hearings to include issue-spotting, meeting with Senate Rules Committee members before the hearing, and reviewing answers to written questions.

We believe this process to be an important point in the Wardens' career. We also find that in many cases our efforts assist the Wardens in managing the prisons even after they are confirmed.

PRIORITY ISSUES

California State Prison, Corcoran

- Inmate Steven Martinez.
- Acute Care Hospital.
- Personnel Issues. Most focused in the medical area and continue to monitor the resolution.
- B Yard lockdowns

Pelican Bay State Prison

- Monitoring the Modified Program. Continue working with the Institution to establish a "programming" Level IV institution.
- Indecent Exposure Policy.
- Improve delivery of inmate mail.

High Desert State Prison
- Monitor modified programs and lockdowns to include the recent Lockdown of the Black population in response to information concerning staff assault.
- Monitor visiting based on legislative interest in the visiting office at HDSP.

Women's Institutions
- Cross gender pat searches.
- Property regulations.
- Medical care
- Staff misconduct

Salinas Valley State Prison
- Monitoring modified programs and lockdowns.
- Monitoring available programming ensuring that all available programming is given and that all appropriate inmates have access.
- Ensuring that medical services are provided in an appropriate manner by working with custody and health care personnel to resolve the issues of access and continuity of care despite institutional staff shortages.

California State Prison, Sacramento
- Monitoring Program Changes. Expansion of missions, especially related to PSU and medical treatment.
- Monitoring of modified programming.

California Correctional Institution
- SHU release after MERDs.
- Medical. Lack of stability at the CMO level and the continuity of leadership.
- Staff Misconduct Issues to include the timely completion of investigations. Confidential issues.
- Youthful Offender Program. Continual monitoring due to legislative interest.

SPECIAL PROJECTS

Inmate Family Council
- Created in 1998 to address issues brought to the Department's attention by Senators Polanco and Vasconcellos.
- Family members and others with significant relationships with inmates.
- Legislative staff.
- Address Issues that affect the inmate population.
- Meets quarterly.
- Expanded to each Institution by the Director in February 2003.

California Training Facility
- Mediating Warden and Health Care Manager relationship.

Inmate Family Notification of Medical Condition
- Derived from IFC, working on legal and operational possibility for a system to notify family members of an inmate's medical condition.

Folsom State Prison
- Monitoring Folsom State Prison subsequent to Senate hearings

Double-Celling of Women's Death Row
- Providing advice and research regarding the double-celling of women's death row.

Office of Civil Rights
- Assisting with policy and structure of new OCR.
- Assisting with staff intervention.

California State Prison, Sacramento
Northern Hispanic Modified Program, 1999
- At the request of the Warden.
- Gathered additional information for the Governor, Director and Institution.
- Assisted in the return to normal program.
- Acted as liaison for the Director between the institution, YACA and the Governor.

Salinas Valley State Prison
Prison Violence Reduction and Program Participation, 1999
- At the request of the Warden.
- Reviewed proposed program.
- Met with staff and inmates regarding the proposal and its implementation.
- Provided advice and consultation.

High Desert State Prison
Program Review, 1998
- At the request of Institutions Division.
- Reviewed programming as it related to lockdown policies and procedures.
- Met with staff and inmates.
- Met with special team assigned from headquarters.
- Made recommendations for return to normal programming.

Headquarters
- Sexual Abuse/Assault Prevention Task Force, ongoing.
- Departmental Retaliation Policy Review, 2002, ongoing.
- Departmental Equal Employment and Opportunity Policy and Practices Review, 2003.
- Sexual Misconduct Task Force, ongoing.

DEPARTMENTAL ISSUES

- Changing the "culture" relative to how we do business.
- "Maturing" of the Bargaining Unit 6 contract in 2006. Where is the "bench?" How do we train for this contingency at the lower as well as upper levels of the department? Are there incentives that can be used to lessen the impact?
- Code of Silence.
- Re-establishing integrity with the outside stakeholders.
- Retaliation Policy.
- Visiting days.

- Vendor packages.
- Indecent exposure and sexual harassment issues related to inmate behavior.
- Investigations.
- Disciplinary process.
- Sensitive Needs Yards.

OFFICE ISSUES

- Ombudsman positions vacant for four years.
- Lack of clerical support for more than two years.

CONCLUSION

As you can see from a review of this document, our history, diversity, and current efforts make this office ready to assist you in your efforts to lead the Department of Corrections. We will look to you to come to us with issues that you believe could cause harm to the Department and its employees. We invite you to utilize our office to help you meet the new expectations that the new leadership has placed on the Department. We look forward to assisting you in implementing your vision as it relates to this new direction.

OMBUDSMAN'S OFFICE DIRECTORY

1515 'S' Street, 540 North Bldg.
Sacramento, CA 95814

Employee	*Classification*	*Assigned to:*	*Telephone Number*
Ken Hurdle	***LEAD OMBUDSMAN***	CSP-Sacramento	(916) 445-1748 I. C. #22 -HQ (916) 985-8610 x8501 – CSP SAC (916) 798-0912- Cell
VACANT	Secretary	Headquarters	**MAIN NUMBER:** (916) 445-1773 I. C. #20 **(916) 324-8263 FAX HQ**
VACANT	Seasonal Clerk	Headquarters	(916) 324-5423 I. C. #55
Sara Malone	Ombudsman	Women's Institutions	HQ (916) 327-8467 CCWF (559) 665-5531 x5007
VACANT	Student Assistant	Headquarters	(916) 445-5464
Chris Weaver	Ombudsman	High Desert State Prison	(916) 445-1769 I. C. #21 (530) 251-5023 (916) 869-1799 - Cell
Duncan Fallon	Ombudsman	Pelican Bay State Prison	(916) 327-8446 (707) 465-9171 (916) 799-7955 - Cell
Domingo Uribe	Ombudsman	Salinas Valley State Prison	(916) 324-5448 I. C. #54 (831) 678-5500 x5805 (916) 799-7963 - Cell
Lonnie Jackson	Ombudsman	California State Prison, Corcoran	(916) 324-5458 I. C. #58 (559) 992-7367 296-4625
VACANT	Ombudsman	California Correctional Institution	(916) 445-5462 I. C. #53 (661) 822-4402 x3214
			Revised: 04/_ 4

Westlaw.

HI ST § 96-2
HRS § 96-2

HAWAII REVISED STATUTES ANNOTATED
DIVISION 1. GOVERNMENT
TITLE 8. PUBLIC PROCEEDINGS AND RECORDS
CHAPTER 96. The Ombudsman

§ 96-2 Ombudsman; office established, appointment, tenure, removal, qualifications, salary, vacancy.

The office of ombudsman is established. The legislature, by a majority vote of each house in joint session, shall appoint an ombudsman who shall serve for a period of six years and thereafter until a successor shall have been appointed. An ombudsman may be reappointed but may not serve for more than three terms. The legislature, by two-thirds vote of the members in joint session, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability.

No person may serve as ombudsman within two years of the last day on which the person served as a member of the legislature, or while the person is a candidate for or holds any other state office, or while the person is engaged in any other occupation for reward or profit. Effective January 1, 1989, and January 1, 1990, the salary of the ombudsman shall be $81,629 and $85,302 a year, respectively. The salary of the ombudsman shall not be diminished during the ombudsman's term of office, unless by general law applying to all salaried officers of the State.

If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the first assistant to the ombudsman becomes the acting ombudsman until a new ombudsman is appointed for a full term.

[L 1967, c 306, § 3; HRS § 96-2; am L 1969, c 127, § 6; am L 1974, c 46, § 2; am L 1975, c 58, § 33; am L 1982, c 129, § 32(1); am imp L 1984, c 90, § 1; am L 1986, c 128, § 30(1); am L 1989, c 329, § 20(1)]

NOTES, REFERENCES, AND ANNOTATIONS

OPINIONS OF THE ATTORNEY GENERAL

HI ST § 96-2
HRS § 96-2

Funds for office of ombudsman as expenses of legislature. -- Funds to enable the office of the ombudsman to perform its functions could be said to constitute expenses of the legislature and could properly be included in the same bill appropriating funds for the expenses generally of the legislature without violating Haw. Const., Art. III, § 14 or the last sentence of the first paragraph of Art. VII, § 9. Op. Att'y Gen. No. 69-4 (1969)./

H R S § 96-2, **HI ST § 96-2**

Current through 2003 Regular and Special Sessions

END OF DOCUMENT

3

Notes from Conversation with Donna Woo: Hawaii Ombudsman

6/17/04

- The Hawaii ombudsman has general jurisdiction and investigates complaints against state and country agencies. It is part of the legislature and serves as an independent intermediary between the citizen and the agency.
- Ms. Woo stated that the bulk of complaints the ombudsman agency receives come from inmates.
- There is no sub-agency or specific group of people that handle inmate complaints. All complaints are rotated to different ombudsman to handle on a daily basis.
- During an inmate's orientation, he or she is apprized of the existence of the ombudsman office. The Hawaii ombudsman usually receives inmate complaints in the form of phone calls.
- Unless the complaint is alleging a health and safety concern, the ombudsman agency will guide the inmate to use existing processes within in the prison facility. If the prison is unresponsive, the ombudsman will investigate. Ms. Woo stated that the ombudsman have developed a relationship with the prison administration so that it is not difficult to make a phone call and have the issue settled.

4

AK ST § 24.55.010
AS 24.55.010

§§ 24.55.010 - 24.55.090

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.010 Office of the ombudsman.

There is created in the legislative branch of the state the office of the ombudsman.

(§ 1 ch 32 SLA 1975)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.010, AK ST § 24.55.010

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.020
AS 24.55.020

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.020 Appointment of the ombudsman.

(a) A candidate for appointment as the ombudsman shall be nominated by the ombudsman selection committee composed of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the speaker of the house. One member of the minority party caucus in each house shall be appointed to the selection committee.

(b) The ombudsman selection committee shall examine persons to serve as ombudsman regarding their qualifications and ability and shall place the name of the person selected in nomination. The appointment is effective if the nomination is approved by a roll call vote of two-thirds of the members of the legislature in joint session and approved by the governor. However, the governor may veto the appointment and return it, with a statement of objections, to the legislature. Upon receipt of a veto message the legislature shall meet immediately in joint session and reconsider approval of the vetoed appointment. The vetoed appointment becomes effective by an affirmative vote of two-thirds of the membership of the legislature in joint session. The vote on the appointment and on reconsideration of a vetoed appointment shall be entered in the journals of both houses.

(c) The appointment of the ombudsman becomes effective if, while the legislature is in session, the governor neither approves nor vetoes it within 15 days, Sundays excepted, after its delivery to the governor. If the legislature is not in session and the governor neither approves nor vetoes the appointment within 20 days, Sundays excepted, after its delivery to the governor, the appointment becomes effective.

(§ 1 ch 32 SLA 1975)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.020, AK ST § 24.55.020

Current through August 12, 2003

Westlaw.

AK ST § 24.55.030
AS 24.55.030

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.030 Qualifications; prohibition against political activity.

(a) A person may not serve as ombudsman

(1) within one year of the last day on which the person served as a member of the legislature;

(2) while the person is a candidate for or holds any other national, state, or municipal office; nor may the ombudsman become a candidate for national, state, or municipal office until one year has elapsed from the date the ombudsman vacates the office of ombudsman;

(3) while the person is engaged in any other occupation for which the person receives compensation;

(4) unless the person is at least 21 years of age and is a qualified voter who has been a resident of the state for at least three years.

(b) It is essential that the nonpartisan nature, integrity, and impartiality of the ombudsman's functions and services be maintained. The ombudsman and members of the staff of the ombudsman may not join, support, or otherwise participate in a partisan political organization, faction, or activity, including but not limited to the making of political contributions. However, this subsection does not restrict the ombudsman or members of the staff of the ombudsman from expressing private opinion, registering as to party, or voting.

(§ 1 ch 32 SLA 1975)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.030, AK ST § 24.55.030

Current through August 12, 2003

Westlaw.

AK ST § 24.55.040
AS 24.55.040

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.040 Term of office.

(a) The term of office of the ombudsman is five years. An ombudsman may be reappointed but may not serve for more than three terms.

(b) If the term of an ombudsman expires without the appointment of a successor under this chapter, the incumbent ombudsman may continue in office until a successor is appointed. If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the person appointed as acting ombudsman under AS 24.55.070(a) serves until a new ombudsman is appointed for a full term.

(§ 1 ch 32 SLA 1975; am § 1 ch 71 SLA 1990)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.040, AK ST § 24.55.040

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.050
AS 24.55.050

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.050 Removal.

The legislature, by a concurrent resolution adopted by a roll call vote of two- thirds of the members in each house entered in the journal, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability.

(§ 1 ch 32 SLA 1975)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.050, AK ST § 24.55.050

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.060
AS 24.55.060

ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.060 Compensation.

The ombudsman is entitled to receive an annual salary equal to Step A, Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau.

(§ 1 ch 32 SLA 1975; am § 5 ch 21 SLA 1987)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.060, AK ST § 24.55.060

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.070
AS 24.55.070

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.070 Staff and delegation.

(a) The ombudsman shall appoint a person to serve as acting ombudsman in the absence of the ombudsman. The ombudsman shall also appoint assistants and clerical personnel necessary to carry out the provisions of this chapter.

(b) The ombudsman may delegate to the assistants any of the ombudsman's duties except those specified in AS 24.55.190 and 24.55.200; however, during the ombudsman's absence from the principal business offices, the ombudsman may delegate the duties specified in AS 24.55.190 and 24.55.200 to the acting ombudsman for the duration of the absence. The duties specified in AS 24.55.190 and 24.55.200 shall be performed by the acting ombudsman when serving under AS 24.55.040(b).

(c) The ombudsman and the staff appointed by the ombudsman are in the exempt service under AS 39.25.110 and are not subject to the employment policies under AS 24.10 or AS 24.20.

(§ 1 ch 32 SLA 1975; am § 6 ch 21 SLA 1987; am §§ 2, 3 ch 71 SLA 1990)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.070, AK ST § 24.55.070

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.080
AS 24.55.080

ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.080 Office facilities and administration.

(a) Subject to restrictions and limitations imposed by the executive director of the Legislative Affairs Agency, the administrative facilities and services of the Legislative Affairs Agency, including computer, data processing, and teleconference facilities, may be made available to the ombudsman to be used in the management of the office of the ombudsman and to carry out the purposes of this chapter.

(b) The salary and benefits of the ombudsman and the permanent staff of the ombudsman shall be paid through the same procedures used for payment of the salaries and benefits of other permanent legislative employees.

(c) The ombudsman shall submit a budget for each fiscal year to the Alaska Legislative Council and the council shall annually submit an estimated budget to the governor for information purposes in the preparation of the executive budget. After reviewing and approving, with or without modifications, the budget submitted by the ombudsman, the council shall submit the approved budget to the finance committees of the legislature.

(§ 1 ch 32 SLA 1975; am §§ 4, 5 ch 71 SLA 1990)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.080, AK ST § 24.55.080

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

AK ST § 24.55.090
AS 24.55.090

C
ALASKA STATUTES
Title 24. Legislature.
Chapter 55. Office of the Ombudsman.
Article 1. Organization.

Sec. 24.55.090 Procedure.

(a) The ombudsman shall, by regulations adopted under AS 44.62 (Administrative Procedure Act), establish procedures for receiving and processing complaints, conducting investigations, reporting findings, and ensuring that confidential information obtained by the ombudsman in the course of an investigation will not be improperly disclosed.

(b) The ombudsman may not charge fees for the submission or investigation of complaints.

(§ 1 ch 32 SLA 1975; am § 6 ch 71 SLA 1990)

<General Materials (GM) - References, Annotations, or Tables>

A. S. 24.55.090, AK ST § 24.55.090

Current through August 12, 2003

END OF DOCUMENT

Westlaw.

O.R.S. § 423.400

C
West's Oregon Revised Statutes Annotated Currentness
Title 34. Human Services; Juvenile Code; Corrections
Chapter 423. Corrections and Crime Control Administration and Programs (Refs & Annos)
Corrections Ombudsman

→423.400. Establishment and appointment of Corrections Ombudsman

The office of Corrections Ombudsman is established in the office of the Governor. The Governor shall appoint the Corrections Ombudsman.

Laws 1977, c. 378, § 1.

LIBRARY REFERENCES

2003 Main Volume

Key Numbers

States ⚿44.
Westlaw Key Number Search: 360k44.

Encyclopedias
C.J.S. States §§ 80, 82.

O. R. S. § 423.400, OR ST § 423.400

Current through end of the 2001 Reg. Sess.

END OF DOCUMENT

Westlaw.

A.R.S. § 41-1371

C
Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1371. Definitions

In this article, unless the context otherwise requires:

1. "Administrative act" means an action, decision, omission, recommendation, practice, policy or procedure of an agency but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion.

2. "Agency" means a department, office, corporation, authority, organization, commission, council or board of the executive branch of state government, a department, office, institution, authority, organization, commission, committee, council or board of state government that is independent of the executive or legislative branches of state government or an officer, employee or member of an agency acting or purporting to act in the exercise of official duties. Agency does not mean the judicial department of state government, the board of regents, universities or community college districts.

3. "Record" means any document, photograph, film, exhibit or other item developed or received under law or in connection with the transaction of official business except an attorney's work product, communications that are protected under the attorney-client privilege and confidential information as defined in § 41-1378, subsection D, paragraph 4.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

A. R. S. § 41-1371, **AZ ST § 41-1371**

Westlaw.

A.R.S. § 41-1372

C
Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1372. Exemptions

This article does not apply to:

1. Any elected state official.

2. Chief advisors who maintain a direct, confidential and advisory relationship with:

(a) The governor.

(b) The secretary of state.

(c) The attorney general.

(d) The state treasurer.

(e) The state mine inspector.

(f) The superintendent of public instruction.

A.R.S. § 41-1372

(g) A commissioner of the corporation commission.

3. An agency attorney who maintains an attorney-client relationship with either:

(a) An officer or employee of an agency acting in the exercise of the officer's or employee's duty.

(b) An elected official who is listed under paragraph 2.

4. The staff of the legislature.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

A. R. S. § 41-1372, AZ ST § 41-1372

Current through Legislation effective May 19, 2004

END OF DOCUMENT

A.R.S. § 41-1373

C

Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1373. Ombudsman-citizens aide selection committee

A. When there is a vacancy in the office of ombudsman-citizens aide, or within twelve months before the expiration of the term of office, the ombudsman- citizens aide selection committee is established consisting of:

1. Two members of the senate appointed by the president of the senate. One member shall be from each political party.

2. Two members of the house of representatives appointed by the speaker of the house of representatives. One member shall be from each political party.

3. One public member who is appointed by the president of the senate and who represents a large business that is regulated by this state.

4. One public member who is appointed by the speaker of the house of representatives and who represents a small business that is regulated by this state.

5. Three members who are appointed by the governor and who represent:

(a) A consumer group that is not regulated by this state.

(b) State employees who hold managerial positions.

A.R.S. § 41-1373

(c) State employees who hold nonmanagerial positions.

B. The appointing officers shall appoint the members of the committee when a vacancy occurs in the office of ombudsman-citizens aide. The committee shall receive applications and nominate by a two-thirds vote one candidate for ombudsman-citizens aide according to its adopted procedures. The appointment of the ombudsman-citizens aide from this nomination is made by passage of a bill on a roll call vote of two-thirds of the membership of each house of the legislature. Membership on the ombudsman-citizens aide selection committee expires when the appointment is approved. If the governor disapproves the bill, he shall return it to the house in which it originated. If after reconsideration, it again passes on a roll call vote of three-fourths of the membership of each house of the legislature, it shall become law notwithstanding the governor's objection.

C. Meetings of the committee are open to the public except for meetings to interview candidates and to make preliminary choices among the candidates. The meeting held to vote for the nominee is open to the public.

D. The identity of all candidates shall be public.

E. Committee members are eligible to receive reimbursement of expenses pursuant to title 38, chapter 4, article 2 [FN1] but are not eligible to receive compensation.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

[FN1] Section 38-621 et seq.

HISTORICAL AND STATUTORY NOTES

Laws 1996, Ch. 69, §§ 1 and 2, effective April 1, 1996, provide:

"Section 1. Appointment of ombudsman-citizens aide

"Pursuant to Laws 1995, chapter 281, § 4, Patrick M. Shannahan is appointed

ombudsman-citizens aide according to the terms and conditions prescribed by law.

"Sec. 2. Requirements for appointment

"This act becomes effective on the roll call vote of two-thirds of the membership of each house of the legislature and the approval of the governor."

LIBRARY REFERENCES

States ⚿46, 47, 51, 62.
Westlaw Topic No. 360.
C.J.S. States §§ 47, 61, 80, 83 to 84, 87, 92, 102, 106.

A. R. S. § 41-1373, **AZ ST § 41-1373**

Current through Legislation effective May 19, 2004

END OF DOCUMENT

A.R.S. § 41-1374

C
Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1374. Qualifications

A person may not serve as ombudsman-citizens aide within one year of the last day the person served as a state elected officer. As minimum qualifications, the ombudsman-citizens aide shall be a resident of this state for at least six months, shall be at least twenty-five years of age and shall have investigatory experience.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

LIBRARY REFERENCES

States ⚿47.
Westlaw Topic No. 360.
C.J.S. States § 83.

A. R. S. § 41-1374, AZ ST § 41-1374

Current through Legislation effective May 19, 2004

END OF DOCUMENT

Westlaw.

A.R.S. § 41-1375

§§ 41-1371 – 41-1383

C

Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1375. Ombudsman-citizens aide; term; compensation

A. The office of ombudsman-citizens aide is established.

B. The ombudsman-citizens aide who is appointed and approved under § 41-1373 shall serve full time and shall be a public officer subject to the conflict of interest provisions of title 38, chapter 3, article 8. [FN1]

C. The term of office of the ombudsman-citizens aide is five years beginning on the date of appointment. Except as provided in subsection D of this section, the ombudsman-citizens aide shall not serve more than three full terms.

D. If the term of the ombudsman-citizens aide expires without the appointment of a successor, the incumbent ombudsman-citizens aide may continue in office until either:

1. A successor is appointed.

2. The ombudsman-citizens aide is removed from office pursuant to subsection E of this section.

E. The ombudsman-citizens aide may be removed from office at any time by a concurrent resolution approved by two-thirds of the membership of each house of the legislature, but only for neglect of duty, conviction of improperly divulging confidential information, misconduct or disability. The ombudsman- citizens aide may forfeit the office of ombudsman-citizens aide without legislative action pursuant to § 38-510. If the ombudsman-citizens aide is removed, resigns, dies or

becomes incapacitated, a deputy ombudsman may serve as acting ombudsman-citizens aide until a new ombudsman-citizens aide is appointed.

F. The ombudsman-citizens aide is eligible to receive compensation as determined pursuant to § 38-611.

G. The ombudsman-citizens aide may incur, subject to appropriation, expenses that are necessary to carry out the duties under this chapter. The legislative council shall fund the expenses of the ombudsman-citizens aide from the monies appropriated to the council. The legislative council shall include the expenses as a line item in the general appropriations act.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

[FN1] Section 38-501 et seq.

HISTORICAL AND STATUTORY NOTES

Laws 1995, Ch. 281, §§ 5, 7, 8 and 9, provide:

"Sec. 5. Administrative procedures; exemption

"The office of ombudsman-citizens aide is exempt from the requirements of title 41, chapter 6, Arizona Revised Statutes, until July 1, 1997."

"Sec. 7. Purpose

"The purpose of the office of ombudsman-citizens aide is to service citizens' complaints by investigating the administrative acts of state agencies and to annually report to the governor, the legislature and the public on its activities.

"Sec. 8. Legislative intent

"It is the intent of the legislature that the ombudsman-citizens aide shall assist

the people of Arizona to enjoy public service of the highest quality from state agencies. The services of the ombudsman-citizens aide are available to all Arizona citizens.

"Sec. 9. Delayed effective date

"Sections 1, 2, 3, 5, 6 and 7 of this act are effective from and after June 30, 1996."

Laws 1998, Ch. 10, § 3, provides:

"Sec. 3. Purpose

"The purpose of the office of the ombudsman-citizens aide is to service citizens' complaints by investigating the administrative acts of state agencies and to annually report to the governor, the legislature and the public on its activities."

Laws 2000, Ch. 47, § 4, provides:

"Sec. 4. Purpose

"Pursuant to § 41-2955, subsection B, Arizona Revised Statutes, the legislature continues the office of ombudsman-citizens aide to service citizens' complaints by investigating the administrative acts of state agencies and to annually report to the governor, the legislature and the public on its activities."

LIBRARY REFERENCES

States ⚿45, 51, 52, 60(1), 62.
Westlaw Topic No. 360.
C.J.S. States §§ 47, 61, 79, 82, 87, 92 to 94, 96, 98 to 102, 106, 136.

A. R. S. § 41-1375, AZ ST § 41-1375

Current through Legislation effective May 19, 2004

Westlaw.

A.R.S. § 41-1376

C
Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1376. Powers and duties

A. The ombudsman-citizens aide shall:

1. Investigate the administrative acts of agencies pursuant to § 41-1377, subsections A and B except as provided in § 41-1377, subsections C, D and E. The ombudsman-citizens aide shall investigate the administrative acts of an agency without regard to the finality of the administrative act.

2. Annually before January 1 prepare a written report to the governor, the legislature and the public that contains a summary of the ombudsman-citizens aide's activities during the previous fiscal year. The ombudsman-citizens aide shall semiannually present this report before the legislative council. This report shall include:

(a) The ombudsman-citizens aide's mission statement.

(b) The number of matters that were within each of the categories specified in § 41-1379, subsection B.

(c) Legislative issues affecting the ombudsman-citizens aide.

(d) Selected case studies that illustrate the ombudsman-citizens aide's work and reasons for complaints.

(e) Ombudsman-citizens aide's contact statistics.

(f) Ombudsman-citizens aide's staff.

3. Before conducting the first investigation adopt rules that ensure that confidential information that is gathered will not be disclosed.

4. Appoint a deputy ombudsman and prescribe the duties of employees or, subject to appropriation, contract for the services of independent contractors necessary to administer the duties of the office of ombudsman-citizens aide. All staff serves at the pleasure of the ombudsman-citizens aide, and they are exempt from chapter 4, articles 5 and 6 of this title. [FN1] All staff shall be subject to the conflict of interest provisions of title 38, chapter 3, article 8. [FN2]

5. Before conducting the first investigation, adopt rules that establish procedures for receiving and processing complaints, including guidelines to ensure each complainant has exhausted all reasonable alternatives within the agency, conducting investigations, incorporating agency responses into recommendations and reporting findings.

6. Notify the chief executive or administrative officer of the agency in writing of the intention to investigate unless notification would unduly hinder the investigation or make the investigation ineffectual.

7. Appoint an assistant to help the ombudsman-citizens aide investigate complaints relating to child protective services in the department of economic security. The assistant shall have expertise in child protective services procedures and laws. Notwithstanding any law to the contrary, the ombudsman- citizens aide and the assistant have access to child protective services records and to any automated case management system used by child protective services in the department of economic security.

B. After the conclusion of an investigation and notice to the head of the agency pursuant to § 41-1379, the ombudsman-citizens aide may present the ombudsman-citizens aide's opinion and recommendations to the governor, the legislature, the office of the appropriate prosecutor or the public, or any combination of these persons. The ombudsman-citizens aide shall include in the opinion the reply of the agency, including those issues that were resolved as a

result of the ombudsman-citizens aide's preliminary opinion or recommendation.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996. Amended by Laws 1997, 2nd S.S., Ch. 3, § 4, eff. Nov. 14, 1997.

[FN1] Sections 41-761 et seq. and 41-781 et seq.

[FN2] Section 38-501 et seq.

HISTORICAL AND STATUTORY NOTES

Reviser's Notes:

1995 Note. Pursuant to authority of § 41-1304.02, in subsection A, paragraph 2, second sentence the spelling of "semiannually" was corrected.

ADMINISTRATIVE CODE REFERENCES

Office of the ombudsman citizens' aide, see A.A.C. R2-16-101 et seq.

LIBRARY REFERENCES

States ⚿67.
Westlaw Topic No. 360.
C.J.S. States §§ 121, 136 to 138, 140.

A. R. S. § 41-1376, AZ ST § 41-1376

Current through Legislation effective May 19, 2004

A.R.S. § 41-1377

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Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1377. Scope of investigations

A. On receiving a complaint the ombudsman-citizens aide may investigate administrative acts of agencies that the ombudsman-citizens aide has reason to believe may be:

1. Contrary to law.

2. Unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion or unnecessarily discriminatory, even though they may be in accordance with law.

3. Based on a mistake of fact.

4. Based on improper or irrelevant grounds.

5. Unsupported by an adequate statement of reasons.

6. Performed in an inefficient or discourteous manner.

7. Otherwise erroneous.

B. On receiving a complaint the ombudsman-citizens aide may investigate to find an appropriate remedy.

C. On receiving a complaint the ombudsman-citizens aide may refuse to investigate an administrative act of an agency that otherwise qualifies for investigation under subsection A of this section if:

1. There is presently available an adequate remedy for the grievance stated in the complaint.

2. The complaint relates to a matter that is outside the duties of the ombudsman-citizens aide.

3. The complaint relates to an administrative act that the complainant has had knowledge of for an unreasonable time period before filing the complaint.

4. The complainant does not have a sufficient personal interest in the subject matter of the complaint.

5. The complaint is trivial or made in bad faith.

6. The resources of the office of ombudsman-citizens aide are insufficient to adequately investigate the complaint.

D. The ombudsman-citizens aide shall refuse to investigate complaints filed by a person in the custody of the state department of corrections.

E. On receiving a complaint that involves confidential information as defined in § 42-2001, the ombudsman-citizens aide shall either:

1. Work with the department of revenue problem resolution officer or an employee of the department of revenue who is authorized to access confidential taxpayer information.

2. Obtain a power of attorney from the taxpayer to access confidential information

specific to the complainant in a form acceptable to the department of revenue.

F. On receiving a complaint that involves confidential information relating to § 36-2903, subsection I, § 36-2917, § 36-2932, subsection F or § 36-2972, the ombudsman-citizens aide shall either:

1. Work with the Arizona health care cost containment system administration employee who is authorized to access confidential information.

2. Obtain a power of attorney from the complainant to access confidential information specific to the complainant in a form acceptable to the Arizona health care cost containment system administration.

G. On receiving a complaint that involves confidential information relating to §§ 36-507, 36-509 and 36-2220, the ombudsman-citizens aide shall either:

1. Work with the department of health services employee who is authorized to access confidential information.

2. Obtain a power of attorney from the complainant to access confidential information specific to the complainant in a form acceptable to the department of health services.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996. Amended by Laws 1997, Ch. 256, § 18; Laws 1997, 2nd S.S., Ch. 3, § 5, eff. Nov. 14, 1997; Laws 1998, Ch. 1, § 123, eff. Jan. 1, 1999; Laws 2001, Ch. 344, § 90, eff. Oct. 1, 2001.

HISTORICAL AND STATUTORY NOTES

The 1997 amendment of this section by 2nd S.S., Ch. 3, explicitly amended the amendment of this section by Laws 1997, Ch. 256, § 18.

The amendment of this section by Laws 1997, Ch. 222, § 71 was repealed by Laws

A.R.S. § 41-1377

1997, 2nd S.S., Ch. 3, § 6, effective November 14, 1997.

For conditional enactment provision of Laws 2001, Ch. 344, and occurrence of the condition, see Historical and Statutory Notes at Ch. 29, preceding § 36- 2901.

Reviser's Notes:

1997 Note. The independent and valid amendment of this section by Laws 1997, Ch. 222, sec. 71 and Ch. 256, sec. 18 could not be blended because of the delayed effective date of Ch. 222.

LIBRARY REFERENCES

Administrative Law and Procedure ⇐343, 348.
Westlaw Topic No. 15A.
C.J.S. Public Administrative Law And Procedure §§ 76 to 78.

A. R. S. § 41-1377, AZ ST § 41-1377

Current through Legislation effective May 19, 2004

END OF DOCUMENT

A.R.S. § 41-1378

C
Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1378. Complaint; investigation; investigative authority; violation; classification

A. All complaints shall be addressed to the ombudsman-citizens aide. If an agency receives correspondence between a complainant and the ombudsman-citizens aide, it shall hold that correspondence in trust and shall promptly forward the correspondence, unopened, to the ombudsman-citizens aide.

B. Within thirty days of receipt of the complaint, the ombudsman-citizens aide shall notify the complainant of the decision to investigate or not to investigate the complaint. If the ombudsman-citizens aide decides not to investigate and if requested by the complainant, the ombudsman-citizens aide shall provide the reasons for not investigating in writing.

C. The ombudsman-citizens aide shall not charge any fees for investigations or complaints.

D. In an investigation, the ombudsman-citizens aide may:

1. Make inquiries and obtain information considered necessary subject to the restrictions in § 41-1377.

2. Enter without notice to inspect agency premises with agency staff on the premises.

3. Hold hearings.

4. Notwithstanding any other law, have access to all state agency records, including confidential records, except:

(a) Sealed court records without a subpoena.

(b) Active criminal investigation records.

(c) Records that could lead to the identity of confidential police informants.

(d) Attorney work product and communications that are protected under the attorney-client privilege.

(e) Confidential information as defined in § 42-2001, except as provided in § 42-2003, subsection M.

(f) Information protected by § 6103(d), 6103(p)(8) or 7213 of the internal revenue code. [FN1]

(g) Confidential information relating to § 36-2903, subsection I, § 36- 2917, § 36-2932, subsection F or § 36-2972.

(h) Confidential information relating to §§ 36-507, 36-509 and 36- 2220.

5. Issue subpoenas if necessary to compel the attendance and testimony of witnesses and the production of books, records, documents and other evidence to which the ombudsman-citizens aide may have access pursuant to paragraph 4 of this subsection. The ombudsman-citizens aide may only issue a subpoena if the ombudsman-citizens aide has previously requested testimony or evidence and the person or agency to which the request was made has failed to comply with the request in a reasonable amount of time.

E. It is contrary to the public policy of this state for any state agency or any

individual acting for a state agency to take any adverse action against an individual in retaliation because the individual cooperated with or provided information to the ombudsman-citizens aide or the ombudsman-citizens aide's staff.

F. If requested by the complainants or witnesses, the ombudsman-citizens aide shall maintain confidentiality with respect to those matters necessary to protect the identities of the complainants or witnesses. The ombudsman- citizens aide shall ensure that confidential records are not disclosed by either the ombudsman-citizens aide or staff to the ombudsman-citizens aide. The ombudsman-citizens aide shall maintain the confidentiality of an agency record. With respect to requests made pursuant to title 39, chapter 1, article 2 [FN2] or other requests for information, the ombudsman-citizens aide shall maintain all records that are received from a custodial agency in the same manner as the custodial agency would if it had received the request.

G. The ombudsman-citizens aide or any staff member or other employee of the ombudsman-citizens aide who knowingly divulges or makes known in any manner not permitted by law any particulars of any record, document or information for which the law restricts disclosure is guilty of a class 5 felony.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996. Amended by Laws 1997, Ch. 256, § 19; Laws 1997, 2nd S.S., Ch. 3, § 7, eff. Nov. 14, 1997; Laws 1998, Ch. 1, § 124, eff. Jan. 1, 1999; Laws 2000, Ch. 47, § 1; Laws 2001, Ch. 261, § 1; Laws 2001, Ch. 344, § 91, eff. Oct. 1, 2001; Laws 2002, Ch. 50, § 1, eff. April 20, 2002.

[FN1] 26 U.S.C.A. § 6103(d), 6103(p)(8) or 7213.

[FN2] Section 39-121 et seq.

RETROACTIVE APPLICATION

<This section, as amended by Laws 2002, Ch. 50, applies retroactively to taxable years beginning January 1, 2002.>

HISTORICAL AND STATUTORY NOTES

A.R.S. § 41-1378

The 1997 amendment by Ch. 256, in subsec. A, substituted "complaints shall" for "complaints should", and "If an agency receives" for "Should an agency receive"; and modified a reference to a statutory subsection.

The 1997 amendment by 2nd S.S., Ch. 3, inserted "ombudsman-citizens" before "aide shall provide" in subsec. B; and deleted an exception in subsec. D, par 4, which read, "Confidential information as prescribed in § 8-546.07".

The 1997 amendment of this section by 2nd S.S., Ch. 3 explicitly amended the amendment of this section by Laws 1997, Ch. 256, § 19.

The amendment of this section by Laws 1997, Ch. 222, § 72, which was to become effective July 1, 1998, was repealed by Laws 1997, 2nd S.S., Ch. 3, § 8, effective November 14, 1997.

The 1998 amendment by Ch. 1 made changes in statutory references to conform to the reorganization of Title 42.

The 2000 amendment by Ch. 47 inserted subsec. D, par. 5, relating to the issuance of subpoenas.

The 2001 amendment by Ch. 261 substituted "subsection N" for "subsection M" at the end of subsec. D, par. 4(e).

The 2001 amendment by Ch. 344 substituted "subsection I" for "subsection J" in subsec. D, par. 4(g); and substituted "records that are received from a custodial agency in the same manner as the custodial agency would if it had received the request" for "records in the same manner that the ombudsman- citizens aide receives from the custodial agency as those on the custodial agency" in subsec. F.

For conditional enactment provision of Laws 2001, Ch. 344, and occurrence of the condition, see Historical and Statutory Notes at Ch. 29, preceding § 36- 2901.

The 2002 amendment by Ch. 50 substituted "subsection M" for "subsection N" at the end of subsec. D, par. 4(e).

Laws 2002, Ch. 50, § 9, eff. April 20, 2002, provides:

"Sec. 9. Retroactivity

A.R.S. § 41-1378

"This act applies retroactively to taxable years beginning from and after December 31, 2001."

Reviser's Notes:

1997 Note. The independent and valid amendment of this section by Laws 1997, Ch. 222, sec. 72 and Ch. 256, sec. 19 could not be blended because of the delayed effective date of Ch. 222.

2001 Note. Prior to the 2002 amendment, this section contained the amendments made by Laws 2001, Ch. 261, sec. 1 and Ch. 344, sec. 91 that were blended together pursuant to authority of § 41-1304.03.

LIBRARY REFERENCES

Administrative Law and Procedure ⚿346, 349, 356.
Westlaw Topic No. 15A.
C.J.S. Public Administrative Law And Procedure §§ 78 to 79, 81.

A. R. S. § 41-1378, AZ ST § 41-1378

Current through Legislation effective May 19, 2004

END OF DOCUMENT

Westlaw.

A.R.S. § 41-1379

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Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1379. Procedures after an investigation

A. If an opinion or recommendation of the ombudsman-citizens aide is critical of a person or agency, the ombudsman-citizens aide shall first consult with the person or agency before rendering the opinion or recommendation. A preliminary opinion or preliminary recommendation is confidential and shall not be publicly disclosed by any party.

B. The ombudsman-citizens aide shall report the ombudsman-citizens aide's opinion and recommendations to an agency, if the ombudsman-citizens aide finds, after investigation, that:

1. A matter should be further considered by that agency.

2. A matter should be referred to the presiding officers of both houses of the legislature for further investigation or legislative action.

3. A statute or rule on which an administrative act is based should be amended.

4. An administrative act should be modified or cancelled.

5. Reasons should be given for an administrative act.

6. There are no grounds or there are insufficient grounds for action by the agency.

A.R.S. § 41-1379

7. Any other action should be taken by the agency.

8. The agency's action was arbitrary or capricious, constituted an abuse of discretion or was not according to law.

C. The ombudsman-citizens aide may request the agency to notify the office within a specified time of any action taken on his recommendations.

D. The ombudsman-citizens aide shall notify the complainant of the ombudsman-citizens aide's recommendations and the actions taken by the agency.

E. If the ombudsman-citizens aide believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's duty, the ombudsman-citizens aide shall refer the matter to the chief executive officer of the agency, to the presiding officer of both houses of the legislature, to a prosecutor's office or to another appropriate official or agency.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

LIBRARY REFERENCES

Administrative Law and Procedure ⚿365, 366.
Westlaw Topic No. 15A.
C.J.S. Public Administrative Law And Procedure §§ 78, 84.

A. R. S. § 41-1379, AZ ST § 41-1379

Current through Legislation effective May 19, 2004

END OF DOCUMENT

A.R.S. § 41-1380

C

Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1380. Ombudsman-citizens aide protections

A. A civil action may not be brought against the ombudsman-citizens aide or the staff of the ombudsman-citizens aide for any action or omission in performing the duties under this article except for gross negligence or intentional wrongful acts or omissions except as provided in title 38, chapter 3, article 8. [FN1]

B. A proceeding or decision of the ombudsman-citizens aide may be reviewed in superior court only to determine if it is contrary to this article.

C. The ombudsman-citizens aide and the staff of the ombudsman-citizens aide shall not be required to testify in court regarding matters that come to their attention in the exercise of their duties except as may be necessary to enforce this article.

D. Records and files maintained by the ombudsman-citizens aide are not public records and are exempt from title 39, chapter 1. [FN2] The information contained in these records and files that were prepared pursuant to an investigation conducted under this article are not subject to disclosure except to the attorney general or any county attorney in connection with an investigation that has been referred to the attorney general or a county attorney pursuant to § 41-1379. For the purposes of this subsection, "records and files" means all information the department of economic security and the office of the ombudsman-citizens aide gathers during the course of a child protective services investigation conducted under this article from the time a file is opened and until it is closed. Records and files do not include information that is contained in child welfare agency licensing records.

CREDIT(S)
Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996. Amended by Laws 1997, 2nd S.S., Ch. 3, § 9, eff. Nov. 14, 1997.

Westlaw.

A.R.S. § 41-1381

Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1381. Ombudsman-citizens aide political activity

The ombudsman-citizens aide and the staff of the ombudsman-citizens aide may express a private opinion, may register to vote as to party and may vote but may not engage in any other political activity. If the ombudsman-citizens aide or any staff member or employee of the ombudsman-citizens aide becomes a candidate for political office, that person shall resign.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

LIBRARY REFERENCES

States ⚷77.
Westlaw Topic No. 360.
C.J.S. States §§ 122, 125.

A. R. S. § 41-1381, AZ ST § 41-1381

Current through Legislation effective May 19, 2004

END OF DOCUMENT

Westlaw.

A.R.S. § 41-1382

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Arizona Statutes Annotated Currentness
Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1382. Ombudsman-citizens aide office

The office of ombudsman-citizens aide shall not be located within the state office building complex or adjacent or contiguous to any other state agency.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

A. R. S. § 41-1382, AZ ST § 41-1382

Current through Legislation effective May 19, 2004

END OF DOCUMENT

A.R.S. § 41-1383

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Title 41. State Government (Refs & Annos)
Chapter 8. Agencies of the Legislative Department
Article 5. Office of Ombudsman-citizens Aide (Refs & Annos)

→§ 41-1383. Violation; classification

A person who knowingly hinders the lawful actions of the ombudsman-citizens aide or the staff of the ombudsman-citizens aide or who knowingly refuses to comply with their lawful demands is guilty of a class 1 misdemeanor.

CREDIT(S)

Added by Laws 1995, Ch. 281, § 1, eff. July 1, 1996.

A. R. S. § 41-1383, AZ ST § 41-1383

Current through Legislation effective May 19, 2004

END OF DOCUMENT

Westlaw.

O.R.S. § 423.405

West's Oregon Revised Statutes Annotated Currentness
Title 34. Human Services; Juvenile Code; Corrections
Chapter 423. Corrections and Crime Control Administration and Programs (Refs & Annos)
Corrections Ombudsman

→423.405. Qualifications and restrictions

(1) The Corrections Ombudsman shall be a person of recognized judgment, objectivity and integrity who is qualified by training and experience to analyze problems of law enforcement, corrections administration and public policy.

(2) No person while serving as Corrections Ombudsman shall:

(a) Be actively involved in political party activities;

(b) Be a candidate for or hold other public office, whether elective or appointive; or

(c) Be engaged in any other full-time occupation, business or profession.

Laws 1977, c. 378, § 2.

LIBRARY REFERENCES

2003 Main Volume

Key Numbers
States ⚿48.
Westlaw Key Number Search: 360k48.

Encyclopedias
C.J.S. States §§ 61, 83, 91.

O. R. S. § 423.405, OR ST § 423.405

Current through end of the 2001 Reg. Sess.

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AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF BUSINESS LAW
SECTION OF DISPUTE RESOLUTION
COMMISSION ON THE LEGAL PROBLEMS OF THE ELDERLY
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association supports the greater use of "ombudsmen" to receive, review, and resolve complaints involving public and private entities.

FURTHER RESOLVED, that the American Bar Association endorses the Standards for the Establishment and Operation of Ombudsman Offices dated August 2001. **STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDSMAN OFFICES**

PREAMBLE

Ombudsmen receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombudsmen protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombudsmen offices, but with enormous variation in their duties and structures. Ombudsman offices so established may be placed in several categories: A Classical Ombudsman operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An Organizational Ombudsman may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. Both types may conduct inquiries or investigations and suggest modifications in policies or procedures. An Advocate

Ombudsman may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombudsman office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombudsmen offices so that ombudsmen may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombudsman are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality.

ESTABLISHMENT AND OPERATIONS

A. An entity undertaking to establish an ombudsman should do so pursuant to a legislative enactment or a publicly available written policy (the "charter") which clearly sets forth the role and jurisdiction of the ombudsman and which authorizes the ombudsman to:

(1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombudsman's jurisdiction as defined in the charter establishing the office

(2) exercise discretion to accept or decline to act on a complaint or question

(3) act on the ombudsman's own initiative to address issues within the ombudsman's prescribed jurisdiction

(4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem

(5) gather relevant information

(6) resolve issues at the most appropriate level of the entity

(7) function by such means as:

(a) conducting an inquiry

(b) investigating and reporting findings

(c) developing, evaluating, and discussing options available to affected individuals

(d) facilitating, negotiating, and mediating

(e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them

(f) identifying complaint patterns and trends

(g) educating

(h) issuing periodic reports, and

(i) advocating on behalf of affected individuals or groups when specifically authorized by the charter

(8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

B. An ombudsman should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombudsman with relevant education and the periodic updating of the ombudsman's qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

C. To ensure the effective operation of an ombudsman, an entity should authorize the ombudsman to operate consistently with the following essential characteristics. Entities that have established ombudsman offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

(1) Independence. The ombudsman is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombudsman is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombudsman's jurisdiction or anyone directly responsible for a person

under the ombudsman's jurisdiction (a) can control or limit the ombudsman's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombudsman, or (3) reduce the budget or resources of the office.

(2) Impartiality in Conducting Inquiries and Investigations. The ombudsman conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombudsman from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombudsman may become an advocate within the entity for change where the process demonstrates a need for it.

(3) Confidentiality. An ombudsman does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombudsman's office. An ombudsman does not reveal the identity of a complainant without that person's express consent. An ombudsman may, however, at the ombudsman's discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombudsman should discuss any exceptions to the ombudsman's maintaining confidentiality with the source of the information.

LIMITATIONS ON THE OMBUDSMAN'S AUTHORITY

D. An ombudsman should not, nor should an entity expect or authorize an ombudsman to:

(1) make, change or set aside a law, policy, or administrative decision

(2) make binding decisions or determine rights

(3) directly compel an entity or any person to implement the ombudsman's recommendations

(4) conduct an investigation that substitutes for administrative or judicial proceedings

(5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent

(6) address any issue arising under a collective bargaining agreement unless the ombudsman is authorized to do so by the agreement or unless the collective bargaining representative and the employing entity jointly agree to allow the ombudsman to do so, or

(7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombudsman.

REMOVAL FROM OFFICE

E. The charter that establishes the office of the ombudsman should also provide for the discipline or removal of the ombudsmen from office for good cause by means of a fair procedure.

NOTICE

F. An ombudsman who functions in accordance with these standards shall not be deemed to be an agent of anyone other than the office of the ombudsman, nor shall any communication to the ombudsman be imputed as notice to anyone else, including the entity in which the ombudsman acts.

CLASSICAL OMBUDSMEN

G. A classical ombudsman is a public sector ombudsman who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee. In addition to and in clarification of the standards contained in Paragraphs A-F, a classical ombudsman:

(1) should be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office

(2) should have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office

(3) should be authorized to issue public reports

(4) should be authorized to advocate for change both within the entity and publicly

(5) should, if the ombudsman has general jurisdiction over two or more agencies, be established by legislation and be viewed as a part of and report to the legislative branch of government.

ORGANIZATIONAL OMBUDSMEN

H. An organizational ombudsman facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombudsman should:

(1) be authorized to undertake inquiries and function by informal processes as specified by the charter

(2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office

(3) be authorized to issue reports

(4) be authorized to advocate for change within the entity.

ADVOCATE OMBUDSMEN

I. An advocate ombudsman serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombudsman should:

(1) have a basic understanding of the nature and role of advocacy

(2) provide information, advice, and assistance to members of the constituency

(3) evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim

(4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter, and

(5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

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GOVERNMENTAL OMBUDSMAN STANDARDS

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United States Ombudsman Association
Governmental Ombudsman Standards
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Approved October 14, 2003 by the
United States Ombudsman Association's Board of Directors

For more information on the United States Ombudsman Association,
please visit www.usombudsman.org

PREFATORY NOTE

At the 2001 annual United States Ombudsman Association (USOA) conference, the creation of standards for the establishment and functioning of an Ombudsman office emerged as a top priority for the membership. USOA representatives had worked on a steering committee of the American Bar Association (ABA) to create what the ABA adopted in August 2001 as Standards for the Establishment and Operation of Ombuds Offices. The 2001 ABA standards modify and expand on the ABA's 1969 Resolution (as amended in 1971) regarding the essential characteristics of an Ombudsman. However, the USOA did not support the ABA standards in their entirety. The USOA then decided to establish its own standards for Governmental Ombudsman offices.

In early 2002, the USOA Board of Directors created a three-member Standards Committee made-up of a long-time "classical" Ombudsman (Angrick), an executive Ombudsman (Adcock), and a municipal Ombudsman located in the city auditor's office (Chiao). The committee was charged with developing standards which could be used as a means to educate and provide advice or guidance to legislators, state officials and the public about the roles and core principles of Governmental Ombudsman offices.

After initial conference calls and a review of relevant materials including "Essential Characteristics of a Classical Ombudsman" by Dean M. Gottehrer and Michael Hostina, the USOA's Model Ombudsman Act, and the General Accounting Office's Government Auditing Standards "Yellow Book," the committee convened in July 2002 in Des Moines, Iowa for two days. The committee balanced the goal of providing a standard measure of what a Governmental Ombudsman should be with practical ideas that would be useful to individuals in offices that are not general jurisdiction in scope or established in the legislative branch.

The result was a first draft of the Standards, submitted to the USOA Board in August and to the USOA membership in October 2002 at the association's annual conference. Participants at the conference and other members made helpful suggestions that were incorporated into a second draft. We also received a comment that Ombudsman offices in government agencies that address solely internal matters along the lines of an Organizational Ombuds model were not included under what we labeled a "Governmental Ombudsman." Footnote 2 was added to the final draft to address this concern.

The second draft of the Standards was presented to the USOA Board and membership at the 2003 annual conference. After incorporating minor changes to the draft presented at the conference, the USOA Board approved the Standards in the present form. We expect that this document may be used as a starting point for other projects, such as a "best practices" manual or a handbook for establishing a Governmental Ombudsman office. We hope that these Standards will be useful to individuals and organizational entities interested in how a Governmental Ombudsman can serve the public and improve administrative efficiency and fairness.

United States Ombudsman Association
Governmental Ombudsman Standards

I. PREAMBLE

The title "Ombudsman" has gained popularity in both the public and private sectors to describe various types of problem-solvers.[1] The United States Ombudsman Association (USOA) promotes a model that defines a Governmental Ombudsman (hereinafter Ombudsman) as:

> an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about government actions, and, when appropriate, make findings and recommendations, and publish reports.[2]

The standards in this document, which has been produced by the USOA, lay out basic principles, guidelines, and best practices for Ombudsman offices. Existing Ombudsman offices can evaluate how they conform to these guidelines with the goal of working towards the best practices described below. Government policy makers may use them to establish new Ombudsman offices. The general public can use this document to understand more fully the role of the Ombudsman.

These standards are divided into the following four categories: Independence, Impartiality, Confidentiality, and Credible Review Process.

A. Independence

The Ombudsman's office, in structure, function and appearance, should be free from outside control or influence. This standard enables the Ombudsman to function as an impartial and critical entity that reports findings and makes recommendations based solely on a review of facts and law, in the light of reason and fairness.

B. Impartiality

The Ombudsman should receive and review each complaint in an objective and fair manner, free from bias, and treat all parties without favor or prejudice. This standard instills confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman's findings and recommendations.

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[1] Ombudsman is a gender-neutral term, used throughout the world by women and men who hold the office. However, some prefer the terms Ombuds or Ombudsperson.

[2] There are a number of Ombudsman offices, primarily in federal agencies and public universities, that address solely internal matters along the lines of an "Organizational Ombuds" model, and although governmental, may not see themselves as being included in this definition.

C. Confidentiality

The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or investigation. This standard balances the need to protect sensitive information so that a complainant can come forward, and witnesses and subjects can speak openly, with the need to disclose information as a part of an investigation or public report.

D. Credible Review Process

The Ombudsman should perform his or her responsibilities in a manner that engenders respect and confidence and be accessible to all potential complainants. This standard is necessary for the work of the Ombudsman to have value and to be accepted by all parties to a complaint.

II. STANDARDS

A. Independence

Independence is a core defining principle of an effective and credible Ombudsman. The Ombudsman should be independent to the greatest degree practicable. Authoritativeness and permanency are two criteria by which to measure this standard.

The following are indicators of independence, the absence of any one of which may create functional problems:

1. The Ombudsman's authority should be established by law.
   a) Establishment of the Ombudsman in an organic legal document such as a constitution or a charter provides the ultimate stature and protection. Creation by legislation through statute or ordinance gives the ombudsman a sturdy, enduring existence.
   b) A legislative resolution would indicate a lesser degree of authority and permanence.
   c) Creation by administrative fiat such as an executive order, administrative rule, or formal policy contains potential temporal limitations subject to changes in the mandating authority's term or whim.
   d) When established to the greatest degree practicable, the existence, authority, and power of the Ombudsman are less apt to be challenged, compromised, or diminished.

2. The Ombudsman should be appointed by an entity not subject to the Ombudsman's jurisdiction and which does not have operational or administrative authority over the program(s) or agency(ies) that are subject to the Ombudsman's jurisdiction.
   a) Appointment by a legislative body is the preferred means to ensure independence.
   b) An Ombudsman who is appointed by an executive should seek operational and administrative independence from the entity over which the Ombudsman has jurisdiction.
   c) The less independent Ombudsman will be suspect as unable to conduct a thorough and critical investigation by various clients from the outset; and vulnerable to retaliation or lasting animosity if aggressive inquiry is, indeed, carried out.

3. Prior to expiration of term, the Ombudsman may be removed from office for cause only.
   a) Appointment of the Ombudsman for a defined term of office helps to insure the Ombudsman's ability to conduct investigations and make reports without external pressure, internal hesitancy, or timidity.
   b) A fixed-term with the potential for reappointment allows an appointing authority to reappoint an effective Ombudsman and replace an ineffective Ombudsman.
   c) Removal from office in retribution for carrying out an unpopular investigation or making a candid and critical report is often a real or indirect threat to the Ombudsman's independence. Accordingly, both the appointment and removal of the Ombudsman should be defined, transparent, and for cause. These indicators reduce the Ombudsman's vulnerability to retaliatory or political retribution.

4. The Ombudsman should be afforded sufficient compensation, status, budget, resources, and staff.
   a) Affording the Ombudsman sufficient compensation, status, budget, resources, and staff gives indication that the office has meaning and importance.
   b) Best practices may link the Ombudsman's compensation to that of other high level public positions such as senior judges.
   c) Ideally, the Ombudsman's budget and resources should be sufficient to perform the duties prescribed by the establishing authority. Best practice would limit any reduction in resources to only general reductions and limitations when the legislative branch or chief executive self impose across-the-board limitations on themselves.
   d) When the Ombudsman is not afforded appropriate status and compensation, the position may only attract and be filled by less experienced individuals who may not be as effective in carrying out the Ombudsman's duties. When the Ombudsman's budget, resources, and staff are insufficient to allow the office to meet its responsibilities, the office cannot operate in accordance with best practice.

5. The Ombudsman should retain sole authority to select, direct, and discharge staff.
   a) Having the sole authority to select, direct, and discharge staff enhances the Ombudsman's independence. Restrictions or expectations placed upon staff hiring, assignment, evaluation, discipline, and termination could interfere with the Ombudsman's ability to conduct thorough, impartial, and critical investigations.
   b) While it is preferable that the Ombudsman enjoy the general legislative prerogative of "employment at will", it is essential the Ombudsman not be required to hire the favorite of another governmental official, ignore performance shortcomings of a partisan protected staff member, or share supervisory responsibility with someone outside the office.
   c) Some Ombudsman offices allow for employees to belong to unions or protect them under civil service or merit employment provisions, but even these protections could inhibit the Ombudsman's performance and duties if they inappropriately interfere with what an Ombudsman investigates and the findings and conclusions the Ombudsman makes.
   d) The Ombudsman should have access to independent legal advice, either in-house or on a contract basis. It would compromise the Ombudsman's independence to be forced to rely on the attorneys representing the governmental entity in the event of a legal controversy.

e) The Ombudsman should be empowered to contract with outside experts, such as physicians, when useful or necessary to conduct a thorough investigation.

6. The Ombudsman should have discretion to accept or reject matters for investigation, including the ability to initiate on the Ombudsman's own motion, subject only to the legally defined limits of jurisdiction.

   a) Legislated policy parameters can give guidance to the Ombudsman in applying this discretion.

   b) However, the specific indicators should be general and flexible in nature so that the Ombudsman has freedom to select, prioritize, and emphasize the complaints accepted and investigations undertaken.

7. The Ombudsman should have discretion to prescribe how complaints are to be made, received, and acted upon, including the scope and manner of investigations.

   a) Independence is enhanced when the Ombudsman has discretion to prescribe how complaints are to be made, received, and acted upon, including the scope and manner of investigations.

   b) The Ombudsman should not have to receive complaints through an intermediary.

8. The Ombudsman should have discretion to determine which conclusions and recommendations are reached, and freedom to determine what to publish.

   a) Inhibiting the Ombudsman by requiring a structured review procedure before speaking weakens the credibility and integrity of the office in both fact and appearance.

   b) The Ombudsman should not be required to submit proposed findings, conclusions, recommendations, and reports to an editorial or review entity, including the appointing authority, which would weaken the force of them. Requiring the Ombudsman to inform a subject agency or official being criticized of his or her findings or expecting the Ombudsman to consult with the subject of a recommendation for comments on accuracy before public release is not the kind of practice being cautioned against. Those are fair and equitable process issues that when properly followed do not detract from the performance of the Ombudsman.

   c) The Ombudsman's office should be physically and organizationally separated from those entities subject to an Ombudsman's jurisdiction.

   d) Space should not be shared because to do so compromises the confidentiality of complainants and witnesses coming into the office. It also diminishes the protection afforded to the Ombudsman's files, and may reduce the confidence complainants, witnesses, and other stakeholders have in the ability of the Ombudsman to fulfill the duties and responsibilities of the office.

   e) Similarly, the Ombudsman's communications and record keeping should be separate from and independent of those services under the Ombudsman's jurisdiction. When absolute independence cannot be achieved, sufficient separation, insulation, or firewalls should be sought and fundamental elements such as locking file cabinets, password protected email systems, keyed doors to enclosed offices, internally controlled surveillance systems, and confidentiality agreements with service providers, vendors and consultants should be ensured.

9. The Ombudsman should be immune from discovery and prosecution for claims arising out of the lawful performance of duty.

   a) This principle, its indicators and best practices are based upon the concept that the Ombudsman represents an alternative to the formal administrative and legal procedures for resolving complaints. It is coupled with the limiting expectation that the Ombudsman should not be able to overturn or modify an action of a subject agency or officer.

   b) Indicators of best practice include statutory based protections and immunities recognized in court and the legal community.

   c) To a much lesser extent, administrative policy and practice may attempt to approximate this ideal protection.

   d) Without this principle and effective indicators of best practice, the Ombudsman cannot effectively and responsibly offer and maintain the core principle of confidentiality.

10. The findings and recommendations of the Ombudsman are not appealable to any other authority.

   a) If the Ombudsman's findings and recommendations can be appealed to another authority, then the Ombudsman's role is reduced to just another step in a series of administrative procedures.

   b) This ideal principle sets the Ombudsman apart from routine administrative process and supports the Ombudsman's role as an impartial critic and opinion giver.

   c) Because the Ombudsman ideally does not affect substantive rights and should not be able to impose binding decisions, the Ombudsman's findings and recommendations should stand alone and not be subject to modification or alteration upon appeal to some other body or authority.

   d) The best practice is for this protection to be stated in the establishing document, ideally constitution, charter, or legislation.

   e) Lesser indicators would find the protection in policy or commonly accepted practice.

B. Impartiality

Impartiality is at the heart of the Ombudsman concept. Both the complainant and the agency are able to place confidence in the Ombudsman knowing that the Ombudsman has no vested interest in the outcome of a complaint investigation. If the Ombudsman is not perceived to be impartial by the complainant, the complainant will not seek the Ombudsman's assistance. If the Ombudsman is not perceived to be impartial by the agency, the agency will be resistant to the investigation and unlikely to accept the Ombudsman's criticism and recommendations. It is not sufficient for the Ombudsman to avoid actual conflict of interest but also to avoid the appearance of such a conflict to instill the utmost confidence. Members of staff acting under delegated power should also be subject to the same high standards.

The following are indicators of impartiality, the absence of any one of which may create problems of credibility and effectiveness:

1. The Ombudsman refrains from partisan and political activities, and employment and business relationships and transactions that may create a conflict of interest, or may create the appearance of a conflict of interest.

a) The Ombudsman as citizen may, or course, exercise his or her right to vote in partisan elections. However, because the Ombudsman works within a political environment, it is essential not to be perceived as favoring one political person or group over another. This limits the ability of the Ombudsman to speak publicly in favor of or against any candidate for elective or appointive office, make or solicit contributions to political candidates or parties, put partisan signs on vehicles or in yards, or other similar political activities.

b) It is equally important that the Ombudsman not enter into any business or employment relationship that might, rightly or wrongly, cause others to question the Ombudsman's ability to be impartial and fair.

2. The Ombudsman holds no other public office that has the potential of creating a conflict of interest or the appearance of a conflict of interest.

   a) It may be possible for the Ombudsman to hold a non-partisan public office. But, great care must be taken to assure that there is no potential for a conflict of interest.

   b) The Ombudsman must not seek or accept a public office over which the Ombudsman has jurisdiction, or an office that may have a contractual or other relationship with an agency or agencies over which the Ombudsman has jurisdiction.

3. The Ombudsman absents himself or herself from involvement in complaints where a conflict of interest or the appearance of a conflict of interest may exist.

   a) If the Ombudsman does receive a complaint with which there is a potential for a conflict of interest or the appearance of a conflict of interest, the Ombudsman must remove himself or herself completely from that complaint and turn it over to a staff member or other party for appropriate action.

   b) It must be understood that the Ombudsman will not interfere in any investigation or the production or publication of recommendations.

4. The Ombudsman does not allow personal views regarding the subject matter or the parties involved to affect decisions as to what complaints to accept or how they are investigated.

   a) It would be unrealistic to think that an Ombudsman would never have personal values and opinions that may relate to the subject of a complaint. It is imperative, however, that the Ombudsman be able to set aside his or her personal views and approach the complaint in an impartial, unbiased manner.

   b) It is important that the Ombudsman be aware of his or her personal views and guard against letting those views influence whether or not a complaint will be accepted and how it will be treated.

5. The Ombudsman is not predisposed as an advocate for the complainant nor an apologist for the government, however the Ombudsman may, based on investigation, support the government's actions or advocate for the recommended changes.

   a) The Ombudsman has no client. The Ombudsman is not the complainant's representative, and is not the protector of the public agency.

   b) The Ombudsman's primary interest is in assuring that laws, rules, and policies are adhered to, and that the outcome is fair.

c) While the Ombudsman may advocate changes that benefit a complainant, it is the objective of the Ombudsman to improve government performance.

C. Confidentiality

Confidentiality is an Ombudsman's tool. It may be offered, at the Ombudsman's discretion, to complainants, agency employees, and witnesses when such an offer is necessary to elicit needed information or to protect the source of needed information. The Ombudsman must take care, however, that more is not offered than can be delivered. Each Ombudsman must carefully review the legislation establishing his or her office to determine what, if any, confidentiality protections are afforded. These may vary greatly from jurisdiction to jurisdiction. An Ombudsman located in the legislative branch may have more protections than one located in the executive branch. An Ombudsman established by law may have more protections than one established by executive order. An Ombudsman created by state law or local ordinance also needs to determine if the protections the Ombudsman has within his or her political jurisdiction would be honored or sustained by federal courts.

The following are indicators of the appropriate use of the Ombudsman's discretion:

1. The Ombudsman should not reveal information when confidentiality has been promised.
   a) In most situations, it should be the Ombudsman who determines whether or not confidentiality will be offered to a complainant, agency employee, or witness.
   b) The Ombudsman may choose not to raise the issue, but if the Ombudsman, the complainant, or a party from whom information is being sought raises the issue, the Ombudsman has a responsibility to advise that person as to any limitations to confidentiality that may apply.
   c) Once confidentiality has been promised, and its known limits explained, the Ombudsman must honor the promise within those limits.

2. The Ombudsman should not release information where confidentiality is required by law, or where unnecessary harm would result.
   a) During the course of an investigation, the Ombudsman may come into possession of information that federal and/or state law prohibits being made public.
   b) The Ombudsman must treat information with the same degree of confidentiality as would be legally required of the agency being investigated.
   c) Further, if the Ombudsman has reason to believe that release of information, though legal, would result in unnecessary harm to one or more persons, the Ombudsman should protect that information and/or its source.

3. The Ombudsman should not be compelled to testify or to release records.
   a) In the establishment of the Ombudsman's office, the Ombudsman should seek statutory protection from being compelled to testify in a legal or administrative proceeding, or from having to release information gathered during the course of an investigation.
   b) A promise of confidentiality would be of limited value if the Ombudsman could be required to testify in a proceeding or to release information as a part of a discovery process.

c) The inability of the Ombudsman to maintain control over the information gathered during an investigation may well have the effect of discouraging cooperation and openness on the part of complainants, agency employees, and/or witnesses.

D. Credible Review Process

The concept of a credible review process encompasses the authority granted to the Ombudsman and the Ombudsman's responsibilities towards the complainant, the subject of a complaint, the appointing entity, and the public. If the process the Ombudsman uses to investigate complaints is flawed, the resulting recommendations are more likely to be ignored.

The following are powers and responsibilities inherent in a credible review process:

1. The Ombudsman should be qualified to analyze issues and matters of law, administration, and policy.
   a) Describing what qualities are necessary for an Ombudsman is difficult because there are many intangible factors that go into making an Ombudsman a person whose judgment and recommendations will be respected.
   b) In addition to being independent and impartial, the basic qualification for an Ombudsman is an ability to analyze issues and matters of law, administration, and policy.
   c) In some positions, expertise, knowledge, or experience in a particular subject matter may be useful. This would be more true for a limited jurisdiction office set up to monitor an area like corrections, for example, than for someone who investigates complaints about a wide array of government activities.
   d) Where there are reasons for specialized qualifications, they should be detailed in the authorizing law.
   e) Where the Ombudsman also functions as the manager of others, he or she should also possess adequate managerial skills--the ability to hire and supervise qualified staff.

2. The Ombudsman should have the discretion to act informally to resolve a complaint.
   a) Conducting investigations is the primary function of an Ombudsman, but not all inquiries and complaints are appropriate for formal investigation.
   b) Other options include providing information and referrals, expediting individual matters, coaching people to take action on their own behalf, mediating, or providing other assistance.
   c) The choice of the right approach to use should remain with the Ombudsman.
   d) The number of cases formally investigated is usually a small proportion of the number of contacts. Not all complaints require full investigation to resolve and most likely, there are not enough resources to investigate every complaint. However, if most members of the public are turned away without any assistance, confidence in the value of bringing a matter to the Ombudsman will be lost.

3. The Ombudsman should have the authority to delegate power to a deputy or acting Ombudsman.
   a) The powers and duties of the Ombudsman should be delegable during periods when the Ombudsman is unavailable.

b) The only powers not delegable should be the power to delegate and the reporting responsibilities.

c) This authority to delegate and its limits serves to maintain confidence that someone will always be there to fill the role of Ombudsman and that the Ombudsman still remains ultimately responsible for the office and the reports that are issued.

4. The Ombudsman provides for sufficient access for any person to make a complaint known to the Ombudsman directly without a fee.

   a) An Ombudsman is of little value if not visible and readily accessible.

   b) The Ombudsman is responsible for making public the existence and role of the Ombudsman.

   c) The Ombudsman must assure that complainants have direct and timely access to the Ombudsman and that there be no barriers, such as fees, that may discourage a complainant from making their complaint known.

   d) The Ombudsman should make provisions to accept complaints from those with access difficulties, for example those with disabilities or for whom English is not their first language.

5. The Ombudsman's jurisdiction should be clearly defined and the Ombudsman should not act outside of that jurisdiction.

   a) The government agency or agencies whose acts are subject to review by the Ombudsman should be described in the authorizing statute (or other document).

   b) Limits on the Ombudsman's jurisdiction should be made clear to the public.

   c) Legislation or regulations to create an Ombudsman to provide services in a more limited area should also clearly define the entities and individuals covered in the Ombudsman's jurisdiction and exceptions that apply in the particular situation.

   d) An Ombudsman should not have jurisdiction over those officials who have supervisory or funding authority over the Ombudsman.

   e) Once established, an Ombudsman should not act outside jurisdictional limits.

6. The grounds for Ombudsman review should be stated broadly.

   a) An Ombudsman's review of administrative acts should not be limited narrowly to whether or not the act was legal or consistent with policy.

   b) The standard list of appropriate subjects of review includes administrative acts which fall into the following categories: contrary to law or regulation, based on mistaken facts or irrelevant considerations, unsupported by an adequate statement of reasons, performed in an inefficient manner, unreasonable, unfair, or otherwise erroneous even though in accordance with law.

   c) The Ombudsman should be granted authority to review an administrative act from the broadest perspective with the goal of improving government.

   d) An Ombudsman should be empowered to act in pending matters, as well as after a final action has been taken by an administrative agency, provided the Ombudsman is not asked to act in anticipation of an action on an assumption that it will be wrong.

e) The Ombudsman should be empowered to investigate complaints from any sources and to initiate an investigation into a matter when there has not been a complaint from the public.

f) The Ombudsman should retain discretion over which complaints to accept or deny within the Ombudsman's jurisdiction.

7. The Ombudsman should have sufficient powers to conduct thorough investigations.

   a) Government entities and individual government employees that are the subjects of complaints may be resistant to cooperating in investigations. Therefore, the Ombudsman's authority to investigate must be clearly established.

   b) Agency staff should be required to cooperate with the Ombudsman during the conduct of an investigation. The power to issue subpoenas and to take sworn testimony makes enforcement of such a requirement possible.

   c) Supervisors should not interfere with an Ombudsman's ability to talk directly to staff.

   d) An Ombudsman can allow a union representative to be present during an interview when an employee requests. But information obtained at such an interview should come from the employee directly.

   e) The authority to examine government premises, documents and files, including electronic records, is crucial to the Ombudsman's role as an investigator.

   f) The Ombudsman should be authorized to enter agency premises and inspect without notice.

   g) The Ombudsman should have unlimited access to records and proceedings held by jurisdictional agencies, including records that are considered confidential or not otherwise open to the public.

8. The Ombudsman should have the authority and responsibility to publish findings, recommendations, and reports.

   a) It can be seen as a duty of the Ombudsman to make the public aware of investigation results to promote accountability.

   b) If the results of an investigation and an Ombudsman's recommendations cannot be publicized, the function of the Ombudsman as a watchdog for the public interest is frustrated.

   c) Identifying information of complainants and witnesses can be changed to protect confidentiality.

9. The subjects of the Ombudsman's reports should be consulted and afforded the opportunity to respond to the report prior to its being published.

   a) Prior to issuing a public report, the Ombudsman should give the agency and any of its officers or employees about whom the report is critical an opportunity to respond to the findings and recommendations.

   b) It should be made clear that no one is authorized to release or publicize the Ombudsman's preliminary recommendations that have been shared for this purpose on a confidential draft basis.

c) Once the Ombudsman has reviewed the agency's response, it is for the Ombudsman to release the final version.

d) The Ombudsman is sometimes specifically given the responsibility to publish the agency's response along with the Ombudsman's report.

10. The process for how complaints are to be made, received, and acted upon, including the scope and manner of investigations, should be defined and transparent.

a) The process by which the Ombudsman accepts and acts upon complaints should be clearly defined for the public and the investigated agencies.

b) If there are specific requirements for the form complaints must be in to be accepted, or other intake rules, they should be made clear.

c) Guidelines for how the Ombudsman will proceed with investigations or dismiss complaints should be available to interested parties.

d) Clearly stated standard procedures let parties know what to expect from an Ombudsman's review and establish benchmarks to evaluate whether the office operates as it is intended.

11. The Ombudsman should state the reason a complaint is not accepted for investigation.

a) The Ombudsman should provide an explanation to a complainant when a case is not accepted for investigation.

b) Examples of the reasons why cases are not accepted can include the following: the case is outside the Ombudsman's jurisdiction, the complainant has other available remedies, the complaint is made in bad faith or is vexatious, the complaint is trivial, the complainant will not provide information necessary to conduct an investigation, the office lacks sufficient resources, or the issue has been previously investigated.

12. The Ombudsman should keep both complainants and subjects apprised of the status of the investigation.

a) Status updates should include information about whether a case will be accepted for investigation and the progress of the review.

b) The Ombudsman should advise the complainant and subject regarding the closing of any complaint and the reasons therefore if the complaint does not result in a published report.

c) Since many complaints to an Ombudsman will have to do with communication breakdowns between the government and members of the public, the Ombudsman should adhere to and model good communication.

13. The Ombudsman should complete investigations in a timely manner.

a) Timely completion of investigations is important to the credibility of an Ombudsman's office.

b) Although an Ombudsman's investigation generally occurs after an administrative decision has been made, at the end of a process, the recommendations may lose their value if there is too long a delay.

c) Since the Ombudsman seeks to uphold standards of government efficiency, the office should be efficient itself.

14. The Ombudsman should, at least annually, report generally on the activities of the office to the Ombudsman's appointing authority, other policy makers, and the public.

    a) There should be an obligation to inform the appointing authority and the public of the activities of the Ombudsman.

    b) Most offices issue a report annually that describes the work of the previous year: the number of inquiries, the number of cases resolved informally, cases investigated and investigations pending, recommendations made, and whether or not they were followed.

15. The Ombudsman should, in practice and appearance, uphold the highest standards of public service.

    a) As an advocate for good government, the Ombudsman must exemplify the standards used to measure the government agencies under his or her jurisdiction.

    b) Complainants will come forward with complaints and suggestions and agencies will follow recommendations when they see that the Ombudsman can be trusted to behave appropriately.

APPENDIX G

Management of Pro Se Cases

Management of Pro Se Cases in the Central District of California

In the Central District of California, there is no uniform approach to the management of pro se litigation. Because the 13 pro se law clerks do not operate as a separate unit and instead are assigned to particular magistrate judges, the manner in which case management procedures are applied is dictated by the assigned magistrate judge. Accordingly, procedures and approaches tend to differ chambers by chambers.

Of the 13 pro se law clerks currently serving the Central District of California, virtually all report that case management is handled by the magistrate judge or the judge's elbow clerk. The one pro se law clerk who is directly involved in managing pro se litigation reports the following procedures:

Re Prisoner Civil Rights Cases:

1. The pro se law clerk does the initial screening. If, after screening, the pro se law clerk and magistrate judge decide the complaint states a cognizable claim for relief, and the plaintiff is IFP, the Court will issue an order directing service upon identified defendants by the U.S. Marshal. The Court also issues a "Civil Rights Order" which, among other things, tells the plaintiff about the need to keep a current address and the need to accomplish service within 120 days per FRCP Rule 4(m).

2. The magistrate judge's secretary then puts a tickler in the file for 120 days from the date of the order directing service.

3. If, after the expiration of 120 days, the Court has no response from the defendant(s), and no request for any extension from the plaintiff, the Court issues an order to show cause why the action should not be dismissed for failure to serve within 120 days. Either the magistrate judge or the pro se law clerk will handle any requests for an extension. The pro se law clerk prepares dismissals for failure to prosecute.

4. If the plaintiff is not an IFP prisoner, the Court issues a "Civil Rights Order" and tickler for 120 days.

5. If the defendant files a motion to dismiss, the pro se law clerk drafts the order ruling on the motion.

6. Once the defendant has filed an answer, the magistrate judge issues a scheduling order setting discovery and motion cut-off dates.

7. The pro se law clerk handles all screenings, recommends issuance of orders directing service, drafts orders to show cause and any follow-up orders, and handles all motions to dismiss and motions for summary

judgment. The pro se law clerk usually handles discovery motions as well.

8. The judge and his secretary issue the civil rights orders and the scheduling orders setting cut-off dates. The secretary handles the ticklers.

Re Non-prisoner Civil Rights Cases:

1. If the plaintiff is IFP, the pro se law clerk screens and follows the above steps.

2. If the plaintiff is not IFP and not a prisoner, the pro se law clerk typically only screens for jurisdictional defects. If the Court does not dismiss on jurisdictional grounds, it issues the Civil Rights Order and tickles for 120 days.

3. The pro se law clerk handles these cases as well, including any screening, jurisdictional dismissals, orders to show cause, etc., motions to dismiss, and motions for summary judgment. The judge and the secretary handle issuance of the Civil Rights Order and any scheduling orders.

Re habeas corpus cases:

1. The magistrate judge or the judge's elbow clerk handle all screenings and case management. The pro se law clerk drafts the report and recommendation disposing of the case on the merits, and occasionally will handle a complex motion to dismiss.

The above steps are meant to serve as an example of how one chambers group handles pro se litigation involving prisoner cases and non-prisoner civil rights complaints. The pro se law clerks are not assigned to Article III judges or involved at any level with general pro se civil litigation or criminal litigation. In such cases, the case management procedures are decided and implemented by the Article III judge assigned to the particular case.

EASTERN DISTRICT OF CALIFORNIA
(Fresno Division)

Except for motions filed under 28 U.S.C. § 2255, prisoner cases are assigned or referred to the magistrate judges. Pro se law clerks (PSLCs) generally work directly with one to three magistrate judges. PSLCs specialize in either civil rights or habeas law. In addition, because the District's prisoner caseload is so heavy, the magistrates' elbow law clerks are sometimes involved with prisoner litigation. Elbow clerks help out with overflow as time permits.

Section 2255 motions are generally handled by the district judges' elbow clerks, though the district judge may decide to refer them to a magistrate judge, in which case a PSLC works on them.

There are some differences in the way pro se cases are handled, as opposed to cases where all parties are represented by counsel. Those differences are shown here. Most cases are conducted pro se.

§ 1983 Prisoner Civil Rights Action Case Flow

A. Complaint Filed.

1. The Clerk's Office sends out a "litigant letter" to the plaintiff, informing the plaintiff of pertinent Local Rules. A consent form is sent to the plaintiff at this time.

2. The assigned PSLC reviews any IFP application and screens the complaint. Complaints are screened for subject matter jurisdiction, failure to state a claim, frivolousness or maliciousness, and three strikes bars. The magistrate judge (1) dismisses complaint with leave to amend within thirty days; (2) orders the plaintiff to either amend or notify the court of willingness to proceed only on cognizable claims (if there are some cognizable claims and some deficient claims; if plaintiff does not opt to amend, F&R issues dismissing deficient claims); (3) recommends dismissal of the action in its entirety; or (4) orders that service of the complaint is appropriate.

3. When the orders granting ifp, directing collection of the filing fee, and screening the complaint are issued, the court issues the First Informational Order, which provides information on pertinent Federal Rules of Civil Procedure and Local Rules (more detailed than "litigant letter").

B. Service.

1. Court sends USM-285 forms and summonses for completion by plaintiff.
   a. If plaintiff returns all documents properly, court orders Marshal to serve; or
   b. If plaintiff fails to send docs, court issues F&R for dismissal.

2. U.S. Marshal requests waiver of service from, or serves complaint on defendants; defendants receive consent forms at this time.

3. Along with the order directing service by the Marshal, the court issues the Second Informational Order, and Motion to Dismiss and Summary Judgment Notice, which gives the warnings required by *Rand* and *Wyatt*.

C. Answer or Responsive Motion.

1. In pro se cases, if defendants answer the complaint, the magistrate judge issues a discovery/scheduling order which sets forth pertinent rules governing discovery and sets deadlines for the completion of discovery, amending the pleadings, and filing pretrial dispositive motions. Between this point and the deadlines set in the order, the parties should conduct discovery to gather the information necessary to prepare their case for trial and file any pretrial dispositive motions.

2. In pro se cases, defendants often file a motion rather than an answer as their first response to the complaint. In this instance, the discovery/scheduling order does not issue until the case proceeds to the point where an answer is filed.

D. Second Scheduling Order (Pro Se Cases Only).

1. After the pretrial dispositive motion deadline passes, if there are no motions pending or if the pending motions do not resolve the case in full, the magistrate judge issues the Second Scheduling Order. Dates are set for the telephonic trial confirmation hearing and trial, and for filing pretrial statements and motions for the attendance of incarcerated witnesses.

E. Pretrial Statements.

1. After pretrial statements are filed by both parties, depending on the district judge assigned to the case, the magistrate judge issues the Pretrial Order defining issues for trial.

2. If plaintiff fails to file a pretrial statement, the magistrate issues an order to show cause or F&R recommending dismissal.

G. Telephonic Trial Confirmation Hearing.

1. Depending on the district judge assigned to the case, the magistrate judge conducts the telephonic trial confirmation hearing, rules on pending witness motions, and entertains any objections to the Pretrial Order. Consent is usually raised during the hearing.

2. After the hearing, the PSLC ensures writs for incarcerated plaintiffs and/or witnesses for trial are issued, and makes any necessary changes to the Pretrial Order.

H. Trial.

1. Unless it is a consent case, the district judge's staff assists with the trial, including the preparation of jury instructions, and the PSLC is no longer involved.

2. Jury trial usually last 1-2 days, and the jury is summoned for day one of trial.

Habeas Corpus (§§ 2254, 2241) Case Flow

1. Preliminary Review.

   Pursuant to Rule 4 of the Rules Governing Section 2254 cases, screens the petition for venue, proper respondent, custody, second or successive petition, exhaustion, statute of limitations, whether the claims raised are cognizable federal issues, and that the petition is signed. If claims are unexhausted, the proper respondent is not named, the case is premature or the challenges a federal conviction, the Court will issue an Order to Show Cause why the petition should not be dismissed for lack of jurisdiction. If the claims are unclear or the form petition is incomplete, the Court will grant the Petitioner leave to amend the petition to cure the defects. Following the filing of an Amended Petition, the screening process starts anew.

   Included in the screening process is the review of all Applications to Proceed In Forma Pauperis and drafting of Orders granting or denying IFP.

2. Answer

   In the event the Petition passes screening, the PSLC prepares an Order directing the Respondent to file a responsive pleading. This order sets forth the deadlines for the filing of an Answer, Motion to Dismiss on the grounds of exhaustion, statute of limitations or second/successive petitions, the filing of a Traverse, and Oppositions to all motions filed in the case. The Order further requires Respondent to set forth an argument of procedural default in an Answer that also addresses the merits of the claims in the Petition.

   If the magistrate decides that counsel should be appointed, that discovery is necessary or that an evidentiary hearing is warranted, the Court appoints the Federal Defender to represent the Petitioner. This may happen at any stage in the proceedings.

3. Motions to Dismiss

   The PSLC handles all Motions to Dismiss by Order, in consent cases, or Report and Recommendation. In the event the Motion is mooted by the withdrawal of unexhausted claims, an Order or Report and Recommendation will issue. The Court will direct the Respondent to file an Answer subsequent to the resolution of the Motion to Dismiss.

   In Immigration cases where a Motion to Dismiss for mootness is filed, the PSLC will prepare an Order granting the Motion and dismissing the case for the District Judge's signature.

4. Disposition.

   Following the filing of a Traverse, the case is ready for review on the merits.
   The PSLC continues to work with the magistrate judge in disposing of the matter, including any motions for discovery, evidentiary hearings, etc., that may be necessary

regardless of whether counsel is appointed. A review of the merits of the claims will result in either an Order (in consent cases) or a Report and Recommendation addressing the claims made in the petition and any defenses asserted by the Respondent. Elbow clerks assist with the disposition of a cases on the merits as time permits.

5. Orders Adopting the Report and Recommendation

The PSLC tracks the case following the issuance of the Report and Recommendation. After the objection period expires, the PSLC (Fresno) prepares an Order Adopting the Report and Recommendation on behalf of the District Judge and forwards the Order and file to the District Judge assigned to the case.[1]

6. Certificates of Appealability/Notices of Appeal

All requests for COAs in non-consent cases are sent directly to the assigned District Judge. Should the Magistrate feel the granting of a COA is warranted he/she will include such recommendation in the Report and Recommendation regarding the merits of the Petition. Requests for COAs in consent cases are handled by the PSLC/Magistrate.

7. Miscellaneous Motions

All motions not mentioned above and filed in §§ 2254, 2241 cases are resolved by the PSLC.

Motions to Vacate, Correct or Modify a Federal Sentence (§ 2255)

The motion is routed to the district judge for review.

[1] As the District Court conducts de novo review pursuant to 28 U.S.C. § 636(b)(1)(C), the Order prepared by the PSLC is not always used.

EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO DIVISION

Except for motions filed under 28 U.S.C. § 2255, all prisoner cases are assigned to both a district judge and a magistrate judge at case opening and referred by general order and local rule to the assigned magistrate judge. Pro se law clerks (PSLCs) work directly with the magistrate judges on all aspects of prisoner case management and disposition. All PSLCs work on both civil rights and habeas corpus cases. In addition, when civil rights cases proceed to trial PSLCs often work with district judges on trial preparation, including trial confirmation hearings, motions in limine and jury instructions.

Section 2255 motions are referred on filing to the district judge who tried the underlying criminal case. The district judge decides whether to refer the motion to a magistrate judge. The PSLCs work on all referred § 2255 motions.

The majority of prisoner cases are pro se cases. Both pro se and represented cases are handled by the magistrate judges and the PSLCs as set forth herein.

The duties of the PSLC are as follows:

CIVIL RIGHTS CASES

1. Initial Complaint filed. If filed with IFP application, review IFP. If prisoner qualifies for IFP status, the PSLC prepares (or requests from pro se writ clerk) draft boilerplate order granting IFP status, including assessment of initial partial filing fee if appropriate, and prepares (or requests from pro se writ clerk) draft order to correctional agency to collect filing fee. If IFP is defective, PSLC prepares or requests an appropriate boilerplate order to resolve fee status before case is screened.

2. After IFP application is complete, PSLC screens complaint pursuant to 28 U.S.C. § 1915A and drafts appropriate order and/or findings and recommendations (i.e., dismiss with leave to amend; serve complaint on one or more defendants; or dismiss action without leave to amend for one or more reasons enumerated in § 1915A).

3. When the magistrate judge determines that service is appropriate for one or more defendants, the prisoner is directed to return forms for service of process. If the inmate fails to comply with the order, the pro se writ clerks prepare finding and recommendations for dismissal of the action. If the inmate does return the forms, the pro se writ clerks prepare a boilerplate service order. The PSLC reviews the prepared draft before presentation to the magistrate judge.

4. After one or more defendants appear in the action, the pro se writ clerks prepare a boilerplate discovery order and boilerplate scheduling order. Both are reviewed by the PSLC before presentation to the magistrate judge.

5. The PSLCs draft orders responsive to the numerous documents (“mail”) filed daily in prisoner cases, and/or they review boilerplate orders drafted initially by the pro se writ clerks (including orders resolving requests for extension of time, requests for appointment of counsel, etc.)

6. The PSLCs research and draft findings and recommendations on all dispositive pretrial motions as well as all non-dispositive motions (i.e. discovery motions, etc.).

7. For cases that survive summary judgment, the PSLC drafts a pretrial order and any necessary

writs of habeas corpus ad testificandum for review and signature by the assigned magistrate judge.

8. Trial Confirmation Hearing (TCH) and trial before district judge. Most district judges in the Sacramento Division hold trial confirmation hearings in those prisoner civil rights cases that proceed to trial, and most work with PSLCs in connection with both the TCH and the jury trial. The PSLC drafts a memo for the TCH highlighting issues that remain for resolution before trial, attends the TCH, and drafts a trial memo and proposed jury instructions.

HABEAS CORPUS (§ 2254) CASES.

1. Initial petition filed. If filed with IFP application, review IFP. If IFP is defective, PSLC prepares or requests an appropriate boilerplate order to resolve fee status before case is screened.

2. After IFP application is complete, PSLC screens habeas corpus petition for, e.g., venue, exhaustion, and cognizability of claims and drafts appropriate order for amendment or service of petition, or findings and recommendations for summary dismissal.

3. PSLC drafts orders for all interim motions (extensions of time, appointment of counsel, discovery, evidentiary hearing).

4. PSLC drafts findings and recommendations for final disposition of petition.

5. PSLC drafts proposed order re: certificate of appealability for final orders from which a notice of appeal is filed.

When § 2255 motions are referred to the magistrate judge, process is similar to that for habeas corpus cases.

Management of Pro Se Cases in the Northern District of California

In the Northern District of California, the Pro Se Law Clerks ("PSLCs") handle all of the Court's unrepresented prisoner actions. This amounts to around 1300 cases per year, over 20% of the Court's civil docket, almost all of which are either habeas petitions or civil rights actions. Each PSLC currently handles the cases of two District Judges. The Magistrate Judges do not handle pro se prisoner actions in the Northern District.

The PSLCs work the cases all the way through. After a case is filed and opened, the Pro Se Writ Clerk reviews the IFP application and, if necessary, sends out a deficiency notice. Upon the resolution of the IFP/fee, the PSLC conducts an initial review and prepares the appropriate proposed order for the District Judge to whom the case is assigned. If the case is not dismissed at initial review, the order sets a schedule for amendment, service, dispositive motions, discovery, and/or an answer and traverse. The PSLC tracks the cases to ensure that the deadlines set out in the initial order are met. Once dispositive motions, or, in habeas, an answer and traverse, are filed, the PSLC prepares a proposed order for the District Judge addressing the merits of the dispositive motion and/or habeas petition. The PSLC also prepares any necessary proposed orders to resolve all of the miscellaneous requests and motions filed by the parties both pre- and post-judgment.

If a trial and/or evidentiary hearing is necessary, the PSLC locates counsel and prepare the necessary orders for counsel's appointment. Once counsel is appointed, the case presumptively is then handled by the District Judge's in-chambers law clerks; however, in some cases, the PSLC continues to handle a case even after counsel is appointed. In addition, if a case which was filed with counsel then becomes pro se, the PSLC takes it over mid-stream from the chambers law clerks.

PROCEDURES FOR PRO SE CASES
DISTRICT OF IDAHO

The District of Idaho has adopted the following procedures for handling pro se cases.

Initially, the non-capital habeas and prisoner civil rights cases are assigned to the U.S. Magistrate Judges. If the parties do not consent to the assignment, the cases are reassigned to one of the District Court judges. Upon the conditional filing of inmate cases, they are assigned to one of the three staff attorneys in the Court's Pro Se Unit. The staff attorneys continue to work on all aspects of their assigned cases until final disposition. The unit consists of two full-time staff attorneys and one half-time attorney.

Capital habeas cases are assigned to the Capital Case Staff Attorney. This Staff Attorney also works on some non-capital habeas cases, though this is expected to end in the wake of the *Schriro* decision. The full-time Pro Se Staff Attorney's caseload consists of both non-capital habeas and prisoner civil rights cases, and the half-time Pro Se Staff Attorney works primarily on prisoner civil rights cases.

Non-prisoner pro se cases are randomly assigned among the magistrate and district judges. The staff attorneys also work on non-prisoner pro se cases upon the request of the Judges. Elbow law clerks also work on non-prisoner pro se cases.

The staff attorneys are also responsible for updating self-help packets that are provided to Idaho Department of Correction facilities and county jail facilities in Idaho. The self-help packets provide basic legal information and forms. A similar self-help packet for non-prisoner pro se litigants is currently being revised by one of the elbow law clerks.

Management of Pro Se Cases in the District of Montana

I. Civil Cases That Trigger Statutory Pre-Screening Requirement

A. All cases that trigger statutory pre-screening requirements – applications to proceed *in forma pauperis* ("IFP"), civil cases filed by prisoners, and habeas cases filed by state prisoners – are directed to a magistrate judge, pursuant to Standing Order DWM-34.

1. The pro se law clerks work with the magistrate judge in reviewing the application. If IFP is warranted, the magistrate grants it. If the applicant has significant assets, the magistrate issues Findings and Recommendation ("F&R") pursuant to 28 U.S.C. § 636. The F&R is reviewed by an Article III judge without a ten-day period for objections, pursuant to *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998) (per curiam). Occasionally, this procedure is used when the financial showing is sufficient but the pleading is patently lacking in merit (e.g., a civil notice of appeal from the Montana Supreme Court).

B. Civil cases in which a magistrate judge grants IFP status to a non-prisoner are returned to the wheel for random assignment. Thereafter, the case is handled as in Part II below. (The random reassignment of non-prisoner pro se cases may be changed soon so that all pro se cases are automatically assigned to the magistrate judges.)

C. Habeas cases and civil cases filed by prisoners remain before the magistrate judge for all pretrial purposes, under 28 U.S.C. § 636(b)(1), regardless of the parties' consent. The pro se law clerks work with the presiding magistrate judge.

D. Pre-Screening. The whole case or one or more defendants or claims may be dismissed on pre-screening.

1. Pursuant to 28 U.S.C. §§ 1915(e)(2), 1915A, 42 U.S.C. § 1997e(c), civil cases filed by prisoners are screened for subject-matter jurisdiction, failure to state a claim, frivolousness or maliciousness, and three strikes bars.

2. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts,

habeas cases are screened for custody, correct respondent, federal issue, federal statute of limitations, second or successive petition, exhaustion, procedural default, and merit.

E. Amendment (Civil Cases). In civil cases, if a complaint (or claim) is defective but might be cured by additional factual allegations, the magistrate judge briefly describes the missing factual element(s), issues an order to the plaintiff to amend the complaint, and occasionally advises the litigant of the application of Fed. R. Civ. P. 11. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). If the plaintiff fails to amend, or if amendment does not cure the defect, then the case is recommended for dismissal with prejudice. If the magistrate judge recommends that a plaintiff drop a particular claim, and the plaintiff does so, the next F&R notes that the claim was dropped under the magistrate's direction, so that the Article III judge can rule on the lawfulness of the magistrate's recommendation.

F. Service. In civil cases, service is effected by requesting waiver of service of the summons. Habeas cases are served pursuant to Rule 4 of the 2254 Rules.

G. Scheduling Order. When an Answer has been filed, the Court sets deadlines for discovery requests, close of discovery, and motions. A copy of Chapter V of the Fed. R. Civ. P.; of Forms 24 and 25 of the Fed. R. Civ. P.; and of Rules 6, 7, 26.2, 26.3, and 56 of the Local Rules is sent to the plaintiff. If necessary, trial and trial filing requirements (exhibits, Final Pretrial Order, etc.) are set after motions are decided.

H. Consent to Magistrate Jurisdiction. If service is ordered, the Clerk sends out magistrate consent requests after all parties who have been ordered to appear have made an appearance.

I. Case Management Orders. Where a pro se litigant files numerous, unnecessarily lengthy, or otherwise inappropriate documents, the Court may order a moratorium on filing until a particular issue before the Court is resolved.

J. Appointment of Counsel. If counsel is appointed in a prisoner civil case or a habeas case, the pro se law clerk continues to work the case.

K. Trial and Post-Trial Matters. If there is no consent, the pro se law clerk works with the magistrate judge on all pretrial issues; the Article III judge's elbow clerks work with the Article III in reviewing F&R's. If the case goes to trial, the pro se law clerk works with the Article III judge on all trial and post-trial matters. If there is consent, the pro se law clerk continues to work with the magistrate on trial and post-trial matters.

II. Non-Prisoner Pro Se Cases

A. Pursuant to Standing Order DWM-30, all non-prisoner civil cases, whether a litigant is pro se or not, are randomly assigned to either an Article III judge or, under 28 U.S.C. § 636(b)(1), to a magistrate judge. (See parenthetical note at Part I.B above.)

B. The pro se law clerks work with the presiding judge to pre-screen cases filed by non-prisoners proceeding *in forma pauperis* for subject-matter jurisdiction, failure to state a claim, and frivolousness or maliciousness. (The pro se law clerk is aware of the case because of the IFP application.)

C. The pro se law clerks work with the presiding judge on all non-prisoner cases in which there is a pro se litigant, regardless of the stage at which a litigant begins to proceed pro se. If counsel enters or re-enters the case, it will probably be returned to an elbow law clerk.

III. Motions in Criminal Cases

A. Elbow law clerks to the Article III judges send pro se motions from federal prisoners to the pro se law clerks, who then work directly with the Article III judge. (Senior judges' law clerks handle all aspects of their judges' cases themselves.)

B. Elbow law clerks to the Article III judges also send motions under 28 U.S.C. § 2255, whether counseled or not, to the pro se law clerks.

Management of Pro Se Cases in the District of Nevada

I. Prisoner Civil Rights and Habeas Filings

Upon filing, a letter is sent to the plaintiff/petitioner with the case number and a brief explanation that the Court must prescreen the pleading and will take time to do so.

A. § 1983 and *Bivens* Cases

1. All prisoner civil rights cases (§ 1983 and *Bivens*) are assigned to a magistrate judge.

2. A pro se law clerk (PSLC) works with a magistrate judge to review any *forma pauperis* application, and, at the same time, reviews the complaint to determine if it warrants service. Civil rights actions are screened for subject matter jurisdiction, failure to state a claim, frivolousness or maliciousness, and three strikes bars. The assigned clerk prepares either an order granting IFP or a Report and Recommendation (R&R) denying IFP. If IFP is granted, the clerk also prepares either an order directing service, an order dismissing the complaint with leave to amend, or an R&R recommending dismissal of some, or all, of the claims/defendants. In rare cases, where the complaint is clearly beyond all hope, an order for dismissal will be sent directly to the district judge.

3. Service is effected pursuant to an agreement reached with the State. The Attorney General either states that s/he is authorized to accept service for individual defendants or states that s/he has no authority to accept service. If the AG cannot accept service for certain defendants, the plaintiff is required to personally serve those defendants.

4. The PSLC continues to work with the magistrate judge only through the stage of service. Once a civil rights complaint is served, the case reverts to the magistrate judge's elbow law clerks and is generally handled like other civil cases.

B. Habeas (§§ 2241 and 2254) Cases

1. Habeas cases (§§ 2241 and 2254) are assigned to district judges and are not referred to magistrate judges.

2. A PSLC works with a district judge to review any *forma pauperis* application, and, at the same time, reviews the petition to determine if it warrants service. Habeas actions are screened for naming of a proper respondent, custody, second or successive petition, federal issue, federal statute of limitations, exhaustion, procedural default, and merit.

3. Service is effected pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

4. Counsel is generally appointed to represent petitioners facing long sentences.

5. In cases with counsel, a standard scheduling order is issued. In cases where the petitioner is proceeding pro se, the petitioner is specifically warned of the one-action rule and given a period of time to supplement the petition with any additional claims s/he may want to bring.

II. § 2255 Motions

Motions filed under § 2255 are handled by the district judge's elbow law clerks.

III. Non-Prisoner Pro Se Cases

Non-prisoner pro se cases are generally handled by the elbow law clerks of the judge assigned to the case. Occasionally a PSLC may assist with non-prisoner cases, if a judge requests it, but this is rare.

Management of Pro Se Cases in the Western District of Washington

Initial Screening

Upon filing, all prisoner civil rights cases (§ 1983 and *Bivens*) and habeas cases (§ 2241 and § 2254) are immediately routed to the deputy clerk responsible for prisoner cases. The deputy clerk does an initial review for basic filing deficiencies (*i.e.*, IFP deficiencies, failure to provide a complaint/petition bearing an original signature) and sends out deficiency letters, if necessary, to prisoners.

Case Assignment

After a complaint/petition clears the initial screening process, it is assigned a case number and, pursuant to a recently issued General Order of the court, is assigned to both a district judge and a magistrate judge (this new procedure supersedes the previous procedure of entering orders of reference in all prisoner cases). Motions pursuant to § 2255 are assigned to the district judge who entered the judgment and are then referred to a magistrate judge. All prisoner cases (whether counseled or not) are divided amongst the pro se clerks and the elbow clerks to the magistrate judges. Most cases are assigned to the clerks based on case number. The exception are immigration cases which are assigned to a single pro se law clerk who handles only immigration cases.

Pre-Screening of Complaints/Petitions

§ 1983/Bivens Actions

The assigned pro se/elbow clerk reviews the IFP application, if any, and, at the same time, reviews the complaint to determine if it warrants service. Civil rights actions are screened for subject matter jurisdiction, failure to state a claim, frivolousness or maliciousness, and three strikes bars.

The assigned clerk prepares, as appropriate, either an order granting IFP or a Report and Recommendation (R&R) denying IFP. If IFP is granted, the clerk also prepares either an order directing service, an order declining to serve and granting leave to amend to correct specified deficiencies in the complaint, or an R&R recommending dismissal of some, or all, of the claims/defendants. Every service order and order declining to serve, when mailed to the prisoner, is accompanied by a General Order which summarizes basic procedural rules for pro se litigants. The General Order includes a *Rand* warning. Every service order is also accompanied by magistrate consent forms.

In civil rights cases, service is effected, when possible, by requesting a waiver of service of summons. Frequently, a plaintiff will name a defendant who is required to be personally served in accordance with either Fed. R. Civ. P. 4(i) or Fed. R. Civ. P. 4(j).

§ 2254 Petitions

The assigned clerk reviews the IFP application, if any, and, at the same time, reviews the petition to determine if it warrants an answer. Petitions filed pursuant to § 2254 are screened for naming of a proper respondent, custody, second or successive petition, and exhaustion.

The assigned clerk prepares, as appropriate, either an order granting IFP or an R&R denying IFP. If IFP is granted, the clerk also prepares either an order directing service, an order declining to serve and granting leave to amend to present a viable petition, or an R&R recommending transfer or dismissal of the petition. Every service order and order declining to serve, when mailed to the prisoner, is accompanied by a General Order which summarizes basic procedural rules for pro se litigants and by magistrate consent forms.

Actions brought pursuant to § 2254 are served pursuant to Rule 4 of the Rules Governing Section 2254 Cases. The service order issued in § 2254 actions directs the respondent to file an answer in accordance with Rule 5 of the Rules Governing Section 2254 Cases and to note the answer on the court's calendar for four Fridays from the date of filing. The respondent is permitted to file a dispositive motion, in lieu of an answer, upon a showing of good cause.

§ 2241 Petitions

Immigration Cases

A majority of the § 2241 petitions filed in this district are immigration cases. As noted above, the immigration case load is handled by one pro se law clerk whose sole responsibility is to handle those cases. The immigration cases themselves fall into two general categories: indefinite detention and everything else.

Indefinite Detention Cases

Indefinite detention cases are submitted to the Court by the Office of the Federal Public Defender. The initial submission includes a petition, an application to proceed IFP, and a motion for appointment of counsel. The petitioners in these cases almost always qualify for IFP status and for appointment of counsel. The immigration law clerk prepares appropriate orders on the application to proceed IFP and the motion for appointment of counsel, and, at the same time, prepares a service order directing that the petition be served on the respondent and that the respondent filed a response to the petition. These cases require very little screening because the same counsel are almost always involved and the procedures are well known.

Other Immigration Cases

Non-indefinite detention immigration cases are presented either pro se or through private counsel. These cases are rarely accompanied by applications to proceed IFP. The immigration law clerk screens the petitions primarily to determine whether the petitioner has named the proper respondent. If the petition is serviceable, the immigration clerk prepares an order directing that the petition be served on the respondent and that the respondent file a response to the petition.

Non-Immigration § 2241 Petitions

This Court also receives § 2241 petitions from state and federal prisoners incarcerated in this district who are challenging the manner in which their sentences are being executed. These cares are assigned to the pro se/elbow clerks based on case number. The assigned clerk reviews the application to proceed IFP, if any, and, at the same time, reviews the petition to determine if it warrants service. Petitions filed pursuant to § 2241 are screened for naming of a proper respondent, custody, and exhaustion. The assigned clerk prepares, as appropriate, an order granting IFP or an R&R denying IFP. If IFP is granted, the clerk also prepares an order of service, an order declining to serve the petition and granting leave to amend, or an R&R recommending dismissal of the petition.

§ 2255 Motions

Motions filed under § 2255 are generally referred to the magistrate judges and are assigned to the pro se/elbow clerks based on case number. The assigned clerk reviews the motion to determine if the petitioner is in custody and if the motion is a second or successive one. The assigned clerk will prepare, as appropriate, either an order declining to serve the motion and granting leave to amend, an order of service directing that the motion be served and a response be filed, or an R&R recommending transfer or dismissal of the motion.

Pre-Trial Procedures

Generally, the pro se/elbow clerks work with the magistrate judges to handle all pre-trial matters in all prisoner cases. This includes preparation of case management orders, where necessary, orders on any non-dispositve pretrial motions, and Reports and Recommendations on dispositive motions.

In § 1983/*Bivens* cases, once an answer has been filed, the magistrate judge issues a Pretrial Preparation Order which sets deadlines for discovery, for the filing of dispositive motions, and for the filing of a joint pretrial statement. With respect to the joint pretrial statement, the parties are directed to confer and provide a short statement of the case, a narrative statement of the facts, witness and exhibit lists, and information relevant to the

scheduling of trial. As a practical matter, few joint pretrial statements are ever filed. If a case does not survive dispositive motions, the joint pretrial statement is unnecessary. If a case, or part of a case, does survive dispositive motions, the assigned district judge typically has his or her own procedures for getting the case ready for trial. The pretrial preparation order also contains a *Rand* warning.

Hearings, Trial and Post-Trial Matters

The magistrate judge, with the assistance of the assigned pro se/elbow clerk, conducts hearings in prisoner cases as necessary. Oral argument and evidentiary hearings are most common in immigration cases. If there is no consent, the involvement of the magistrate judge and the pro se/elbow clerks usually terminates once all dispositive issues have been addressed by way of an R&R.

If a civil rights case survives dispositive motions, or if no dispositive motions are filed, the magistrate judge may continue to manage the case until a joint pretrial statement is filed. At that point, the case reverts to the district judge and the district judge and his/her elbow clerk manage the case through trial and any post-trial proceedings.

Non-Prisoner Pro Se Cases

Non-prisoner pro se cases are assigned to a district judge upon filing. If the complaint is accompanied by an application to proceed IFP, the case is forwarded to the magistrate judge who is on "civil duty" that month. The elbow clerk to the magistrate judge reviews the application to proceed IFP and the complaint. If IFP is warranted, the magistrate judge grants it and the case is returned to the district judge for further proceedings. If IFP is not warranted, either because the plaintiff does not financially qualify, or because a complaint is clearly frivolous, the magistrate judge may issue an R&R denying IFP.

Typically, non-prisoner pro se cases are *not* referred to the magistrate judges for anything other than IFP review. The decision not to refer such cases was made several years ago when prisoner case filings (mostly habeas) increased dramatically and created a substantial backlog of cases requiring the attention of the magistrate judges.

APPENDIX H

Sample Pro Bono Contract Letter

March 25, 1994

Re:

Dear

We are pleased to accept the opportunity to represent you with regard to the above-referenced appeal. The purpose of this letter is to set forth the basic terms upon which we will represent you, including the anticipated scope of our services and the nature of our pro bono representation.

1. Scope of Engagement. The undersigned have been appointed as pro bono counsel by the United States Court of Appeals for the Ninth Circuit (the "Court") to represent you in the above referenced appeal. Our appointment is limited and includes only the handling of this appeal and the drafting of a petition for rehearing if requested by you, but does not include the preparation and filing of a petition for certiorari in the Supreme Court or any other proceedings in any other court.

2. Pro bono Representation. Please be advised that we are representing you as participants in the Court's pro bono project. We will seek reimbursement from the Court for reasonable and necessary costs incurred in our representation of you in the appeal. In addition, we may seek an award of statutory attorney's fees from appellees if appropriate. You will not be responsible for any attorney's fees or costs incurred in our representation of you.

3. Errors and Omissions Coverage. Under California law, all lawyers are required to advise their clients whether they maintain errors and omissions insurance coverage applicable to the services to be rendered. We confirm that we do maintain such insurance coverage applicable to the services which we anticipate rendering in connection with this matter.

4. Other Issues. For all engagements undertaken by our firm, our firm performs a conflict check, i.e., a review of its records to determine whether or not the firm is currently involved in the engagement. We have performed the requisite conflict check and wish to advise you of its results. The check revealed that a former principal of our law firm, while still a principal of our firm, filled out paperwork on February 24, 1990, indicating that he would be representing the management of ABC Corp. in conjunction with a corporate acquisition. Our records indicate that such representation was never undertaken. We do not believe that a conflict of interest exists with regard to our representation of you in this matter; however, we make the foregoing disclosure so that you may have all relevant facts before you in determining whether or not to go forward with this engagement. Should we learn any additional information that leads us to believe that a potential or actual conflict of interest does exist, we will of course inform you promptly of that fact in writing.

For best results, we look forward to a high degree of cooperation from you. Although we will endeavor to achieve a satisfactory result and to keep you apprised of the status of

these matters, no guarantees of any kind can be made concerning the outcome of any litigation, or of any other legal services in which the voluntary consent or action of another party is involved.

While we would prefer to confirm the terms of our engagement by a less formal method than a written letter such as this, in certain instances attorneys are required by California law or firm policy to memorialize these matters in writing. Accordingly, we ask that you review this letter carefully and, if it is acceptable to you, please so indicate by returning a signed copy at your earliest convenience. Enclosed is an additional copy of this letter for your files.

We look forward to working with you on this engagement. Please do not hesitate to call either of us if you have any questions.

Very truly yours,

ACCEPTED AND AGREED:

_____ Dated: _____

APPENDIX I

Pro Bono Litigation Program

August 30, 2004

Pro Bono Litigation Program for Pro Se Litigants
With Potentially Meritorious Cases

Revision to Exemplar prepared by Ninth Circuit Advisory Board (4/17/02)[1]

[To be adopted as Local Rule, General Order, or Other Directive by District Court]

1. **Definitions**. The following definitions shall apply:

(a) The term "appointment of counsel" means the appointment of a member of the bar of this court to represent a party who lacks the resources to retain counsel by any other means. Such appointment shall only be in a civil action or actions in which a judge of the court determines that appointment of counsel is appropriate in accordance with this [Order]. The term does not include any appointment pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

(b) The term "judge" means the judge to whom the action has been assigned. It includes a magistrate judge in a case assigned to the magistrate judge for all purposes or assigned for evidentiary hearings or case management.

(c) The term "panel" means those members of the bar who are available for appointment as pro bono counsel.

2. **Creation of the Panel**. The panel shall be created by the judges of the court or the clerk in [a manner that best meets the needs of the district court given the

[1] The Appointment of Counsel subcommittee believes that the previous draft is unnecessarily complex and could be more concise.

availability of counsel willing to serve].[2]

3. **Representation in Other Divisions or in Other Districts**. Counsel participating in the panel are encouraged to inform the clerk whether they will accept appointment in cases outside the division in which their principal office is located or outside of the District.

4. **Appointment to the Panel**. [To be developed by each district in accordance with local needs and circumstances]

5. **Application for Appointment of Counsel**. An application for appointment of counsel by a party appearing pro se shall be made to the judge and may be made in any manner consistent with the local rules.[3]

6. **Factors Used in Determining Whether to Appoint Counsel**. Upon receipt of an application for the appointment of counsel or upon the court's own motion, the judge shall determine whether counsel should be appointed. The following factors may be taken into account:

(a) The potential merit of the claims;

(b) The nature and complexity of the action, both factual and legal, including the need for factual investigation;

(c) The presence or likelihood of conflicting testimony calling for a lawyer's presentation of evidence and cross-examination;

(d) The ability of the party seeking appointed counsel to present the case

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[2] Creation of the panel and its membership should be described in accordance with local needs and local circumstances.

[3] The subcommittee believes that the application process should be as simple as possible, recognizing that the judge should be sufficiently familiar with the nature of the case and the parties to determine whether appointment is warranted.

without counsel;

(e) The inability of the party to obtain counsel by other means;

(f) The extent to which the interests of justice will be served by appointment of counsel, including the benefit the court may derive from counsel's assistance;

(g) Any other factors relevant to the exercise of the court's discretion.

7. **Order of Appointment**. Whenever the judge concludes that the appointment of counsel is warranted, selection of a member of the panel shall be made by the judge or the clerk [in the manner preferred by the district]. The judge shall issue an order appointing counsel.

8. **Notice of Appointment**. After counsel has been selected and an order has been entered, the clerk shall send notice to all parties. Appointed counsel shall receive a copy of the order and copies of all pleadings and documents filed through the time the appointment is made.

9. **Stay of Proceedings**. Upon entry of the order of appointment, the judge shall issue an order staying all proceedings in the case for a period of 30 days, including all discovery, in order to allow appointed counsel time to become familiar with the case. The judge shall schedule a status conference as soon as practicable following expiration of the stay of proceedings.

10. **Scope of Appointment**. Appointed counsel shall represent the party in the action through final judgment or other resolution of the case. Counsel is not required, but may choose, to represent the party on appeal.

11. **Relief from Appointment**.

(a) Grounds. After appointment, counsel may seek to withdraw and terminate the representation for any of the following reasons:

(1) Conflict of interest:

(2) Personal incompatibility or a substantial disagreement on litigation strategy or tactics;

(3) The party is proceeding for the purpose of harassment or malicious injury, or the party'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;

(4) Any other basis that would permit withdrawal in the discretion of the judge.

(b) Motion to Withdraw. Any motion by appointed counsel for withdrawal shall be made to the judge with service on the party represented at the party's last known address. Under appropriate circumstances the motion may be made ex parte with service on the party represented. The judge may refer the motion to another judge of the court for determination.

12. **Expenses**. It is expected that expenses incurred by counsel may be reimbursed by the court up to $3,000 at the conclusion of the representation. The court may reimburse counsel prior to the conclusion of the representation in the discretion of the court. The court shall determine whether expenses are reasonable and necessary.

(a) Reimbursable expenses. Reimbursable expenses shall include, but shall not be limited to: deposition costs, except to the extent reimbursed by any State Transcript Reimbursement Fund,[4] photocopying, service of process, expert witness and consultation fees, reasonable travel expenses, reasonable investigation expenses, telephone expenses, interpreter fees. To the extent applicable, the court's guidelines for reimbursement under the Criminal Justice Act shall determine whether expenses are reasonable.

(b) The party represented shall to the extent possible seek to obtain costs from the adverse party, if entitled to do so. Under no circumstances will the court reimburse a party for costs taxed.

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[4] See e.g. Cal. Business & Professions Code §§ 8030 et seq.

(c) Expenses in case of judgment or settlement. No expenses will be reimbursed where the party for whom counsel was appointed prevails or accepts a settlement and the amount awarded or accepted is more that $6,000. If the amount awarded or accepted is less than $6,000, then the court shall reimburse appointed counsel for 50% of reasonable and necessary expenses, not to exceed $3,000.

(d) Duty to Reimburse the Court. In any case in which expenses were paid by the court prior to final resolution, counsel shall reimburse the court in accordance with subsection (c), if the party is awarded or accepts a settlement.

(e) Request for Reimbursement. Any request for reimbursement shall be made by letter to the judge with receipts attached. Reimbursement may be denied in the absence of appropriate documentation or if the amount is unreasonable.

(f) Attorney's fees. Nothing herein shall preclude appointed counsel from seeking and receiving court awarded attorney's fees and expenses when the party prevails and is otherwise entitled to an award of attorney's fees and expenses.

APPENDIX J

Legal Assistance Available to Prisoners

SITE	PRE LITIGATION ADMINISTRATIVE PROCEDURES	LEGAL ASSISTANCE AVAILABLE TO INMATES
Alaska Department of Law, Criminal Division John K. Bodick, Assistant Attorney General 907.269.6379, john_bodick@law.state.ak.us 310 K Street, Ste. 407 Anchorage, AK 99501	*Grievance Process (Four Levels)* An inmate must: 1. Fill out a Request for Interview to remedy problem informally. 2. File a formal grievance with the Grievance Coordinator who screens the case for alternative resolution or investigation. 3. Appeal to the Department through the Grievance Coordinator. 4. Appeal to the Grievance and Compliance Administration by sending a letter to the Administrator.	Inmates have access to law libraries and typewriters.
Arizona Department of Corrections Daryl Johnson, Legal Access Coordinator 602.542.1532 1601 West Jefferson Phoenix, AZ 85007	The inmate is first instructed to resolve the problem informally by submitting their grievance to the COIII on an Inmate Issue/Response Form 916-1P within ten workdays of action. If the issue is not resolved, the inmate can file a formal grievance through the Unit's Grievance Coordinator. The inmate can appeal the Coordinator's decision to the Warden or Deputy Warden. The inmate can then appeal the Warden's response to the Director. The Director's response is the final stage in the Department's Inmate Grievance System for standard grievances. There are also specific policies regarding emergency, staff or medical grievances.	The Legal Access Program provides court-approved forms, assistance from contract paralegals and some legal reference and self-help resources. Paralegal Assistance: 1. If the issue involves 1983 civil rights or conditions of confinement, the inmate must first seek resolution through the inmate grievance system. If the issue involves Notice of Appeal from the Superior Court, a Rule 32 or habeas petition, the inmate must include appropriate documentation. 2. Inmates can then submit an Inmate Request for Paralegal Assistance. 3. If it is unclear whether the claim is valid, or if a meeting might create resolution, the paralegal requests that designated staff schedule a meeting with the inmate. If the inmate does not have a qualified legal claim, the paralegal refers the inmate to relevant assistance if possible.
California Department of Corrections Bryan Snyder, Staff Counsel Legal Affairs Division 916.445.3412 PO Box 942883 Sacramento, CA 94283	*Inmate Appeals Process* Case must be presented internally, with two opportunities for internal appeal before appealing to the CA Dept. of Corrections.	The CDC provides access to law libraries throughout the grievance process. Librarians and inmate law clerks direct inmates to law library materials; while staff librarians cannot offer legal advice, inmate law clerks can advise other inmates.
Idaho Department of Corrections Kevin Burnett, Paralegal 208.658.2097 1299 North Orchard, Ste 110 Boise, Idaho 83706	*Offender Grievance Process* Informal reconciliation is attempted through the Inmate Concern Form. If the informal process is unsuccessful, appeals can be filed to grievance officers and ultimately, the warden.	The Department provides a series of preprinted packets with which an offender may challenge his sentence or conditions of confinement. The Department does not provide assistance for suits against private individuals in cases that are unrelated to the Department. The U.S. District Court provides forms for federal civil rights complaints and petitions for habeas corpus.
Nevada Department of Corrections Warden Don Helling 775.887.9213 dhelling@ndoc.state nv.us PO Box 7011 Carson City, NV 89702	*Administrative Regulation 740, Grievance Process* 1. Informal Review Level: Caseworker responds with Grievance Coordinator approval. 2. First Level Review: Warden responds. 3. Second Level Review: Assistant Director of Operations, Assistant Director of Support Services, Offender Management Administrator or Medical Director responds.	See Melaine Mason's response below.

SITE	PRE LITIGATION ADMINISTRATIVE PROCEDURES	LEGAL ASSISTANCE AVAILABLE TO INMATES
Nevada Department of Corrections Melaine Mason, Management Analyst/Inmate Services 775.887.3234 mmason@ndoc.state nv.us PO Box 7011 Carson City, NV 89702	See Warden Helling's response above.	The NDOC provides legal services and resources for inmate cases involving habeas corpus, civil rights actions and post-conviction petitions, as well as personal issues such as family law and bankruptcy. Inmate law clerks are available to help other inmates locate legal material and learn the legal process.
Oregon Department of Corrections Trent Axen, Library Coordinator 503.378.2081 2605 Salem Street Salem, OR 97310-0505	*Grievance Procedures (Four-Part Process)* 1. Submit an inmate communication form for informal resolution. 2. Submit a written grievance for formal processing. 3. File an intermediary grievance appeal. 4. File a final grievance appeal. There is no requirement that inmates exhaust their administrative remedies prior to proceeding with litigation.	A law library is available for research and typing, and inmate legal assistants are available for inmates who need help. ODOC does not prevent inmates from filing legal actions related to personal civil matters (e.g., divorces, civil actions against private individuals).
Washington Department of Corrections Roy Gonzalez, Correctional Manager 360.753.1796 igonzalez@DOC1.wa.gov PO Box 41118 Olympia, WA 98504-1118	*Grievance Process (Four Levels)* 1. Informal process to attempt resolution. 2. An investigation of the inmate's allegations occurs and a Corrections Specialist provides a formal response. 3. Inmate can appeal to the Superintendent of the facility. 4. Inmate can appeal the Superintendent's response to the Grievance Program Manager. The program handled 24,773 complaints and grievances filed by 7,875 inmates during calendar year 2001.	Contract Legal Service Providers and full service legal libraries are available. Inmates are supplied with necessary stationary materials and typewriters, and are allowed to purchase additional related materials. They can also communicate with family, friends or support groups for legal purposes via visitation, mail and/or telephone. Priority access is granted in order for inmates to meet pending deadlines.
U.S. Dept. of Justice, Federal Bureau of Prisons Alma Lopez, Senior Attorney Advisor-Litigation Branch 202.307.3872 Washington, DC 20534	1. Inmates are first encouraged to seek resolution of their complaints by informally discussing the matter with a member of their Unit Team. If no informal resolution can be found, the inmate may file a formal complaint with the Warden. The inmate can appeal the Warden's response to the Regional Director. The inmate can then appeal the Regional Director's response to the Office of General Counsel. 2. In accordance with the Federal Tort Claims Act, the BOP reviews claims for money damages for personal injury, death and loss and/or damage to personal property arising from negligent actions or omissions of government employees. Claims must be filed within two years of the time of the occurrence; after mailing of the disposition letter, the claimant has six months to file a lawsuit in court.	• Inmates are allowed access to legal materials irrespective of whether they have filed a lawsuit or are preparing to file one. Certain special accommodations can be made only when an inmate has an imminent court deadline. • Each institution must maintain a law library or satellite library to guarantee inmates access to legal research materials. • Each institution has policies regarding reasonable access to legal research and legal visiting. • The BOP funds legal aid programs in at least seven institutions nationwide, including the facility at Terminal Island, CA.

APPENDIX K

Court Clerk Office Public Information

WELCOME TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF

WE ARE HAPPY TO HELP YOU IF WE CAN. HOWEVER, WE ARE ALLOWED TO HELP YOU ONLY IN CERTAIN WAYS, SINCE WE MUST BE FAIR TO EVERYONE.

This is a list of some things the court staff can and cannot do for you.

We can	explain and answer questions about how the court works.	**We cannot**	tell you whether or not you should bring your case to court.
We can	provide you with the number of the local lawyer referral service, legal services program, family law facilitator program, and other services where you can get legal information.	**We cannot**	tell you what words to use in your court papers. (However, we can check your papers for completeness. For example, we check for signatures, notarization, correct county name, correct case number, and presence of attachments.)
We can	give you general information about court rules, procedures, and practices.	**We cannot**	tell you what to say in court.
We can	provide court schedules and information on how to get a case scheduled.	**We cannot**	give you an opinion about what will happen if you bring your case to court.
We can	provide you information from your case file.	**We cannot**	talk to the judge for you.
We can	provide you with court forms and instructions that are available.	**We cannot**	let you talk to the judge outside of court.
We can	usually answer questions about court deadlines and how to compute them.	**We cannot**	change an order signed by a judge.

Since court staff may not know the answers to all questions about court rules, procedures, and practices, and because we don't want to give you wrong information, we have been instructed not to answer questions if we do not know the correct answers. For additional information, please contact a lawyer or your local law library, or check the California Courts Self-Help Center Web site at *www.courtinfo.ca.gov/selfhelp.*

Form Approved for Optional Use
Judicial Council of California
MC-800 [New January 1,2002]

Court Clerks Office: signage

I Am Being Sued

What should I do?

Go to court right away and file your "response." If you do not do this, you could lose your case.

How long do I have to file my response?

It depends on your case. You may have 30 days, or less. To find out, look at the papers you were served.

What papers do I need to file?

That depends. There are different kinds of responses. Most people file an "Answer." **But only a lawyer can tell you which response is best for your case.**

Where do I find a lawyer?

Call the San Francisco Bar Association's Lawyer Referral Service:

415-989-1616

Can I just call or write the court or the person who is suing me instead?

No. You **must** file a response. A letter or phone call to the person who is suing you or the court, or just showing up for your court date is not enough.

If I file an "Answer", how do I fill it out?

In some cases, you have to use a special court form. In other cases, you have to use "pleading" paper. (Pleading paper is attached.) A lawyer can tell you what to use.

What do I do with my completed Answer?

1. Make 2 copies.
2. Ask someone to "serve" one of the copies to the Plaintiff. (The Plaintiff is the person who is suing you.)

   The server must:
   - Be 18 or over.
   - Not be involved in your case.
   - Mail the Plaintiff a copy of your Answer.
   - Fill out the *Proof of Service by Mail* form and give it to you.
3. Take your original Answer, the extra copy and the completed *Proof of Service by Mail* form to the Clerk's Office in Room 103.

Need more help?

Call the San Francisco Bar Association's Lawyer Referral Service:

415-989-1616

ACCESS

San Francisco Superior Court
400 McAllister Street
Room 208
San Francisco, CA
94102-4514

415.551.5880
www.sfgov.org/courts

Superior Court of California, County of Ventura
Self-Help Legal Access Center

List of Resources for Legal Research

If you have access to a law library, the following resources may be helpful in drafting papers to be filed with the court, called **pleadings**, and in understanding the civil court process:

SUBSTANTIVE LAW - to learn about the actual laws themselves, and different legal theories upon which a civil lawsuit may be based, the following books are helpful:

- WITKIN, *Summary of California Law*, published by Bancroft-Whitney.
- Books published by Continuing Education of the Bar (CEB) on different legal subjects.
- *California Practice Guides*, published by The Rutter Group on different legal subjects.
- MILLER & STARR, *California Real Estate,* 2d, published by Bancroft-Whitney, for information about real estate laws.

PROCEDURAL LAW - to learn about the procedure for filing, prosecuting or defending a civil case in court, the following books are helpful:

- WITKIN, *California Procedure*, published by Bancroft-Whitney. The two volumes on "Pleadings" explain the elements of different **causes of action** of a complaint. Each **cause of action** states a separate legal theory upon which the plaintiff's claims are based.
- WEIL & BROWN, *Civil Procedure Before Trial*, a California Practice Guide published by The Rutter Group.

SAMPLE FORMS - to see sample language to be used in drafting pleadings, MATTHEW BENDER, *Forms of Pleading and Practice*, may be helpful.

APPENDIX L

Handbook for Litigants without a Lawyer

HANDBOOK FOR
LITIGANTS WITHOUT A LAWYER

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

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INTRODUCTION

This handbook is intended to help people who want, or need, to participate in a civil lawsuit in this court without having the help of a lawyer. It is **not** intended for use by people who want to defend themselves in a criminal case without a lawyer.

This handbook is also not intended for companies or similar entities (under Civil Local Rule 3-9, only individuals may participate in a lawsuit without a lawyer). If you are suing on behalf of a company or a partnership or some other such entity, you need to get a lawyer who is a member of the bar of the United States District Court for the Northern District of California.

Assuming that you are an individual who is considering representing yourself in a civil lawsuit, you should be aware that there may be alternatives to suing. Lawsuits can be costly, time-consuming and stressful. Some alternatives include the following:

1. Gathering Information

Sometimes things are not what they seem at first. Sometimes things that appear to have been done on purpose were done unintentionally. Better information may help you decide whether a lawsuit is advisable.

2. Working Things Out

Consider talking directly to the people who you think might be responsible for causing the problem. Sometimes people are more likely to respond in a positive way if they are approached respectfully and given a real opportunity to talk than if the first thing they hear from you is a lawsuit.

3. Going to Governmental or Private Agencies

Consider whether there are other processes you could use, or agencies you could enlist, to address your problem. Sometimes there is a governmental or private agency that can address the problem you have or who would lend you assistance. Examples of such agencies include the Equal Employment Opportunity Commission (or an equivalent state or local agency) to address employment discrimination, the local police review board or office of citizens' complaint to hear complaints about police misconduct, a consumer protection agency or the local district attorney's office to investigate consumer fraud, and the Better Business Bureau or private professional associations (e.g., associations of contractors, accountants, securities dealers, architects and engineers, etc.) to hear business-related complaints.

4. Using a Small Claims Court

In some cases you may have the option of filing a case in small claims court, which is designed to be used directly by the people without formal training in the law. These courts are part of the California state (not federal) court system.

5. Mediation

Dispute resolution services–such as mediation or arbitration—may be faster and less expensive than taking a case to court. Mediation encourages parties to communicate clearly and constructively to find common ground or to identify solutions that can serve the parties' real interests.

The point of this Handbook, and this Introduction, is not to discourage you from using a court if you need to. If your rights under the law have been violated, you are entitled to seek relief from the court. Moreover, there may be time limits that require you to bring a lawsuit within a certain amount of time. Nonetheless, you may want to consider all your options before going forward with a lawsuit.

Because representing yourself in a lawsuit is difficult, the Court urges you to think seriously about getting a lawyer, if at all possible. Please see Chapter 1, for some suggestions on how to get a lawyer for your case.

If you have tried to get a lawyer and have not been able to find one, this handbook will help you through some of the procedures involved in participating in a civil lawsuit. To use this book, look first at the table of contents located at the beginning of the manual. You can find specific topics covered in this handbook there.

Many of the terms in this book may seem unfamiliar, so please use the Glossary at the end of the book to look up explanations for words you do not understand. You can also look up unfamiliar words in a legal dictionary at your local public library. One that is often used is *Black's Law Dictionary*. You can also try free internet legal dictionaries; one can be found at the website: http://dictionary.law.com.

This handbook will help you understand the legal process, but it will not teach you about the law. For that, you will need to do your own research at a law library. A list of law libraries that are open to the public can be found in Chapter 2.

The staff of the Clerk's Office can also help you with court procedures, but they are forbidden by federal law from giving you any legal advice. For example, they cannot help you decide how to litigate your lawsuit; suggest legal strategies that may help you win your lawsuit; give you "inside information" about judges or other court personnel; interpret the law for you; or even advise you about when documents are due. If you have questions or need to know more about the law, you need to research the answers yourself. **You may not call the judge or the judge's staff to ask for legal advice on how to pursue your case, or to argue your position outside of court.**

While this handbook is designed to help you proceed without an attorney, it is no substitute for having your own lawyer. Besides having to research and learn the facts in your case, you must also learn and obey detailed procedural rules that may seem confusing or even picky. Those rules are important, and failing to follow them can affect how your case turns out; in some cases a mistake may even cause you to lose your case. Litigation is already stressful and time-consuming for the people involved; that stress is even greater for people who are trying to be their own lawyer. So as you read these materials, remember that deciding to act without a

lawyer is a major step, and that not presenting your arguments effectively can have a dramatic effect on your case and, in turn, your life. **The Court strongly urges everyone who needs to participate in a lawsuit to obtain a lawyer, if possible.**

This handbook does not try to cover all of the procedures that may apply to your case; it is only a summary. Therefore, you should NEVER rely entirely on these materials, and you should ALWAYS review the law before taking any action in your lawsuit. If you have questions or need to know more about the law, that is up to you. Representing yourself means that you are responsible for following the law. Not knowing the law is no excuse; you will need to do research at a law library yourself.

CHAPTER 1
HOW CAN I FIND A LAWYER?

Everyone who is involved in a lawsuit[1] should make a serious effort to get a lawyer. The law can be complicated. In every case, there are important issues that take skill and practice to understand and handle. If you represent yourself, you are responsible for understanding and presenting not just your own point of view about your case, but also understanding the law, the rules of procedure, and the strengths and weaknesses of the other party's case.

Some organizations specialize in helping people in particular cases or just finding a lawyer. The organizations listed below are all certified legal referral services who may be able to help you find a lawyer to help you with your case. This list was obtained from the website of the State Bar of California and was updated as of January 1, 2003. You may wish to visit that website at http://www.calbar.org/2con/referral.htm to obtain the most current listings. Many lawyers also advertise in the Yellow Pages under "Attorneys."

SERVING ALL COUNTIES:

Elder Law
California Advocates for Nursing Home Reform Lawyer Referral Service
1610 Bush Street
San Francisco, CA 94109
(800) 474-1116
(415) 474-5171
(415) 474-2904 (fax)
LRS@canhr.org
http://www.canhr.org

Rights Relating To Creative Works
California Lawyers for the Arts

Headquarters, San Francisco County
Building C, Room 255
Fort Mason Center
San Francisco, CA 94123
(415) 775-7200 x762
(415) 775-1143 (fax)
cla@sirius.com
www.calawyersforthearts.org

Branch Office, Oakland
1212 Broadway St., #834
Oakland, CA 94612
(510) 444-6351
(510) 444-6352 (fax)
oaklandcla@yahoo.com

[1] To help you understand this manual better, most legal terms are defined in the Glossary, located at the end of this handbook. You should consult this glossary any time you are not sure what a word means.

Branch Office, Sacramento
926 "J" Street, #811
Sacramento, CA 95815
(916) 442-6210
(916) 442-6281
UserCLA@aol.com

Branch Office, Santa Monica
1641 18th Street
Santa Monica, CA 90404
(310) 998-5590
(310) 998-5594 (fax)

ALAMEDA COUNTY:

Alameda County Bar Association Lawyer Referral Service
610 Sixteenth Street, Suite 426
Oakland, CA 94612
(510) 893-7160
(510) 893-3119 (fax)
http://www.acbanet.org

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
(415) 701-1100
(415) 701-1400 (fax)
www.alrp.org
Counties served: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, Sonoma

Bay Area Policewatch
1230 Market Street, #409
San Francisco, CA 94102
(415) 951-4844
(415) 451-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

Project Sentinel Lawyer Referral Service
430 Sherman Avenue, Suite 308
Palo Alto, CA 94306
(650) 321-6291
(650) 321-4173 (fax)
Counties served: Alameda, San Francisco, San Mateo, Santa Clara

CONTRA COSTA COUNTY:

Contra Costa County Bar Association Lawyer Referral Service
1001 Galaxy Way, Suite 102
Concord, CA 94520-5736
(925) 825-5700
(925) 686-9867 (fax)
http://www.cccba.org/cclawyer/lrs.htm

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
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(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

DEL NORTE COUNTY:

There are no certified legal referral services in Del Norte County.

HUMBOLDT COUNTY:

Humboldt County Bar Association Lawyer Referral Service
123 Third Street
P.O. Box 1017
Eureka, CA 95502
(707) 445-2652
(707) 445-0935
justice@reninet.com

LAKE COUNTY:

There are no certified legal referral services in Lake County.

MARIN COUNTY:

Lawyer Referral Service of the Marin County Bar Association
1010 B Street, Suite 325
San Rafael, CA 94901-2989
(415) 453-5505
(415) 453-8273 (fax)
http://www.marinbar.org

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
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(415) 701-1400 (fax)
www.alrp.org
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1230 Market Street, #409
San Francisco, CA 94102
(415) 951-4844
(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

MENDOCINO COUNTY:

There are no certified legal referral services in Mendocino County.

MONTEREY COUNTY:

Monterey County Bar Association Lawyer Referral Service
140 W. Franklin Street, #308
P.O. Box 2307
Monterey, CA 93940
(408) 375-9889
(408) 375-5036 (fax)
sgood@redshift.com

NAPA COUNTY:

Bay Area Policewatch
1230 Market Street, #409
San Francisco, CA 94102
(415) 951-4844
(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

SAN BENITO COUNTY:

There are no certified legal referral services in San Benito County.

SAN FRANCISCO COUNTY:

Bar Association of San Francisco Lawyer Referral Service (No walk-ins)
465 California Street, Suite 1100
San Francisco, CA 94104-1804
(415) 989-1616
(415) 782-8985 (TDD)
(415) 477-2389 (fax)
www.sfbar.org/lrs/general.html

Barustors (No walk-ins)
595 Market Street, #1900
San Francisco, CA 94105
(415) 957-1330
http://www.barustors.com/maywerecommend.shtml

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
(415) 701-1100
(415) 701-1400 (fax)
www.alrp.org
Counties served: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, Sonoma

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San Francisco, CA 94102
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(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

Project Sentinel Lawyer Referral Service
430 Sherman Avenue, Suite 308
Palo Alto, CA 94306
(650) 321-6291
(650) 321-4173 (fax)
Counties served: Alameda, San Francisco, San Mateo, Santa Clara

SAN MATEO COUNTY:

Lawyer Referral Service of the San Mateo County Bar Association
303 Bradford Street, Suite B
Redwood City, CA 94063
(650) 369-4149
(650) 368-3892 (fax)
http://www.smcba.org/lrs.htm
Counties served: San Mateo, Santa Clara

Palo Alto Area Bar Association Lawyer Referral Service
405 Sherman Avenue
Palo Alto, CA 94306
(650) 326-8322
(650) 326-2218 (fax)
www.lawscape.com/paaba/
Counties served: San Mateo, Santa Clara

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
(415) 701-1100
(415) 701-1400 (fax)
www.alrp.org
Counties served: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, Sonoma

Bay Area Policewatch
1230 Market Street, #409
San Francisco, CA 94102
(415) 951-4844
(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

Project Sentinel Lawyer Referral Service
430 Sherman Avenue, Suite 308
Palo Alto, CA 94306
(650) 321-6291
(650) 321-4173 (fax)
Counties served: Alameda, San Francisco, San Mateo, Santa Clara

SANTA CLARA COUNTY:

Santa Clara County Bar Association Lawyer Referral Service
4 North Second Street, Suite 400
San Jose, CA 95113
(408) 971-6822
(408) 287-6083 (fax)
http://www.sccba.com/legalconsumer/

Lawyer Referral Service of the San Mateo County Bar Association
303 Bradford Street, Suite B
Redwood City, CA 94063
(650) 369-4149
(650) 368-3892 (fax)
http://www.smcba.org/lrs.htm
Counties served: San Mateo, Santa Clara

Palo Alto Area Bar Association Lawyer Referral Service
405 Sherman Avenue
Palo Alto, CA 94306
(650) 326-8322
(650) 326-2218 (fax)
www.lawscape.com/paaba/
Counties served: San Mateo, Santa Clara

Bay Area Policewatch
1230 Market Street, #409
San Francisco, CA 94102
(415) 951-4844
(415) 951-4813 (fax)
humanrts@ellabakercenter.org
www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

Project Sentinel Lawyer Referral Service
430 Sherman Avenue, Suite 308
Palo Alto, CA 94306
(650) 321-6291
(650) 321-4173 (fax)
Counties served: Alameda, San Francisco, San Mateo, Santa Clara

SANTA CRUZ COUNTY:

Lawyer Referral Service of Santa Cruz County
P.O. Box 1311
Santa Cruz, CA 95061-1311
(831) 425-4755
(831) 423-6202 (fax)
scba@juno.com

SONOMA COUNTY:

Sonoma County Lawyer Referral Service
37 Old Courthouse Square, Suite 100
Santa Rosa, CA 95404
(707) 546-5297
(707) 542-1195 (fax)
socobar@sonomacountybar.org
http://www.sonomacountybar.org/public/index.htm

Sonoma County Lawyer Referral Service Council on Aging
730 Bennet Valley Road
Santa Rosa, CA 95404
(707) 525-1146

Sonoma County Legal Services Foundation Modest Means Program
1212 Fourth Street #I
Santa Rosa, CA 95404
(707) 546-2924
(707) 546-0263 (fax)

AIDS Legal Referral Panel of the San Francisco Bay Area
205 13th Street, Suite 270
San Francisco, CA 94103-2461
(415) 701-1100
(415) 701-1400 (fax)
www.alrp.org
Counties served: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, Sonoma

Bay Area Policewatch
1230 Market Street, #409
San Francisco, CA 94102
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(415) 951-4813 (fax)
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www.ellabakercenter.org
Counties served: San Francisco, Alameda, Contra Costa, Fresno, Marin, Napa, San Joaquin, San Mateo, Santa Clara, Solano, Sonoma

CHAPTER 2
WHERE CAN I GO TO RESEARCH THE LAW ON MY OWN?

To bring a case in this Court, you need to know the procedural law or "steps" of a lawsuit. You also need to know the "substantive law," that is, what your case is about. For example, your case may concern an employment issue, or discrimination, or social security benefits; each of these subjects has a different set of laws.

Before you bring a lawsuit, you should look through the rules that explain the court's procedures. They can be found in several places, and you must know them all.

First, you need to know the **Federal Rules of Civil Procedure**. These rules apply in every federal court in the country, including this Court. These rules include information such as when briefs are due, how many pages they can be, and various other procedures. You can review the Federal Rules of Civil Procedure in any law library. You can also find them on the internet at http://www.law.cornell.edu/rules/frcp/overview.htm. The court does not provide copies of the Federal Rules of Civil Procedure.

Second, you should consult the **Federal Rules of Evidence**. These rules define what types of evidence can be given to the court. Obviously, a case can turn dramatically on what information can and cannot be shown to the court, so you should learn these rules early in your case. You can review the Federal Rules of Evidence in any law library. You can also find them on the internet at http://www.law.cornell.edu/rules/fre/overview.html. The court does not provide copies of the Federal Rules of Evidence.

Third, this Court has what are known as "Local Rules" that every person must know. The **Local Rules of the United States District Court for the Northern District of California** are in addition to the Federal Rules of Civil Procedure; and they apply **only to this Court**. You can obtain a copy of these rules free of charge in three different ways: (a) If you have a computer, you can download a copy of the rules to your computer from this Court's website, http://www.cand.uscourts.gov. (b) You also may pick up a copy by visiting any office of the clerk of the court during office hours. (c) You also may obtain a copy by mail by sending a written request, along with a stamped (with $4.30 return postage), self-addressed 10"x14" envelope to:

Local Rules
Clerk, U.S. District Court
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, California 94102.

Fourth, each judge has rules for his or her courtroom. These special rules are called "Standing Orders." Normally, the judge's clerk will send you a copy of these if you are the one who has filed the complaint. If you do not get them, you can call the judge's courtroom deputy or check the Court's website: http://www.cand.uscourts.gov.

In order to find the law that applies to your lawsuit–for example, the law of employment discrimination, or housing claims, or social security benefits–you will need to visit a law library.

You should seek help from a law librarian, who can show you where to find the specific law that you need. The following law libraries are all open to the general public. Always call first to make sure that the library will be open when you plan to visit.

Public Law Libraries in the Northern District of California

Alameda County:

Bernard E. Witkin Alameda County Law Library
http://www.co.alameda.ca.us/law/index.htm

Main Branch
125 12th Street

Oakland, CA 94607-4912
Telephone: (510) 208-4800
Fax: (510) 208-670-4836

South County Branch
224 W. Winton Avenue, Rm. 162
Hayward, CA 94544
Telephone: (510) 670-5230
Fax: (510) 670-5292

University of California Law Library, Boalt Hall
Berkeley, CA 94720-2499
Telephone: (510) 642-4044
Fax: (510) 643-5039
http://www.law.berkeley.edu/library/library.html

Contra Costa County:

Contra Costa County Public Law Library
http://www.cccllib.org

Main Branch
1020 Ward Street, 1st Floor
Martinez, CA 94553
Telephone: (925) 646-2783
Fax: (925) 646-2438

Richmond Branch
100 37th Street, Room 237
Richmond, CA 94805
Telephone: (510) 374-3019

Del Norte County:

Del Norte County Law Library
County Courthouse
450 H Street
Crescent City, CA 95531
Telephone: (707) 464-8115

Humboldt County:

Humboldt County Law Library
County Courthouse
825 5th Street #812
Eureka, CA 95501
Telephone: (707) 269-1270
Fax: (707) 445-7201

Lake County:

Lake County Law Library
175 3rd Street
Lakeport, CA 95453
Telephone: (707) 263-2205
Fax: (707) 263-2207

Marin County:

Marin County Law Library
20 North San Pedro Road, Suite 2015
San Rafael, CA 94903
Telephone: (415) 499-6356
Fax: (415) 499-6837

Mendocino County:

Mendocino County Law Library
Room 307
100 North State Street
Ukiah, CA 95482
Telephone: (707) 463-4201
Fax: (707) 468-3459

Monterey County:

Monterey County Law Library

Monterey Branch
Courthouse
1200 Agualjito Road, Room 202
Monterey, CA 93940
Telephone: (831) 647-7746
Fax: (831) 372-6036

Salinas Branch
Federal Office Building
100 W. Alisal Street, Room 144
Salinas, CA 93901
Telephone: (831) 755-5046
Fax: (831) 422-9593

Napa County:

Napa County Law Library
Historic Courthouse
825 Brown Street
Napa, CA 94559
Telephone: (707) 259-8191
Fax: (707) 259-8318

San Benito County:

San Benito County Law Library
Courthouse
440 Fifth Street
Hollister, CA 95023
Telephone: (831) 636-9525

Santa Clara County:

Santa Clara County Law Library
360 N. First Street
San Jose, CA 95113
Telephone: (408) 299-3568
Fax: (408) 286-9283

Santa Cruz County:

Santa Cruz Law Library
701 Ocean Street, Room 070
Santa Cruz, CA 95060
Telephone: (831) 457-2525
Fax: (831) 457-2255
librarian@lawlibrary.org

San Francisco County:

San Francisco Law Library
401 Van Ness Avenue, Room 400
San Francisco, CA 94102
Telephone: (415) 554-6821
Fax: (415) 554-6820
http://www.ci.sf.ca.us/sfll/

Financial District Branch
Monadnock Building
685 Market Street, Suite 420
San Francisco, CA 94105
Telephone: (415) 882-9310
Fax: (415) 882-9594
http://www.ci.sf.ca.us/sfll//

Hastings College of the Law, Library
200 McAllister Street, 4th floor
San Francisco, CA 94102-4978
Telephone: (415) 565-4750
Fax: (415) 621-4859
http://www.uchastings.edu/library/index.html

San Mateo County:

San Mateo County Law Library
Cohn-Sorenson Law Library Building
710 Hamilton Street
Redwood City, CA 94063
Telephone: (650) 363-4913
Fax: (650) 367-8040
http://www.smcll.org

Sonoma County:

Sonoma County Law Library
Hall of Justice, Room 213-J
600 Administration Drive
Santa Rosa, CA 95403-2879
Telephone: (707) 565-2668
Fax: (707) 565-1126
http://www.sonomacountylawlibrary.org/

CHAPTER 3
I WANT TO FILE A LAWSUIT, BUT WHERE DO I START?

Generally, the first official step in filing a lawsuit is to file a complaint with the court. The complaint is a legal document in which you tell the court and the defendant or defendants how and why you believe the defendant or defendants violated the law in a way that has injured you.

You may hear people refer to a lawsuit as "the case" or "the action." These words mean the same thing, and are just other ways of referring to a lawsuit.

What information needs to be in a complaint?

The complaint must contain all of the following information:

- The names, addresses, telephone numbers, and fax telephone numbers (if any) of all of the plaintiffs, and the names of all of the defendants. The plaintiffs are the people who file the complaint and who claim to be injured by a violation of the law. The defendants are the people that the plaintiffs contend injured them in violation of the law. The plaintiffs and the defendants together are referred to as "the parties" or "the litigants" to the lawsuit.

- A statement explaining why you believe this court has the power to decide this particular case (i.e., that it has "subject matter jurisdiction" over your lawsuit). Federal courts cannot decide all legal questions, so you need to explain briefly what federal law allows the court to decide this dispute.

- A statement explaining why you believe the Northern District of California is the proper federal court (as opposed to other federal district courts) for deciding your lawsuit. This is called establishing the "venue."

- A statement indicating the division of the Northern District of California court–i.e., San Francisco, Oakland, or San Jose – to which you believe the case should be assigned.

- A statement explaining what you believe the defendant or defendants did to you that violated the law and how it injured you – i.e., lost wages, lost benefits, etc.

- A statement explaining what you want the court to do.

- The signatures of each of the plaintiffs.

Each of these items is explained in greater detail below.

What does a complaint look like?

There are form complaints available through the clerk's office if your case is about one of the following:

Employment discrimination (complaints alleging violations of Title VII of the Civil Rights Act of 1964); or

Review of a denial of social security benefits.

You can get a form complaint from the clerk's office in the court, or on the Northern District's website at http://www.cand.uscourts.gov. If your lawsuit is in one of these two categories, using the forms will probably make it easier for you to write your complaint.

You can also find form complaints for many other areas of the law in nearly any law library. The following books are examples of large multi-volume encyclopedias of the law that contain form complaints for many areas of the law:

California Forms of Pleading and Practice;

West's Federal Forms;

Federal Procedural Forms, Lawyer's Edition; and

American Jurisprudence Pleading and Practice Forms.

Other books may contain additional helpful forms. Any law librarian can help you find these books or other books that may help you write your complaint.

Even if there is a form complaint, you may choose to write your own complaint. If you cannot find a form complaint that applies to your lawsuit, you **must** write your own complaint.

What is included in a complaint?

The first page of any document you file with the court is sometimes called the "caption page." Rule 10(a) of the Federal Rules of Civil Procedure and this Court's Civil Local Rule 3-4 explain what needs to be on the caption page and how it should look. The last page of this chapter shows what a typical caption page should look like. When you file your complaint, please leave the case number blank. The clerk will assign a case number when you file the complaint and will stamp that number on the complaint.

After the caption, you can begin writing the text of your complaint. Rule 10(b) of the Federal Rules of Civil Procedure requires you to write your complaint using a specific format. Each paragraph must be numbered, and each paragraph must discuss only a single set of circumstances. Do not combine different ideas in a single paragraph. Rule 10(b) also requires you to state each claim separately, as long as it helps make the complaint easier to read. A claim is a statement in which you argue that the defendant violated the law in a specific way.

Ordinarily, complaints begin with a paragraph explaining the basis for the court's subject matter jurisdiction (i.e., what law allows a federal court to decide this case). The next paragraph should explain the basis for filing the federal lawsuit in this venue, that is the Northern District of California. The concepts of subject matter jurisdiction and venue will be explained below.

The next paragraphs of the complaint should identify the plaintiffs and defendants.

After you have identified the plaintiffs and defendants, the following paragraphs should explain what happened and how you were injured.

Next, you should state your separate claims (also known as "counts"), explaining how you believe the defendant's actions violated the law. If you know the specific laws that you believe the defendant violated, you should state them. It makes it easier for the court and the defendants to understand your complaint if you explain the specific laws that you think were violated. It is not required, however, and if you believe the defendant violated the law, but are not sure which law was violated, you still may file a complaint.

The last part of the complaint should be a section entitled "Prayer for Relief." In the prayer for relief, you should state what you want the court to do. For example, you can request that the court order the defendant to pay you money, or order the defendant to do something or stop doing something. If you are not sure what is appropriate, you can also ask the court to award "all additional relief to which to the plaintiff is entitled."

At the very end of the complaint, all of the plaintiffs must sign their names.

Why do I have to include my name, address, and telephone and fax numbers in the complaint? Why do I have to sign the complaint?

Rule 10(a) of the Federal Rules of Civil Procedure requires the complaint to include the names of all of the parties to the lawsuit. Rule 11(a) of the Federal Rules of Civil Procedure requires that every document filed in the lawsuit be signed by the plaintiffs if they are not represented by a lawyer. Rule 11(a) also requires that every document filed with the court must state the address and telephone number of the person who signed it. This Court's Civil Local Rule 3-4(a) requires that every document filed with the Court include the fax number of the person on whose behalf the document is being filed, if they have one.

The purpose of including the addresses and telephone numbers is to ensure that the court and the defendants have a way to contact you. Under Civil Local Rule 3-11, you have a duty to promptly notify the court and all opposing parties if your address changes while your lawsuit is pending. If the court sends you mail and it is returned as undeliverable, and the court does not receive a written communication from you within 60 days with your correct, current address, the court may dismiss your case.

Rule 11(b) of the Federal Rules of Civil Procedure states that by signing the complaint you are promising to the court that:

- You are not filing the complaint for any improper purpose, such as to harass the defendant or to force the defendant to spend unnecessary legal fees;

- The legal arguments you make in the complaint are justified by existing law, or by a good faith argument for extending or changing the existing law; and

- You have evidence to support the facts stated in your complaint, or you are likely to have that evidence after a reasonable opportunity for further investigation or discovery.

If the court later finds that one of these things was not true–for instance, that you filed the complaint to harass the defendant, or that you had no evidence to support the facts you alleged in the complaint–it can impose sanctions on you. Sanctions are penalties. For example, the court might order you to pay a fine, or to pay the defendant's attorney's fees. It can also dismiss your complaint, or impose any other sanction that it believes is necessary to prevent you, or other persons like you, from violating Rule 11 again. See Rule 11(c) for more information about sanctions.

Given the risk of Rule 11 sanctions, it is very important that you investigate the facts and the law **before** you file your complaint.

What is subject matter jurisdiction?

The first paragraph of the complaint should explain why you believe this court has subject matter jurisdiction to hear your lawsuit. Civil Local Rule 3-5(a) requires you to identify the law and facts that give the court jurisdiction over your lawsuit.

The court system in the United States is made up of state courts and federal courts, which are completely separate from each other. State courts have the authority to hear almost any type of case, but federal courts are authorized under the law to hear only certain types of cases. This Court, the United States District Court for the Northern District of California, is a federal court. If the law permits a federal court to hear a certain type of lawsuit, the court is said to have subject matter jurisdiction over that type of lawsuit.

The two most common types of lawsuits that federal courts are authorized to hear are the following:

(1) At least one of the plaintiffs' claims arises under the Constitution, laws, or treaties of the United States (see 28 U.S.C. § 1331). This is often referred to as "federal question jurisdiction."

(2) None of the plaintiffs live in the same state as any of the defendants, and the amount in controversy exceeds $75,000 (see 28 U.S.C. § 1332). This is often referred to as "diversity jurisdiction." "Amount in controversy" refers to the dollar value of what you want the court to do.

There are also other types of lawsuits that federal courts are authorized to hear. You can find more information in the United States Code beginning at 28 U.S.C. § 1330.

Generally, but not always, if a federal court does not have subject matter jurisdiction to hear your lawsuit, you should file your lawsuit in state court.

What is venue?

"Venue" means the place where the lawsuit is filed. The law does not allow you to file your lawsuit just anywhere in the United States. Generally, you must file your lawsuit in a district that is convenient for the defendant. This Court is in the Northern District of California, which includes all of the following counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, and Sonoma.

Although the rules on venue are somewhat complicated, it is generally appropriate to file your lawsuit in:

A district where any of the defendants reside, if they all reside in the same state, or

A district where the defendants did a substantial part of the things that you believe violated the law.

The United States Code contains much more detailed information about venue beginning at 28 U.S.C. § 1391.

How do I determine the division of the court to which my lawsuit should be assigned?

This district has courts in three locations or "divisions": San Francisco, Oakland, and San Jose. Civil Local Rule 3-4(b) requires a complaint to include a paragraph entitled "Intradistrict Assignment," which must identify any basis for assigning the case to a particular location or division of the Court.

Civil Local Rule 3-2(c) explains that the location or division of the Court to which each new lawsuit should be assigned is usually determined by the county in which the lawsuit arose. A civil lawsuit arises where:

A substantial portion of the events that gave rise to the lawsuit occurred, or

Where a substantial part of the property that is the subject of the lawsuit is located.

If the lawsuit arose in Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo or Sonoma counties, the lawsuit usually will be assigned to the San Francisco or Oakland Divisions of the Court. If the lawsuit arose in Santa Clara, Santa Cruz, San Benito or Monterey counties, it usually will be assigned to the San Jose Division of the Court.

A different rule applies to patent infringement actions, securities class actions, capital and noncapital prisoner petitions, and prisoner civil rights actions. Those lawsuits are assigned randomly to one of the three divisions of the Court.

How much detail should I include in the complaint?

Rule 8(a) of the Federal Rules of Civil Procedure states that a complaint only needs to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Therefore, you should include enough detail so that the court and the defendant can clearly understand what happened, how you were injured, and why you believe that you are entitled to a remedy from the court. You do not need to state every bit of detail that you can remember.

It is often easiest for the court and the defendants to understand your complaint if you tell your story in the order it happened.

Rule 9(b) of the Federal Rules of Civil Procedure requires you to include more detail about any claim that the defendant engaged in fraud than you would for other types of claims. The circumstances constituting fraud must be stated with particularity, which means that you must state the time and place of the fraud, the persons involved, the statements made, and an explanation of why or how those statements were false or misleading.

If you have documents that support your complaint, you can attach copies of them to the complaint as exhibits. Do not attach copies of any documents that you do not discuss in your complaint.

What do I have to put in the complaint if I want a jury trial?

Under the law, not all lawsuits are entitled to jury trials. If you want the trial of your lawsuit to be heard by a jury, however, it is a good idea to include a "demand for jury trial" in your complaint. If you do not tell the court and the defendants in writing that you want a jury trial within ten days after filing the complaint, you may be found to have given up any right you might have had to a jury trial. See Rule 38 of the Federal Rules of Civil Procedure for more information. If you give up your right to a jury trial, the trial of your case will be heard by a judge without a jury.

Because the time limit for requesting a jury trial is so short, many people find it easier and more convenient to include the jury demand in the complaint, although it is okay to file it as a separate document. If you decide to demand a jury trial in your complaint, Civil Local Rule 3-6(a) requires that you make the demand at the end of the complaint. To ask for a jury trial in your complaint, all you need to do is include a line at the end of the complaint that says, "Plaintiff demands a jury trial on all issues" and put the words "DEMAND FOR JURY TRIAL" in the caption of your complaint. See Civil Local Rule 3-6(a).

How quickly do I need to file a complaint?

Every claim has a time limit associated with it, which is referred to as the "statute of limitations." The statute of limitations is the amount of time you have to file a complaint after you have been injured, or, in some cases, after you became aware of the cause of the injury. Once that time limit has passed, the claim is considered to be too old to be the basis of a lawsuit. If you include a claim in your complaint that is too old, the opposing party may file a motion to dismiss the claim as "time-barred," which is just another way of saying that it is too late: the statute of limitations has expired on that claim.

The statute of limitations is different for every claim. The only way to find out the statute of limitations for a particular claim is to do research at a law library.

What do I do after I file the complaint?

After you file the complaint, you must serve a copy of the complaint on all of the defendants. Nothing else will happen in your lawsuit until you serve the complaint on the defendants. The requirements for serving the complaint are explained in Chapter 5 of this handbook.

Can I change or amend the complaint after I file it?

Changing a document that has already been filed with the court is known as "amending" the document. Under Rule 15(a) of the Federal Rules of Civil Procedure, you can amend your complaint at any time before the defendant files an answer. You do not need to get permission from the court or from the defendant to amend before the defendant answers.

If you want to amend your complaint after defendant has filed an answer, Rule 15(a) lets you do this in one of two ways.

First, you can file the amended complaint if you get written permission from the defendant. When you file the amended complaint, you must also file the document showing that you have written permission from the defendant to amend your complaint.

Second, if the defendant won't agree to let you amend your complaint, you must file a motion with the court to get its permission to amend your complaint. In that motion, you must explain why you need to amend your complaint. You should include a copy of the amended complaint that you want to file. If the court grants your motion, you can then file your amended complaint.

When you file an amended complaint, Civil Local Rule 10-1 requires you to file an entirely new complaint. Because an amended complaint completely replaces the original complaint, you cannot just file the changes that you want to make to the original complaint. The caption of your amended complaint should say: "FIRST AMENDED COMPLAINT." If you amend your complaint a second time, the caption should say: "SECOND AMENDED COMPLAINT."

Example of a caption page

The following page shows an example of a caption page for a complaint where the plaintiffs are John Doe and Jane Jones, the defendants are John Smith and Smith Construction Company, and the plaintiffs are asking for a jury trial.

John Doe
123 Main Street
San Francisco, CA 94102
(415) 555-1234
(415) 555-1235 (FAX)

Jane Jones
127 Main Street
San Francisco, CA 94102
(415) 555-6789
(415) 555-6700 (FAX)

Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE and JANE JONES, Plaintiffs, vs. JOHN SMITH and SMITH CONSTRUCTION CO., Defendants.	Case No. _____ COMPLAINT DEMAND FOR JURY TRIAL

1. **Jurisdiction.** This court has jurisdiction over this complaint because it arises under the laws of the United States.

2. **Venue.** Venue is appropriate in this court because both of the defendants reside in this district, and a substantial amount of the acts and omissions giving rise to this lawsuit occurred in this district.

3. **Intradistrict Assignment.** This lawsuit should be assigned to the San Francisco Division of this Court because a substantial part of the events or omissions which give rise to this lawsuit occurred in Marin County.

4. Plaintiffs John Doe ("Doe") and Jane Jones ("Jones") are construction workers employed by defendant Smith Construction Co.

CHAPTER 4
HOW DO I FILE PAPERS WITH THE COURT?

In order to start a lawsuit in federal court, there are two things that every person must do. First, you must file your papers with the court. Although it may sound simple, this means more than just giving your papers to the clerk's office to file. The papers must comply with the court's rules, and if they do not, the clerk will not accept them. Second, you must serve your papers on the other side, which means making sure they receive copies. Until the other side receives the papers in a way that the law says is valid, they are not a party to the lawsuit, and the case has not really begun. Although sending papers to another party may sound simple, it too can be complicated.

This chapter describes how you file documents with the court, including your complaint. The next chapter explains how to serve papers that you submit to this Court. While the rules about filing and serving may seem difficult, they exist for very good reasons.

The court's rules about filing ensure that the court receives the papers you want it to receive, and your papers will not be lost somehow. In a lawsuit, the court must keep track of everything that the parties want the judge to receive. Filing your papers with the clerk allows the judges to be sure that they have all the papers, and it allows you a way to check and make sure that the judges actually have your papers to read.

Following the filing rules is important, because most of what happens in your case will be based on the papers that you file. All of your communications with the court will be in writing, except when the judge has a hearing in your lawsuit. (A hearing is a formal meeting that occurs in the courtroom at a date and a time agreed to by the judge.) You may talk to the judge at the hearing to explain the position that you put in your papers to the court. Even then, however, you are allowed only to explain the arguments that you actually gave the court in writing. Because most of your contact with the court is based on what you write and file, pay close attention to the filing rules. Before you begin writing any document that you plan to file with the court, be sure to read Civil Local Rule 3-4. That rule explains what you have to do for your document to be accepted for filing. Although this chapter summarizes the process, you are responsible for obeying the rules themselves.

Do I need a caption page?

Every document you file must begin with a caption page. As discussed in Chapter 3, a caption page is a cover page that includes: (1) your name, address, telephone number, and, if you have a fax machine, your fax number; and (2) the caption that includes the name of this Court, the name of the case, the case number, and a title describing the document. You may wish to look at captions filed in other cases to get a sense of what the caption should look like, and how a cause of action is described. However, do not assume that a caption that you have reviewed complies with all of the rules. You need to review those rules yourself before you submit papers to the court. (One sample caption can be found at the end of Chapter 3.

How do I file documents?

You can file documents in three different ways:

1. You can bring the documents to the clerk's office to file them in person;

2. You can fax the documents to a company known as a "fax filing service," which will then bring the documents to the clerk's office to file them; or

3. You can mail the documents to the court for filing.

Each of these methods is explained in detail below.

Regardless of which method you use, certain rules apply in every case. You need to file all documents in the clerk's office of the correct courthouse. The Northern District of California has three different courthouses: San Francisco, Oakland, and San Jose. Each of these is a different division. You should be sure to send or bring your documents to the clerk's office in the division to which your lawsuit has been assigned, unless the judge informs you that you may file papers elsewhere. For example, if your lawsuit has been assigned to a judge in the San Francisco division of this Court, you must file all papers in that lawsuit in San Francisco, and not in the Oakland or San Jose divisions.

You need to have the correct number of copies of your document. In this Court, you always need an original and **at least** one copy. To file a document, you must give the clerk the original copy of the document (that is, the one that you actually signed) and one photocopy of the signed original. The photocopy must be marked "CHAMBERS" on the caption page. If your case has been assigned to a magistrate judge for a hearing, you must also file a third copy for the magistrate judge . Be sure to keep an extra copy of every document you file for your own files.

The original document that you give the court will be filed in the permanent court file for your lawsuit. Filing means that the document is kept by the court and becomes one of the documents that are formally available to be used by the parties and the judge. The copy will be sent to the judge in his or her private office or chambers – that's why the copy should be marked "CHAMBERS." Documents that are not accepted for filing may not be sent to the judge, and will not be considered by the judge.

With every document you file, you should also file a certificate of service, which shows that you provided a copy of the document to all of the other persons (including organizations) who are named as parties to the lawsuit. The methods for serving documents on other parties must be strictly followed, and are described elsewhere in this handbook. If you do not submit a certificate of service, the clerk will not refuse to file your documents. However, the judge may disregard any document if a party to the lawsuit demonstrates that you did not serve it with a copy of the document. For this reason, you should be sure to carefully follow all of the rules for serving documents and include a certificate of service with all documents that you file.

To file documents in person during normal business hours

The clerk's office in each division of the court is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, except for federal holidays. In San Francisco, the clerk's office is located at 450 Golden Gate Avenue, on the 16th floor. In Oakland, the clerk's office is located at 1301 Clay Street, Suite 400 South. In San Jose, the clerk's office is located at 280 South First Street.

To file documents in person, bring the completed documents, in the format required by Civil Local Rule 3-4, to the clerk's office during business hours.

Although the clerk's office makes every effort to file documents quickly, some days and times of the day are busier than others, and sometimes there are long lines of people waiting to file documents. If you want to avoid waiting in line, the clerk's office is usually less busy in the middle of the week than it is on Monday or Friday. It is also less busy in the middle of the day than it is first thing in the morning and between 3:00 p.m. and 4:00 p.m. in the afternoon.

When the document is filed, the clerk's office personnel will stamp the document with the date you filed the document. If you want to have a stamped copy for your own files, you must bring another copy for the clerk to stamp. The clerk will stamp that copy and hand it back to you. Although you are not required to obtain a stamped copy for your own files, it is a good idea because on very rare occasions documents do get misplaced or lost in the court. If you have a stamped copy of the document in your own files, you will be able to prove to the judge that you filed the document on time.

To file documents in person after hours using the drop box

If you want to file your documents in person, but you are unable to go to the clerk's office between 9:00 a.m. and 4:00 p.m., the clerk's office also maintains a drop box that can be used to file most documents before and after regular business hours.

In San Francisco, the drop box is open between 6:00 a.m. and 9:00 a.m. and between 4:00 p.m. and 6:00 p.m., Monday through Friday, except for federal holidays. The drop box is near the entrance to the clerk's office.

In Oakland, the drop box is open between 7:00 a.m. and 9:00 a.m. and between 4:00 p.m. and 5:00 p.m., Monday through Friday, except for federal holidays. The drop box is located in the courthouse lobby on the first floor.

In San Jose, the drop box is open between 7:30 a.m. and 9:00 a.m., and between 4:00 p.m. and 5:00 p.m., Monday through Friday, except for federal holidays. The drop box is located near the clerk's office entrance on the second floor.

Civil Local Rule 5-3 explains the rules for using the Court's drop box to file documents. Before putting a document in the drop box, you must stamp the last page of the document "Received," using the electronic file-stamping machine that is next to the drop box. Don't forget to stamp your document in the machine before it goes in the drop box. After stamping each original and enclosing one chambers copy, the documents must be placed in an orange court mailing pouch or red Expando folder. These are provided by the court, and will be near the drop box. Each original document should be placed on top of its copies. Before placing the pouch or folder in the drop box, please insert in the pouch or folder window a fully completed Drop Box Filing Information Card. These cards will also be right near the drop box. You may use more than one pouch or folder per filing, but you'll need to include a separate Drop Box Filing Information Card with every pouch or folder.

If you would like a file-stamped copy of each document, you must provide an extra copy of each document. If you would like the clerk's office to mail the file-stamped copies back to you, you also must enclose an appropriately sized, self-addressed, stamped envelope with adequate return postage. If you don't mind coming back to the courthouse to pick up your file-stamped copies, you may mark your return envelope "FOR MESSENGER PICKUP BY: (NAME)." Your copies will be available for pick-up at the clerk's office between 2:00 and 4:00 p.m. on the day the drop box is emptied.

The drop box cannot be used for matters that you want to have heard on very short notice. Specifically, the drop box may not be used to file any papers in support of, or in opposition to, any matter that is scheduled for hearing within seven calendar days.

If you use the drop box to file a complaint, you must include a check or money order for the amount of the applicable filing fee. The check or money order should be made payable to "Clerk, United States District Court." Do not enclose cash.

Filing by fax

Civil Local Rule 5-2 explains the procedure for filing documents by fax. Although this Court will accept fax copies for filing, you cannot fax the documents directly to the Court. Instead, you must fax the documents to a fax filing agency or to some other person who will then file the faxed documents in person at the clerk's office. You must arrange with this person or service to file an additional "chambers" copy of the faxed document, just as if you were filing the original documents in person.

When you file a document by fax, you must keep the original document until the end of the case. You also must keep a copy of the fax record that shows you sent the document. (Most fax machines make one of these records, called a transmission record, automatically when you send a document.) The record must state the telephone number of the receiving machine, the number of pages sent, the transmission time and an indication that no error in transmission occurred. You must keep this transmission record until the case is over.

You must allow the court or any other party to the lawsuit to review the original document, upon request.

Filing by mail

You can also file documents by mailing them to the court.

In San Francisco, the mailing address is Clerk's Office, United States District Court for the Northern District of California, 450 Golden Gate Avenue, 16th Floor, San Francisco, CA 94102.

In Oakland, the mailing address is Clerk's Office, United States District Court for the Northern District of California, 1301 Clay Street, Suite 400 South, Oakland, CA 94612.

In San Jose, the mailing address is Clerk's Office, United States District Court for the Northern District of California, 280 South 1st Street, San Jose, CA 95113.

If you would like a copy of each document with a stamp on it to show that it was filed, you must provide an extra copy of each document. If you would like the clerk's office to mail the file-stamped copies back to you, you also must enclose an appropriately sized, self-addressed, stamped envelope with adequate return postage.

How is filing a complaint different from other papers?

There are special rules for filing a complaint. In addition to the rules explained above, you also must fill out a Civil Cover Sheet. You can obtain a copy of the form for the Civil Cover Sheet at the clerk's office or at this Court's website at http://www.cand.uscourts.gov. Instructions for filling out the Civil Cover Sheet are on the form.

When filing a complaint, you must file the original complaint plus **two** copies. If your complaint contains claims relating to patents, copyrights, or trademarks, you must file the original complaint plus **three** copies.

If you are filing your complaint in person, you must arrive at the clerk's office before 3:30 p.m. because it can take a longer time for the clerk to file complaints.

What kinds of fees and other costs do I have to pay?

The fee for filing a complaint is $150.00. After the initial complaint is filed, you do not have to pay any additional fees to file most documents with the court.

The following chart shows some of the fees that a party must pay if they file certain types of documents. These fees are set by the United States Congress and the Judicial Conference of the United States.

The Clerk's Office can only accept payment by exact change, check, or money order made payable to "Clerk, U.S. District Court."

Fee Schedule (effective June 1, 2004)

Civil Case filing fee	$150.00
Notice of Appeal filing fee	$255.00
Habeas Corpus petition filing fee	$5.00
Filing fee for civil action brought under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 this fee is in addition to $150 civil case filing fee	$5431.00
Filing or indexing any document not in a case or proceeding for which a filing fee has been paid (miscellaneous matter)	$39.00
For every search of the records, per name or item searched (this fee shall be applicable to the United States if the information requested is available through electronic access)	$26.00
For every search of court records conducted by the PACER Service Center	$20.00

For certification of any document, whether made directly on the document or by separate instrument	$9.00
For exemplification of any document or paper	$18.00
For reproducing any record or paper, per page, whether from original documents or from microfiche or microfilm reproductions of original records (this fee shall apply to services rendered on behalf of the United States if the record or paper is available through electronic access)	$.50
For printing copies of any record or document accessed electronically at a public terminal in the courthouse (this fee shall apply to services rendered on behalf of the United States if the record requested is remotely available through electronic access)	$.10
For reproduction of recordings of proceedings, including cost of materials	$26.00
For retrieval of a record from the Federal Records Center or National Archives	$45.00
For a check paid into the court which is returned for lack of funds	$45.00
For an appeal to a district judge from a judgment of conviction by a magistrate judge in a misdemeanor case	$32.00
Power of attorney fee (per attorney, per company)	$39.00
For admission of attorney to practice, including Certificate of Admission	$210.00
For admission of an attorney *pro hac vice*	$60.00
For a duplicate Certificate of Admission or Certificate of Good Standing	$15.00
For remote electronic access to court records via a federal judiciary Internet site, per page, with the total fee per document not to exceed the fee for 30 pages	$.07
(Note: the electronic access fee shall apply to the United States; the 30-page fee limit shall not be applicable to transcripts of federal court proceedings; and, no fee will be charged to view documents at the courthouse.)	
The Clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.	

Note: Fees are authorized by Title 28, USC, Sec. 1914 and Civil L.R. 11-1(d) and 11-3(c). Complete texts of federal court fee schedules are available at: http://www.uscourts.gov/courtfee.html

What is a court transcript and how much does it cost?

Most, but not all, court hearings are recorded by a court stenographer (also known as a court reporter) who types everything that is said in court as it is being said, or by a tape recorder operated by either an electronic court recorder operator (ECRO) or a calendar clerk. To find out if a court proceeding was reported or recorded, you should look at the docket entry of the hearing. Docketinformation is available on-line from PACER or by calling the docket clerk for your judge. (See Chapter 8 of this Handbook for more details on accessing docket information

and the PACER system.) Immediately after the docket entry "MINUTES," you will see another entry such as: "(C/R: John Smith)." In this example, John Smith would have been the reporter or ECRO. If "None" is listed, the proceeding was not taken down by a court reporter and so no transcript is available. If the proceeding was tape recorded by a calendar clerk, the entry after "MINUTES" will be a tape recording number.

If a reporter or ECRO's name is listed, you may obtain a transcript by contacting that court reporter or ECRO directly. If the docket entry indicates that a tape recording of the proceeding was made, you may obtain a copy by contacting the calendar clerk for the assigned judge.

By and large, the faster you want to see the transcript, the more it will cost. There are many different types of transcription. The fastest is real-time transcription, sometimes called a "dirty disk" because it is likely to be messy and contain some errors. Real-time transcripts are available immediately; they are draft, uncorrected transcripts produced by a certified real-time reporter. Real-time transcripts can be delivered electronically during the proceedings, so you can actually see the transcript being written as the court reporter types it into his or her computer, or it can be delivered immediately after court adjourns. The next fastest type of transcription is hourly, which can be delivered within two hours. Then there's daily transcription, where the transcript will be delivered to you after the court adjourns on that day, but before the next normal opening hour of court. Expedited transcripts will be delivered within 7 calendar days after the reporter receives your request. Finally, there is the ordinary rate. For the ordinary rate, the transcripts are delivered within 30 calendar days after the reporter receives your request.

The following is the fee schedule for transcripts; these rates apply to **each** page of transcript:

	Original per page	1st Copy to Each Party per page	Each Additional Copy to Same Party per page
Ordinary Rate	$3.30	$.75	$.50
Expedited Rate	$4.40	$.75	$.50
Daily Rate	$5.50	$1.00	$.75
Hourly Rate	$6.60	$1.00	$.75
Realtime	$2.75		

More information about requests for transcripts for appellate purposes is in Civil Local Rule 79-1.

What if I can't afford the $150.00 fee for filing a new complaint?

If you cannot afford the $150.00 filing fee, you must file an Application to Proceed In Forma Pauperis. In Forma Pauperis (IFP) is a Latin phrase which means that you are proceeding as an indigent person. You must fill out the application completely to the best of your ability if you wish to show the court that you do not have enough money to pay the filing fee. You can get this form at either the clerk's office or at the Court's website, http://www.cand.uscourts.gov.

If the Court finds that you have demonstrated that you cannot afford to pay the $150.00 fee, you will be allowed to file your complaint without paying it.

When you file an Application to Proceed IFP, the clerk will not file your complaint immediately. Instead, the complaint and the Application to Proceed IFP will be assigned to a judge. That judge will decide whether you should be allowed to file your complaint without paying the filing fee. Although the judge will try to make a decision on your application as quickly as possible, it probably will not be done on the day you file your application. Therefore, there is no reason to wait in the clerk's office. You will be notified of the judge's decision by mail.

When the judge reviews your application, he or she will also review your complaint. Whether or not you can afford to pay the filing fee, the judge must dismiss your complaint if he or she finds that your complaint (1) is frivolous or malicious (that is, its only purpose is to harass the other side); (2) fails to state a proper legal claim (that is, a claim on which relief may be granted); or (3) seeks money from a defendant who is legally not required to pay money damages. These requirements are laid out in the federal statute 28 U.S.C. § 1915.

If the judge decides that your complaint meets these requirements, but he or she also finds that you **can** afford to pay the filing fee, your complaint will be dismissed unless you pay the filing fee within a specific period of time.

If the judge decides that your complaint meets these requirements, and he or she also finds that you **cannot** afford to pay the filing fee, then the judge will order the clerk to file your complaint without making you pay the filing fee. You will not need to go back to the clerk's office to file your complaint. When the judge approves your Application to Proceed In Forma Pauperis, the clerk will file the complaint.

However, even if the judge grants your Application to Proceed IFP, the only fee that you will be excused from paying is the initial $150.00 filing fee. You will **still** have to pay all other applicable fees listed above.

CHAPTER 5
WHAT ARE THE REQUIREMENTS FOR SERVING DOCUMENTS ON THE OTHER PARTIES TO THE LAWSUIT?

You must give the other partiesto your lawsuit a copy of every document that you file with the court. This is often referred to as "serving" the other parties. Like filing, serving your documents is critical. If you do not give your papers to the other parties in exactly the way required by law, it is as if you never filed those papers at all.

The rules for serving the original complaint are different from the rules for serving other documents, and must be followed exactly. If the complaint is not properly served on the other parties, the case will not proceed. This chapter describes how to serve your complaint (which can be a complicated process) and how to serve all other papers (which is generally much simpler).

What are the rules for serving the complaint?

Rule 4 of the Federal Rules of Civil Procedure lays out the rules for serving the original complaint. Serving a complaint is often called "service of process." The rules for serving a complaint can be very complicated, but they must be followed carefully. Until the complaint is served, nothing else will happen in the lawsuit.

In order to serve the original complaint, you must first get a summons from the court. You can get a form for this from the clerk's office or at the Court's website at http://www.cand.uscourts.gov. It is your choice whether to ask for one summons listing all of the defendants, or to get a separate summons for each defendant named in your lawsuit.

Rule 4 of the Federal Rules of Civil Procedure describes the different ways to serve a complaint. We explain the gist of them here, but you should always read Rule 4, and the Local Civil Rules of this Court, for yourself to see the complete rules that apply.

What if I filed in forma pauperis?

As discussed in the previous chapter, filing or proceeding in forma pauperis means filing**Error! Bookmark not defined.** or proceeding as one who cannot afford the court fees, in particular the $150.00 filing fee. If you file an Application to Proceed In Forma Pauperis, you should fill out your summons forms and submit them to the clerk's office when you file the complaint. If the court approves your Application to Proceed In Forma Pauperis, the court will issue the summonses and forward them to the United States Marshal. The United States Marshal will then serve the summonses on the defendants at no cost to you.

How do I get summonses if I'm not in forma pauperis?

When the filing fee has been paid, you can obtain as many summonses as you need at the time you file the complaint. You can also obtain the summonses later if you wish. However, if you obtain them at the time you file the complaint, you will not need to return later to the court to obtain them.

You can submit a summons form to the court in person, using the drop box, or by mail, but **not** by fax filing. If you submit a summons form to the court by mail or by using the drop box, you will need to include a self-addressed postage-stamped envelope so that the court can return the issued summons to you.

What do I need to serve with the complaint?

You must serve the complaint and the summons together. Whatever method you use, Civil Local Rule 4-2 also requires you to serve the defendant with all of the following documents at the same time you serve the complaint and the summons. The only exception is if you request and get what is called a "waiver of service," which is explained below. The clerk will give copies of the following documents to you when your complaint is filed:

1. A copy of the handbook entitled *Dispute Resolution Procedures in the Northern District of California.*

2. A copy of the Order Setting Case Management Conference, which is written by the judge and sets a date for you to come to court;

3. Standing Orders of the assigned judge (not all judges have them, but they are special rules that the judge uses and requires parties to follow);

4. The form for preparing a Case Management Statement.

5. Except where your case is assigned to a magistrate judge right away, a copy of the form allowing a party to give notice that it consents to having the case assigned to a magistrate judge; and

6. In cases assigned to a special program called the ADR Multi-Option Program, a copy of the ADR Certification form.

How do I get the defendant to waive service?

If the defendant waives service, it means that he or she agrees to give up the right to insist on formal service by hand, and to accept instead informal service by mail. If a defendant waives service, you will not have to spend money and time hiring a person called a "process server" to serve the summons and complaint. You will still need to be able to prove that the defendant actually got the complaint and required documents, so you need the defendant to sign and send back to you a form saying that he waived formal service and got a copy of the documents in the mail. That form is called a "waiver of service."

Under Rule 4(d) of the Federal Rules of Civil Procedure, you can ask for a waiver of service from any defendant who is not:

1. A minor or incompetent person in the United States; or

2. The United States government, its agencies, corporations, officers or employees; or

3. A foreign, state, or local government.

Rule 4(d) of the Federal Rules of Civil Procedure also sets forth the requirements for requesting a waiver of service. This Court provides a form for requesting waiver of service and a form for waiver of service which comply with the requirements of Rule 4(d). You can obtain a copy of those forms in the clerk's office or at this Court's website, http://www.cand.uscourts.gov.

You should send those forms to the defendant by first-class mail or other reliable means, along with a copy of the complaint and the documents itemized in Civil Local Rule 4-2, plus an extra copy of the request to waive service and a self-addressed envelope with sufficient postage to return the waiver of service to you. In specifying a due date on the form, you must give the defendant a reasonable amount of time to return the waiver of service to you, which must be at least 30 days from the date the request is sent (or 60 days if the defendant is outside the United States).

If the defendant returns to you signed waiver of service to you, you do not need to do anything else to serve that defendant. Just file the defendant's signed waiver of service with the court. Be sure to save a copy for your own files.

What if I requested a waiver of service and the defendant doesn't send it back?

If the defendant does not return the waiver of service to you, you need to arrange to serve that defendant in one of the other ways explained in Rule 4 of the Federal Rules of Civil Procedure. However, if the defendant does not return the waiver of service to you and both you and the defendant are located in the United States, you may ask the court to order the defendant to pay you all your costs to serve the defendant another way.

Rule 4(c)(2) provides that **you may not serve the defendant yourself**. You must have someone else who is at least 18 years old serve the defendant with the complaint and summons. The easiest way to serve a complaint is to hire a professional process server. You can find process servers listed in the Yellow Pages. If you do not want or cannot afford to hire a process server, you can also ask a friend, family member, or any other person over 18 years old to serve the complaint and summons for you.

In general, how do I serve individuals?

Rule 4(e) of the Federal Rules of Civil Procedure provides for several ways to an individual in the United States who is not a minor or an incompetent person:

1. Hand deliver the summons and complaint to the defendant;

2. Hand deliver the summons and complaint to the defendant's home and leave them with another responsible person who lives there;

3. Hand deliver the summons and complaint to an agent authorized by the defendant or by law to receive service of process for the defendant; or

4. Serve the summons and complaint by any other method provided for by the law of the State of California or the state where the defendant is served. California law on service of process can be found in the California Code of Civil Procedure beginning at § 413.10.

How do I serve individuals in foreign countries?

Rule 4(f) of the Federal Rules of Civil Procedure provides for several ways to serve an individual in a foreign country. Rule 4(g) provides that only a few of those methods may be used to serve a minor or incompetent person outside the United States. Please review Rules 4(f) and 4(g) carefully before attempting to serve a defendant outside the United States.

How do I serve minors or incompetent persons?

Rule 4(g) of the Federal Rules of Civil Procedure provides that service on a minor or incompetent person in the United States must be made according to the law of the state where the minor or incompetent person is served. California law for service of process on minors and incompetent persons can be found at §§ 416.60 and 416.70 of the California Code of Civil Procedure.

How do I serve a business?

Rule 4(h) of the Federal Rules of Civil Procedure lists several methods for serving the complaint and summons on a corporation, partnership, or other unincorporated association.

If you serve a business in the United States:

1. You may serve the complaint and summons according to the laws of the State of California or the state in which the business is served. California law on serving corporations, partnerships, and unincorporated associations can be found at §§ 416.10 and 416.40 of the California Code of Civil Procedure. Section 415.40 of the same Code provides for service on businesses outside California.

2. Alternatively, you may serve the complaint and summons by:

   a. Hand delivering them to an officer of the business, a managing agent or general agent for the business, or any other agent authorized by the defendant to accept service of process; or

   b. Hand delivering them to any other agent authorized by law to receive service of process for the defendant. If the law authorizing the agent to accept service of process requires it, you must also mail a copy of the summons and complaint to the defendant.

If you serve a business outside the United States, you may use any method described in Rule 4(f) except personal delivery.

How do I serve the United States, its agencies, corporations, officers, or employees?

The rules for serving the complaint and summons on the United States government or its agencies, corporations, officers, or employees are stated in Rule 4(i) of the Federal Rules of Civil Procedure.

To serve the complaint and summons on the United States, you must:

1. a. Hand deliver the complaint and summons to the United States Attorney for the Northern District of California, or

   b. Hand deliver the complaint and summons to an assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court, or

   c. Send a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney for the Northern District of California;

AND

2. You must also send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C.;

AND

3. If your lawsuit challenges the validity of an officer or agency of the United States but you have not named that officer or agency as a defendant, you must **also** send a copy of the summons and complaint by registered or certified mail to the officer or agency.

To serve the summons and complaint on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, you must serve the United States in the manner described above **and** send a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

To serve the summons and complaint on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, you must serve the United States in the manner described above **and** serve the employee or officer personally in the manner set forth by Rule 4(e), (f), or (g) of the Federal Rules of Civil Procedure.

How do I serve a foreign country?

To serve the summons and complaint on a foreign country, or a political subdivision, agency, or instrumentality of a foreign country, you must follow the procedure stated in the federal statute 28 U.S.C. § 1608.

How do I serve a state or local government?

To serve a state or local government, you must:

1. Hand deliver a copy of the summons and complaint to the chief executive officer of the government entity you wish to serve; or

2. Serve the summons and complaint according to the law of the state in which the state or local government is located.

Is there a time limit for serving the complaint and summons?

Rule 4(m) of the Federal Rules of Civil Procedure requires you to either obtain a waiver of service or serve each defendant within 120 days after the complaint is filed. If you do not meet that deadline and you do not show the court that you had a good reason for not serving a defendant, the court may dismiss all claims against any defendant who was not served. The court must dismiss those claims without prejudice, however, which means that you can file another complaint later in which you assert the same claims that were dismissed. If you file a new complaint, you will have another 120 days to try to serve the complaint and summons.

There is no time limit for completing service of the complaint and summons in a foreign country.

What is a certificate of service?

After you complete service of the complaint and summons, you should file a "certificate of service" (or a "proof of service") with the court which shows when and how you served the complaint and summons on each defendant. The purpose of the certificate of service is to allow the court to determine whether service of the documents was actually accomplished in accordance with the requirements of the law. The certificate of service must state:

1. The date service was completed;

2. The place where service was completed;

3. The method of service used;

4. The names and street address or email address of each person served; and

5. The documents that were served.

The certificate of service must be signed and dated by the person who actually served the complaint and summons. If you hired a process server, the certificate of service must be signed by the process server. If you asked a friend to serve the complaint and summons, the certificate of service must be signed by the friend who actually served the complaint and summons. The person who served the documents must also swear under penalty of perjury that the statements in the certificate of service are true.

How do I serve other documents?

Fortunately, once you serve the complaint it usually becomes easier to serve other documents. Rule 5 of the Federal Rules of Civil Procedure establishes the rules for serving documents other than the original complaint. If the party you have served has a lawyer, then you must serve that party by serving their lawyer. If the other party decides not to get a lawyer, then you need to follow the rules for serving an unrepresented party that are described below.

Rule 5 allows you to serve documents on the attorney or party (if not represented), by any of the following methods:

1. Handing it to the person; or

2. Leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, by leaving it in a conspicuous place in the office; or

3. If the person has no office, or the office is closed, leaving it at the person's home with someone of suitable age and discretion who lives there; or

4. Mailing a copy to the person's last known address; or

5. If the person you want to serve has no known address, you may leave a copy with the clerk of the court; or

6. You may deliver a copy by any other method that the person you are serving has consented to in writing.

In addition, Civil Local Rule 5-5 has other requirements if you have a deadline or due date to serve the particular document. These local rules can affect whether or not you can mail a document to serve it; **be sure you read them**.

For all the documents you serve on other parties, you need a certificate of service like you needed for the complaint.

CHAPTER 6
AFTER THE COMPLAINT HAS BEEN SERVED ON THE DEFENDANT, WHAT HAPPENS NEXT?

Filing and serving the complaint opens a case with the court, and a judge will be assigned to the new case. Papers filed after the complaint go to that judge. There are two kinds of judges at the District Court: district judges and magistrate judges. District judges are appointed under the Constitution by the President of the United States and confirmed by the U.S. Senate. They are appointed for life and cannot be removed unless impeached. Magistrate judges are appointed under federal statute by the District Court. They are selected by the district judges to serve eight year terms subject to renewal.

I got a magistrate judge – what does that mean?

It is possible that your case will be assigned or referred to a magistrate judge. If the entire case is assigned to a magistrate judge when it is filed, you will be asked whether you consent to have the magistrate judge handle the case. This decision is up to you and the other parties; you may accept a magistrate judge, or decline to accept a magistrate judge. If all parties consent, that magistrate judge will be the judge for the entire case, including trial, and will have the same powers as a district judge. If any party refuses to consent, the case will be reassigned to a district judge.

It is also possible that a part of the case–such as a motion regarding a discovery dispute–will be referred by a district judge to a magistrate judge (motions and discovery are discussed in later chapters). In that event, the magistrate judge will rule on the referred matter. Unlike the situation when a magistrate judge is assigned for the entire case, however, your consent is not required for the magistrate judge to rule on a referred matter. But the magistrate judge‘s ruling may be appealed to the district judge. See Chapter 16.

A magistrate judge is also assigned in some cases to serve as a settlement judge, one form of alternative dispute resolution, or ADR. As a settlement judge, the magistrate judge has the power to set conference dates and to require the attendance of parties at a settlement conference. The magistrate judge may also order production of documents or other evidence, and may enter settlements into the record.

What’s next after the complaint is served?

After the defendant has been served with the complaint, he or she must file a written response to the complaint. The written response must eventually be an “answer,” but before filing the answer, the defendant has an opportunity to file a motion to dismiss the complaint, a motion for a more definite statement, or a motion to strike parts of the complaint.

When the defendant files an answer, he or she can also file a counterclaim, which is a complaint against the plaintiff.

If the defendant does not file an answer in the proper amount of time, the plaintiff can file a motion for a default judgment against the defendant. If the court grants the motion for default judgment, the plaintiff has won the case.

This chapter will briefly discuss all of these procedures.

Time to Respond to the Complaint

After a defendant is served with the complaint, he or she has a limited amount of time to file a written response to the complaint. The amount of time the defendant has to file a response to the complaint depends on who the defendant is and how he or she was served.

Rule 12(a)(1) of the Federal Rules of Civil Procedure states that unless a different time is specified in a United States statute, most defendants must file a written response to the complaint within twenty days after being served with the summons and complaint.

According to Rule 4(d)(3) and Rule 12(a)(1)(B) of the Federal Rules of Civil Procedure, if the defendant returned a signed waiver of service within the amount of time specified in the plaintiff's request for a waiver of service, the defendant gets extra time to respond to the complaint. If the request for waiver of service was sent to a defendant at an address **inside** the United States, the defendant has sixty days from the date the request was sent to file a response to the complaint. If the request for waiver of service was sent to a defendant at an address **outside** the United States, the defendant has ninety days from the date the request was sent to file a response to the complaint.

Rule 12(a)(3)(A) of the Federal Rules of Civil Procedure states that the United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity must file a written response to the complaint within sixty days after the United States Attorney is served.

Rule 12(a)(3)(B) of the Federal Rules of Civil Procedure states that an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must file a written response to the complaint within sixty days after he or she was served, or within sixty days after the United States Attorney is served, whichever is later.

The time limits are different for responding to an amended complaint. According to Rule 15(a) of the Federal Rules of Civil Procedure, a defendant must file a response to an amended complaint within the time remaining to respond to the original complaint, or within ten days after being served with the amended complaint, whichever period is longer, unless the court orders otherwise.

Finally, Civil Local Rule 6-1 allows the parties to extend the deadline for responding to the complaint, if they put the agreement in writing and file it with the court, as long as the new deadline will not require changing the date of any event or any deadline already ordered by the court. The parties' written agreement to extend the deadline for responding to the complaint is automatically effective when it is filed, and does not require a court order approving the agreement.

What type of response to the complaint is required?

Under Rule 12 of the Federal Rules of Civil Procedure, once you have been served with a complaint, you must, within the required amount of time, either file an answer to the complaint, or file a motion challenging some aspect of the complaint. If you choose to file a motion, you still must file an answer, but you do not have to file the answer until after the court rules on your motion.

ANSWERS AND COUNTERCLAIMS

What are the requirements for preparing an answer to a complaint?

Rules 8(b)-(e) and Rule 12(b) of the Federal Rules of Civil Procedure state the requirements for writing an answer to a complaint, although they do not actually use the term "answer." The answer serves two main purposes. First, because Rule 8(b) requires you to state which parts of the complaint you admit and which parts you dispute, the answer shows both sides where they disagree. Second, because Rule 12(b) requires you to state in the answer all legal and factual defenses you believe you have to each of the claims against you, the answer also informs the plaintiff what legal and factual issues you intend to bring up during the lawsuit.

It is customary to write your answer in the same numbered paragraph style as the original complaint. So paragraph one of the answer should respond only to paragraph one of the complaint, paragraph two of the answer should respond only to paragraph two of the complaint, etc.

Rule 8(b) requires you to admit or deny every statement in the complaint. If you do not have enough information to determine whether a statement is true or false, you must state that you do not have enough information to admit or deny that statement. If only part of a statement in the complaint is true, you must admit that part and deny the rest. Generally, under Rule 8(d), you are considered to have admitted every statement that you do not specifically deny, except for the amount of damages.

Rule 8(c) and 12(b) require you to state all legal and factual defenses you may have to the plaintiff's claims. Each defense should be listed in a separate paragraph at the end of the answer.

Generally, if you do not state a defense in your answer, you may not rely on that defense or try to present evidence about that defense later in the lawsuit. Because failing to list a defense in your answer can have dramatic consequences for your lawsuit, you should exercise great care when you prepare your answer.

Each defense should be listed in a separate paragraph at the end of the answer.

Each defendant must sign the answer, and the answer must be served upon all the other parties in the lawsuit.

Can I make claims against the plaintiff in my answer?

You may not use the answer to state new claims against the plaintiff. To state new claims against the plaintiff, you must file a counterclaim, which is the name for a complaint by the defendant against the plaintiff. You may include a counterclaim at the end of the document containing your answer to the complaint, and file the answer and counterclaim as a single document. In fact, under Rule 13(a) of the Federal Rules of Civil Procedure, certain types of counterclaims must be filed at the same time the answer is filed. We cover the requirements for counterclaims in more detail below.

Can I amend the answer after I file it?

Under Rule 15(a) of the Federal Rules of Civil Procedure, you can amend your answer at any time within twenty days after it is served on the plaintiff. You do not need permission from the court or from the plaintiff.

If you want to amend your answer more than twenty days after you served the answer on the plaintiff, Rule 15(a) provides two ways to do it.

First, you can file the amended answer if you get written permission from the plaintiff. When you file the amended answer, you must also file the document showing that you have written permission from the plaintiff to amend your answer.

Second, if the plaintiff will not agree to let you amend your answer, you must file a motion with the court seeking permission to amend your answer. In that motion, you must explain why you need to amend your answer. You should include a copy of the amended answer that you want to file. If the court grants your motion, you can then file your amended answer.

When you file an amended answer, Civil Local Rule 10-1 requires you to file an entirely new answer. Because an amended answer completely replaces the original answer, you cannot just file the changes that you want to make to the original answer. The caption of your amended answer should read: "FIRST AMENDED ANSWER" (or, if your answer includes a counterclaim in the same document, "FIRST AMENDED ANSWER AND COUNTERCLAIM"). If you amend your answer a second time, the caption should read: "SECOND AMENDED ANSWER" (or, if your answer includes a counterclaim in the same document, "SECOND AMENDED ANSWER AND COUNTERCLAIM").

Once the answer is filed, does the plaintiff have to file a response to it?

There is no such thing under the Federal Rules of Civil Procedure as a "Response to an Answer." Even if you strongly disagree with the statements in the answer, there is no need to file a response. Under Rule 8(d) of the Federal Rules of Civil Procedure, all statements in an answer are automatically denied by the other parties to the lawsuit.

What are the requirements for counterclaims?

A counterclaim is a complaint by the defendant against the plaintiff. Rule 13 of the Federal Rules of Civil Procedure explains some of the rules for filing counterclaims.

There are two different types of counterclaims under Rule 13. A compulsory counterclaim is a claim by the defendant against the plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant. A permissive counterclaim is a claim by the defendant against the plaintiff that is **not** based on the same events or transactions as the plaintiff's claim against the defendant.

For example, if the plaintiff sues the defendant for breaching a contract, the defendant's claim that the plaintiff breached the same contract is a compulsory counterclaim. The defendant's claim that the plaintiff owes him or her money because the plaintiff breached a different contract would be a permissive counterclaimpermissive counterclaim.

Under Rule 13(a) of the Federal Rules of Civil Procedure, compulsory counterclaims generally must be filed at the same time the defendant files his or her answer. If you don't file a compulsory counterclaim at the same time you file the answer, generally you will lose the ability to ever sue the plaintiff for that claim. One exception is that you do not have to file a compulsory counterclaim if you have already filed that claim in another court. Other more complex exceptions are listed in Rule 13(a).

If you want to file a permissive counterclaimpermissive counterclaim, you should file it as early as you can, but there is no rule that requires you to file it at the same time you file your answer. Whether to file a permissive counterclaimpermissive counterclaim is entirely up to you. By not filing a permissive counterclaimpermissive counterclaim, you do not lose the ability to sue the plaintiff for that claim at another time.

The court automatically has subject matter jurisdiction over compulsory counterclaims if there is subject matter jurisdiction over the plaintiff's claim against the defendant. The court can only decide permissive counterclaimspermissive counterclaim, however, if there is an independent basis for subject matter jurisdiction over the counterclaim. You can bring a permissive counterclaimpermissive counterclaim only if the court would have subject matter jurisdiction over that claim if it were brought as a separate lawsuit.

Counterclaims should be written using the same format you would use to write a complaint. All of the rules that apply to writing a complaint also apply to writing a counterclaim.

If you file your counterclaim at the same time you file your answer, you can include the answer and the counterclaim in separate sections of the same document. If you include the answer and counterclaim in the same document, the caption of the document should say: "ANSWER AND COUNTERCLAIM."

If you forget to file a compulsory counterclaim at the time you file your answer, Rule 13(f) of the Federal Rules of Civil Procedure allows you to file a motion with the court asking for permission to amend your answer and counterclaim to include the counterclaim you forgot to file.

Once a counterclaim is filed, does the plaintiff have to file a response to it?

Because a counterclaim is a complaint against the plaintiff, the plaintiff must file a written response to it. Rule 7(a) of the Federal Rules of Civil Procedure states that the answer to a counterclaim is called a "reply." Rule 12(a)(2) of the Federal Rules of Civil Procedure requires the plaintiff to file a reply to a counterclaim within twenty days after being served, unless the plaintiff files a motion to dismiss under Rule 12(b). Otherwise, the same rules that apply to filing a written response to a complaint also apply to filing a written response to a counterclaim.

MOTIONS CHALLENGING THE COMPLAINT

As explained above, once you are served with a complaint, you have a limited amount of time to file a written response to the complaint. That written response must eventually be an answer. However, you can also choose to file one of the motions specified in Rule 12 of the Federal Rules of Civil Procedure. If you file one of those motions, you do not need to file your answer until after the court decides your motion.

What is a motion to dismiss the complaint?

A motion to dismiss the complaint argues that there are legal problems with the way the complaint was written, filed, or served. Rule 12(b) of the Federal Rules of Civil Procedure lists the following defenses that can be raised in a motion to dismiss the complaint:

1. **Motion to dismiss the complaint for lack of subject matter jurisdiction**. In this type of motion the defendant argues that the court does not have the legal authority to hear the kind of lawsuit that the plaintiff filed.

2. **Motion to dismiss the complaint for lack of personal jurisdiction over the defendant.** In this type of motion the defendant argues that he or she has so little connection with the district in which the case was filed that the court has no legal authority to hear the plaintiff's case against that defendant.

3. **Motion to dismiss the complaint for improper venue**. In this type of motion the defendant argues that the lawsuit was filed in the wrong place.

4. **Motion to dismiss the complaint for insufficiency of process, or for insufficiency of service of process**. In these types of motions the defendant argues that the plaintiff did not prepare the summons correctly or did not properly serve the summons on the defendant.

5. **Motion to dismiss the complaint for failure to state a claim**. In this type of motion the defendant argues that even if everything stated in the complaint is true, the defendant did not violate the law. A motion to dismiss for failure to state a claim is **not** appropriate if the defendant wants to argue that the facts alleged in the complaint are not true. Instead, in a motion to dismiss the complaint for failure to state a claim the defendant assumes that the facts alleged in the complaint **are** true, but argues that those facts do not constitute a violation of any law.

6. **Motion to dismiss the complaint for failure to join an indispensable party under Rule 19**. In this type of motion the defendant argues that the plaintiff failed to sue someone who must be included in the lawsuit before the court can decide the issues raised in the complaint.

Under Rule 12(a)(4) of the Federal Rules of Civil Procedure, if the court denies a motion to dismiss, the defendant must file an answer within ten days after receiving notice that the court denied the motion.

If the court grants the motion to dismiss, it can grant the motion "with leave to amend" or "with prejudice."

If the court grants a motion to dismiss with leave to amend, that means that there is a legal problem with the complaint that the plaintiff may be able to fix. The court will give the plaintiff a certain amount of time to file an amended complaint in which the plaintiff can try to fix the problems identified in the court's order. Once the defendant is served with the amended complaint, he or she must file a written response to the amended complaint within the time ordered by the court. The defendant can either file an answer or file another motion under Rule 12 of the Federal Rules of Civil Procedure.

If the court grants the motion to dismiss with prejudice, that means there are legal problems with the complaint that cannot be fixed. Any claim that is dismissed with prejudice is eliminated permanently from the lawsuit. If the court grants a motion to dismiss the entire complaint with prejudice, the case is over.

If the court grants a motion to dismiss some claims with prejudice and denies the motion to dismiss other claims, the defendant must file an answer to the remaining claims within ten days after receiving notice of the court's order.

What is a motion for more definite statement?

Instead of filing a motion to dismiss, Rule 12(e) permits a defendant to file a motion for a more definite statement before filing an answer to the complaint. In a motion for a more definite statement the defendant argues that the complaint is so vague, ambiguous, or confusing that the defendant cannot respond to it. The motion must point out how the complaint is defective, and ask for the details that the defendant needs in order to respond to the complaint.

Under Rule 12(a)(4)(B) of the Federal Rules of Civil Procedure, if the court grants a motion for a more definite statement, the defendant must file a written response to the complaint within ten days after the defendant receives the more definite statement. The written response can be an answer or another motion under Rule 12 of the Federal Rules of Civil Procedure.

If the court denies the motion, the defendant must file a written response to the complaint within ten days after receiving notice of the court's order.

What is a motion to strike?

Rule 12(f) permits the defendant to file a motion to strike from the complaint any redundant, immaterial, impertinent, or scandalous matter.

WHAT DOES IT MEAN TO WIN BY DEFAULT JUDGMENT?

If you have properly served the defendant with the complaint and the defendant does not file an answer within the required amount of time, the defendant is considered to be in "default." Default simply means that the defendant did not file an answer to the complaint.

If the defendant does not file an answer, the plaintiff is entitled to ask the court for a default judgment against the defendant. A default judgment means the plaintiff has won the case.

Rule 55 of the Federal Rules of Civil Procedure discusses the rules for obtaining a default judgment.

First, you must file a request for entry of default with the clerk of the court. The request for entry of default must include proof (usually in the form of a declaration) that the defendant has been served with the complaint. If the request for entry of default shows that the defendant has been served with the summons and complaint, and has not filed a written response to the complaint within the appropriate amount of time, the clerk will enter default against the defendant. Once the clerk enters default, the defendant is not permitted to respond to the complaint without first filing a motion with the court seeking to set aside the default, under Rule 55(c) of the Federal Rules of Civil Procedure.

Second, after the clerk has entered default against the defendant, you must file a motion for default judgment against the defendant. Rule 55(b) explains some of the rules for obtaining a default judgment.

Along with the motion for default judgment you must include a declaration showing that the defendant was served with the complaint but did not file a written response within the required amount of time and that default has been entered. You also must file one or more declarations proving the amount of damages that you have suffered because of what your complaint claimed the defendant did.

Once default is entered, the defendant is considered to have admitted every fact stated in the complaint, except for the amount of damages. The defendant can still oppose a motion for default judgment, however, by attacking the legal sufficiency of the complaint. For example, the defendant could argue that the facts stated in the complaint do not constitute a violation of any law. The defendant may also oppose a motion for default judgment by presenting evidence that you did not suffer the amount of damages that you ask the court to award.

Under Rule 54(c) of the Federal Rules of Civil Procedure, the court cannot enter a default judgment that awards you more money than you asked for in your complaint. The court also cannot give you any type of relief other than that for which you specifically asked in your complaint.

Special rules apply if you are seeking a default judgment against any of the following parties:

1. A minor or incompetent person (see Rule 55(b) of the Federal Rules of Civil Procedure);

2. The United States government or its officers or agencies (see Rule 55(e) of the Federal Rules of Civil Procedure);

3. A person who is in military service (see federal statute 50 U.S.C. App. § 520); or

4. A foreign country (see federal statute 28 U.S.C. § 1608(e)).

CHAPTER 7
WHAT IS A MOTION, AND HOW DO I WRITE OR RESPOND TO ONE?

Filing and serving a complaint is the first step in a lawsuit. After that, whenever you want the court to do something, you need to make a motion. Basically, a motion is a formal request you make to the court. Rule 7(b) of the Federal Rules of Civil Procedure requires all motions to be made in writing, except for motions made during a hearing or trial. You may make verbal (or "speaking") motions during a hearing or trial, but even then the court may ask you to put your motion in writing.

Usually, the following things occur when a motion is filed. First, one side files a motion explaining what they want the court to do and why the court should do it. The party who files a motion is referred to as the "moving party." Next, the opposing party files an opposition brief explaining why it believes the court should not grant the motion. Then the moving party files a reply brief in which it responds to the arguments made in the opposition brief. At that point, neither side can file any more documents about the motion without first getting permission from the court. Once all of the papers relating to the motion are filed, the court can decide the motion based solely on the arguments in the papers, or it can hold a hearing. If the court holds a hearing, each side has an opportunity to talk to the court about the arguments in their papers. The court then has the option of announcing its decision in the courtroom (ruling from the bench), or to further consider the motion (taking the motion under consideration) and send the parties a written decision.

What are the requirements for motion papers?

In addition to requiring most motions to be in writing, Rule 7(b) of the Federal Rules of Civil Procedure also states that all of the court's rules about captions and the format of documents apply to motions. (A sample caption page can be found at the end of Chapter 3 of this handbook.) Rule 7(b) also requires the party who is filing the motion to **sign** the motion in accordance with Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires parties not to file any motions that are based on facts that they know to be false, or which they did not fairly investigate, or motions that have no reasonable legal basis. You should read Rule 11 before signing and filing any pleading.

Civil Local Rules 7-1 through 7-10 give a detailed set of requirements for motions. Be sure that you understand all of these rules before filing a motion. If you do not follow these procedural rules, the court may refuse to hear your motion.

Civil Local Rules 7-2 and 7-5 require that all motions must contain the following information:

1. **Hearing date and time**: In the caption, under the case number, you must include the date and time that you want the court to hold a hearing on the motion. You should also state the name of the motion in the caption, for example: "PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

2. **Notice of motion**: The first paragraph of the motion must contain the notice of motion, including the date and time of the hearing. The notice of motion is a statement to the other parties telling them what type of motion you have filed and when you have asked the court to hold a hearing on the motion.

3. **Statement of purpose**: In the second paragraph, you must give a brief statement of what you want the court to do.

4. **Memorandum of points and authorities**: The remaining paragraphs are the memorandum of points and authorities in support of your motion, which must comply with Civil Local Rule 7-4(a). The memorandum of points and authorities is your argument why the court should grant your motion. The memorandum of points and authorities is also sometimes referred to as a "brief." Civil Local Rule 7-4(a) requires the memorandum of points and authorities to including the following:

a. A table of contents and a table of authorities, if the memorandum is longer than ten pages. A table of authorities is a list of all the laws, rules, and cases that you have mentioned, indicating the page of your memorandum where each one is mentioned. Every mention of a law, rule or case is referred to as a "citation." When you mention a law, rule or case in a memorandum, you are citing that law, rule or case. You do not have to provide the court with copies of the laws, rules, or cases that you have cited in your memorandum, unless the court asks for them.

When citing a case, use the format that is required by the court. For example, if you are citing a case from the Northern District of California, the rules require that the citation be as follows (you'll need to fill in the numbers for everything that appears in brackets): [the volume number of the Federal Supplement (the book) in which the case appears] F. Supp. [the number of the page where the case starts], [the number of the page where the point you are citing appears] (N.D. Cal. [the year the case was decided]). An example of a complete citation, using the Northern District of California format, would look like the following:

Smith v. Jones, 131 F. Supp. 2d 1154, 1156 (N.D. Cal. 2000).

b. A statement of the issues you want the court to decide;

c. A brief statement of the facts that are relevant to your motion; and

d. Your argument why the court should grant the motion, with citations to the relevant law and facts.

5. **Declaration(s):** If your motion relies on the facts of the lawsuit, you must also provide the court with evidence that those facts are true. The way you provide evidence to the court in support of your motion is by filing one or more declarations. A declaration is a written statement signed under penalty of perjury by a person who has personal knowledge that what he or she states in the declaration is true. Declarations may contain only facts, and may not contain law or argument. If the issue is not factual, or if the person signing the declaration does not explain how he or she personally knows that each statement in the declaration is true, then it may not be considered by the Court.

The first page of each declaration must contain the caption of the case, and include, under the case number, the name of the document, for example "DECLARATION OF JOHN SMITH IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT." The declaration should consist of a series of numbered paragraphs, with each paragraph containing a different fact. At the end of the declaration, you must include the following language:

a. If the declaration is being signed in the United States, the language must read: "I declare under penalty of perjury that the foregoing is true and correct. Executed on (insert the date the document is signed)."

b. If the declaration is being signed outside of the United States, the language must read: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (insert the date the document is signed)."

Below that language, the person whose statements are included in the declaration (the "declarant") must sign and date it.

6. **Proposed order:** You must also include with your motion a proposed order for the court to sign. The first page of the proposed order must contain the caption of the case, and under the case number, you must write the title: "[PROPOSED] ORDER." The proposed order must contain the exact language that you want the court to sign. At the end you must include a line for the court's signature. If the court grants your motion, it may sign your proposed order, or it may write its own order.

Civil Local Rule 7-2(b) requires that motions must be no more than twenty-five pages long. Motions that exceed the page limit may not be accepted or the extra pages might not be read.

All motions must be served on all of the other parties to the lawsuit as soon as the motion is filed.

How do I choose a hearing date?

When you choose a hearing date, the first thing to do is to consult your judge's standing order to find out which day of the week your judge holds hearings. Each judge holds hearings on a certain day every week. For example, some judges hold hearings on motions in civil cases only on Fridays at 9:00 a.m. Once you determine what day and time your judge holds hearings on motions, you do **not** need to contact that judge to reserve a hearing date.

Civil Local Rule 7-2(a) requires that, unless otherwise ordered or permitted by the judge or the Civil Local Rules, all motions must be filed and served on the other parties no less than thirty-five days (five weeks) before the hearing date. You should simply choose the judge's date for hearing civil motions that is at least thirty-five days from the date you want to file and serve your motion. Also, as a courtesy, you should call the other party's attorney and try to pick a date when both of you are available. You then should put that hearing date in your caption and notice of motion. If the court is unable to hear the motion on that date or if the attorney on the other side has a very good excuse why they cannot be there, the Court will set a new hearing date, usually on a date that is convenient for everyone.

What are the requirements for Opposition Briefs?

Opposition briefs must follow the same format as motions, with the following exceptions:

1. In the caption of the document, under the case number, put the title: "OPPOSITION TO [name of motion]" and the date and time the moving party has chosen for the hearing.

2. You do not need to include a notice of motion.

3. The memorandum of points and authorities should explain the reasons why the motion should be denied, with citations to the appropriate law and facts.

4. The proposed order should contain the language that you want the court to sign **denying** the motion.

5. If you do not oppose the motion, Civil Local Rule 7-3(b) requires you to file a Statement of Nonopposition with the court no later than the date the opposition brief is due. A Statement of Nonopposition can be very short, for example: "Plaintiff does not oppose defendant's motion to compel production of documents."

Civil Local Rules 7-3(a) and 7-4(b) require that opposition briefs must be filed and served no later than twenty-one days (three weeks) before the hearing date.

What are the requirements for Reply Briefs?

Reply briefs must follow the same format as motions, with the following exceptions:

1. In the caption of the document, under the case number, put the title: "REPLY BRIEF IN SUPPORT OF [name of motion]" and the date and time the moving party has chosen for the hearing.

2. You do not need to include a notice of motion.

3. The memorandum of points and authorities should address only the arguments raised in the opposition brief. You should not repeat the arguments you made in the motion, except to the extent it is necessary to explain why you believe the arguments in the opposition brief are wrong.

4. **In your reply brief, you may not include new arguments in support of your motion**Error! Bookmark not defined.. Because the opposing party usually is not allowed to file a response to a reply brief, it is unfair to include new arguments in your reply brief. Therefore, in your reply brief, you may only include arguments explaining why you believe the argument in the opposition brief is wrong.

5. You do not need to file an additional proposed order unless you want to change the proposed order that you filed with your motion.

Civil Local Rules 7-3(c) and 7-4(b) require that reply briefs must be filed and served no later than fourteen days (two weeks) before the hearing date.

What if the motion is urgent and needs to be decided in less than thirty-five days?

Sometimes a motion raises an urgent issue that needs to be decided very quickly. You have three ways you may be able to obtain a hearing date that is less than thirty-five days from the date your motion is filed.

1. **Stipulation to shorten time**: Civil Local Rules 6-1(b) and 6-2 state that if both sides agree that the matter should be heard quickly, you may submit a written agreement (called a "stipulation") for the court's approval. A stipulation is nothing more than a written agreement signed by all of the parties to the lawsuit or their attorneys. The stipulation should explain why the matter is urgent and propose a faster schedule for briefing and hearing the motion. With the stipulation, you also must file a declaration that:

- Explains in detail the reasons why you are requesting that the motion be heard on a faster schedule;

- States all previous time modifications that have been made in the case, whether by stipulation or court order; and

- Describes the effect the proposed time modification would have on the schedule for the case.

Under Civil Local Rule 7-11, a proposed order may be submitted with the stipulation. The proposed order can consist of a paragraph at the end of the stipulation, after the signatures of the parties or their lawyers, stating: "PURSUANT TO STIPULATION, IT IS SO ORDERED," with spaces for the date and the signature of the judge.

After you file the stipulation, the judge may grant, deny, or modify your request.

2. **Motion to shorten time**: If both parties cannot agree that the motion is urgent, you can file a motion to shorten time. A motion to shorten time is a motion asking that the court hear another motion on a faster than normal schedule.

Under Civil Local Rule 6-3(a), a motion to shorten time can be no longer than five pages long. Civil Local Rule 6-3(a) also requires that a motion to shorten time must be accompanied by a proposed order, and a declaration that:

- Explains in detail the reasons why the motion should be heard on a faster than normal schedule;

- Describes the efforts you have made to obtain a stipulation from the other parties to the lawsuit;

- Identifies the harm that would occur if the motion is not heard on a faster than normal schedule;

- Describes your compliance with Civil Local Rule 37-1 (requiring the parties to negotiate with each other to try to resolve discovery disputes before filing a motion), if it is necessary;

- Describes the nature of the dispute addressed in the underlying motion and briefly summarizes the position each party has taken;

- Discloses all previous schedule adjustments in the case, whether by stipulation or court order; and

- Describes the effect the requested schedule adjustments would have on the schedule for the case.

You must deliver a copy of the motion to shorten time, the proposed order, and the declaration to all of the other parties the day the motion is filed.

Any opposition to a motion to shorten time must be filed no later than the third court day after the motion is received, unless the court sets another schedule. The opposition must be **no longer than five pages** long and must be accompanied by a declaration explaining the basis for the opposition. The objecting party must deliver a copy of its opposition brief to all the other parties on the day the opposition is filed.

There is no reply brief to a motion to shorten time.

After the court receives a motion to shorten time and any opposition to the motion, it may grant, deny, or modify the requested time change or schedule the motion for additional briefing or a hearing.

3. **Ex Parte Motion**. Civil Local Rule 7-10 defines an ex parte motion m as a motion that is filed without giving notice to the opposing party. You may file such a motion **only** if a statute, Federal Rule, local rule or standing order authorizes the filing of an ex parte motion **and** you have complied with all the applicable requirements. Ex parte motions are rare.

What if I need more time to respond to a motion?

Rule 6(b) of the Federal Rules of Civil Procedure allows the court to give you extra time to respond to a motion if you show a good reason why you need it. Under Rule 6(b), the court can grant extra time with or without a motion or notice to the other parties if you make the request before the original deadline passes. If you wait until after the original deadline passes before asking for extra time, you must make a motion and show that excusable neglect caused you to miss the deadline. The court cannot extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in each of those rules.

You can also file a stipulation to extend time, under Civil Local Rules 6-1(b) and 6-2. The same rules for stipulations to shorten time also apply to stipulations to extend time, with one exception. The exception is that a stipulation to extend time that affects a hearing or other

proceeding that has already been scheduled on the court's calendar must be filed no later than ten days before the scheduled event.

You can also file a motion to extend time, under Civil Local Rule 6-3. The same rules for motions to shorten time also apply to motions to extend time, except that a motion to extend time does **not** need to:

1. Describe what you have done to comply with Civil Local Rule 37-1, or

2. Describe what is in dispute in the underlying motion and briefly summarize the position each party has taken.

CHAPTER 8
HOW CAN I MAKE SURE THAT I KNOW ABOUT EVERYTHING THAT IS HAPPENING IN MY CASE?

Although every document that is filed in a lawsuit must be served on all of the parties, sometimes mistakes are made or documents get lost in the mail. For this reason, it is a good idea to check the docket or the permanent case file with the court clerk every so often to make sure that:

1. Every document you filed has been entered on the docket;

2. You have received copies of every document that everyone else has filed; and

3. You are aware of every order that the court has issued.

The original copy of every document that is filed with the court is kept in a permanent file at the court clerk's office. Each case has its own file.

The docket is the computer file for each case, maintained by the court, which lists the title of every document filed, the date each document was filed, and the date each document was entered into the docket. It does not contain the text of those documents. To review the text of the documents, you must visit the clerk's office in person and ask to see the case file.

If you need to know specifics about your case – for example, if you have a question about the schedule for a hearing – **a call should be placed to the publicly listed courtroom deputy for each judge.** Calls to the judge, the judge's chambers or office, or to the judge's other staff are strongly discouraged. Neither the judge nor the judge's staff is allowed to give you legal advice, or to talk with you about the merits of your case outside of the courtroom.

How do I review the case file?

To review the case file for your lawsuit, all you need to do is visit the clerk's office during business hours in the courthouse where your lawsuit is being litigated. For example, if the judge who is assigned to your case is in San Francisco, you must visit the clerk's office in the San Francisco courthouse to view your case file.

Any case file you request will be made available to you at the time you request it, unless someone else is already using the file. There is no need to call ahead to let the court know that you will be coming to look at a case file.

Cases are filed in the clerk's office by case number, so make sure that you bring the case number with you. The case number is stamped on the complaint on the caption page. It will look something like this: C-02-0001 MHP. If the case number begins with "C," it is a civil case. If it begins with "CR," it is a criminal case. The next two digits are the last two digits of the year in which the case was filed; a case number that begins "C-02" is a civil case that was filed in 2002. The next set of numbers is a unique number which identifies a particular case. The initials at the end are the initials of the judge that has been assigned to your case.

If you do not have the case number, you can find it by looking up the names of the parties on the PACER system on any computer with a modem or an Internet connection. You can also find the case number by looking up the names of the parties on a computer system that is available for use in the clerk's office.

In order to view a case file, you must have a valid government-issued picture identification card. Acceptable identification cards include a state driver's license, a California identification card, a U.S. passport, or a federal, state, county or city employee card. Credit cards, car keys, or student identification cards will not be accepted.

Under no circumstances may you take the case file out of the clerk's office. Instead, you must look at the case file while you are in the clerk's office.

If you need to make a copy of a document from the case file, there are copy machines available for your use in the clerk's office for twenty cents per page. Clerk's office personnel will also copy small orders for you, but at fifty cents per page.

In San Francisco or San Jose, you also can have the court's designated copy services do your copying for you. This is often more efficient if you have large amounts of copying to do, but you have to allow additional time for the copying to be completed. In San Francisco, copying orders can be placed through Eddie Juhn by calling 415-317-5556, or by faxing him at 415-487-1031. In San Jose, copying orders can be placed through Pacific Research and Retrieval at 408-295-6800. These services are not available in Oakland.

You can also make arrangements to bring your own personal copy machine to the clerk's office if you call the clerk's office in advance.

After a case is over, the case files are archived at the Federal Records Center in San Bruno, California. To determine if a case has been archived, contact the clerk's office in the location where the case was litigated.

How do I review the docket?

There are several ways to obtain docket information:

1. Docket information is available through the PACER system on the internet at http://pacer.cand.uscourts.gov. PACER stands for "Public Access to Court Electronic Records."

2. If you do not have internet access, your computer can also reach a dial-up version of the PACER system by modem at (888) 877-5883 or (415) 522-2144.

3. If you do not have access to a computer, you can use the public computers in the clerk's office in all three courthouses (San Francisco, Oakland, San Jose) to obtain docket information.

PACER contains docket information for the Northern District of California for all civil cases filed since August 1990. Docket information for criminal cases is available for all cases

filed since August 1991. Dockets for miscellaneous cases are available for the same date ranges. Docket information for some, but not all, cases filed before those dates is also available.

Dockets are updated every night. The updates are typically, but not always, complete by midnight Pacific Standard Time. Therefore, when you retrieve a PACER docket, you typically get the docket as it stood at the close of the previous business day.

PACER users can search by case number or party name, or for all cases filed within a specified range of dates. The PACER system allows users to:

1. Review the docket online;

2. Print a copy of the docket; and

3. Download docket information for later review.

PACER also has available a U.S. party/case index, which can be used to search for specific parties in federal court cases nationwide. Registered PACER users may find the index at http://pacer.psc.uscourts.gov/uspci.html or by dialing in through a modem at (800) 974-8896.

You must register to become a PACER user before you can use any version of the PACER system. You can register online to become a PACER user at http://pacer.psc.uscourts.gov. You can also call the PACER Service Center at (800) 676-6856 to obtain a PACER registration form by mail. There is no cost for registering.

Once the registration form is received by the PACER Service Center, you will receive a login and password in the mail within about two weeks. Logins and passwords will not be faxed, emailed, or given out over the phone.

Internet access to PACER is billed at seven cents per page of information responding to your query. A page is defined as fifty-four lines of data. There is not an additional per-minute charge.

Dial-up access to PACER via modem is billed at sixty cents per minute of access time. Billing begins after a successful log-in. There is not an additional per-page charge.

For either internet access or dialup access to PACER, you will be billed quarterly by the PACER Service Center.

The public computers in the clerk's office do not use the PACER system, and you do not have to be registered on PACER to use them. There is no charge to look up docket information on those computers. However, if you want to print out docket information, there is a charge of fifty cents per page.

If you cannot afford to pay the PACER access fees, you may file a motion with the court asking to be excused from paying those fees. A court may, for good cause, exempt persons from the electronic public access fees, in order to avoid unreasonable burdens and to promote public access to such information. Your motion must show that it would be an unreasonable burden for

you to pay the fees and that it would promote public access to electronic court docket information if you were permitted to use the PACER system without paying a fee. If the court grants your motion, you must send a copy of the court's order to the PACER Service Center, P.O. Box 780549, San Antonio, Texas, 78278-0549, so that you will not be billed to use the PACER system. If the court denies your motion, you must pay the PACER fees in order to use the PACER system.

If you have problems with your PACER account, please call the PACER Service Center at (800) 676-6856.

If you have problems with the Northern District of California's PACER operations, please call us at (866) 638-7829. We cannot help with problems about your PACER account.

CHAPTER 9
WHAT IS A CASE MANAGEMENT OR STATUS CONFERENCE, AND HOW DO I PREPARE FOR IT?

What is a case management conference?

A case management conference is a meeting with the judge at which the judge, with the help of the parties, sets a schedule for the case. The initial case management conference is held early on. For example, at that initial conference, the judge will usually set a schedule for completing discovery (that is, exchanging information that could be used as evidence), a deadline for filing**Error! Bookmark not defined.** motions, and a trial date. Later case management conferences may be held to review the progress of the case, and change the schedule as necessary.

What is a status conference?

A status conference can also be called a "subsequent case management conference." Regardless of which term is used, it is just a conference that the judge holds after an initial case management conference has happened, to check on the status of the case. The rule providing for subsequent case management conferences is Civil Local Rule 16-10(c). Some judges hold status or subsequent case management conferences regularly, while other judges schedule them only when there is a particular need. Generally, a subsequent case management conference is a chance for the parties to tell the judge about the progress of their case, and about any problems they have had in preparing for trial or in meeting the original schedule. In addition, there is a pretrial conference held shortly before trial, where the judge and the parties decide the procedures for the upcoming trial.

When is the initial case management conference?

Under Civil Local Rule 16-2(a), when the complaint is filed, the plaintiff is given a copy of an Order Setting Initial Case Management Conference. The plaintiff must serve that Order on the defendants. The Order sets the date for the initial case management conference, which is usually held around 120 days after the complaint is filed.

Does every case have a case management conference?

No. Certain types of cases, which are listed in Civil Local Rules 16-4, 16-5, and 16-6, do not have case management conferences.

What should I do before the initial case management conference?

There are several things the parties should do to prepare before the initial case management conference. As explained in more detail below, the parties are expected to call each other or meet in person, in a process that is called *meeting and conferring*, and try to agree on a number of issues. These include: making a single proposal for how and when discovery will be done (if a joint proposed discovery plan is required); deciding whether to submit the case to arbitration, mediation, or early neutral evaluation; and preparing the joint case management statement. Among other things, the joint case management statement tells the court the results of

your meetings and what positions you have both taken about issues such as discovery and arbitration.

The requirements for case management conferences are explained in detail in Civil Local Rules 16-1 through 16-10, and in Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure. You should also check your judge's standing order, which may have additional rules.

Why do I have to meet and confer?

The point of meeting with the other side and conferring about issues like scheduling, discovery and resolving the case is to save everyone time, work out what you can before going to court, and to make sure both sides are clear on each other's views. Under Rule 26(f) of the Federal Rules of Civil Procedure, unless the case is in one of the categories listed in Rule 26(a)(1)(E), all parties must meet and confer at least 21 days before the case management conference to:

1. Discuss the nature and basis of their claims;

2. Discuss whether there is a way to resolve the case quickly and informally through a settlement;

3. Arrange for initial disclosure of information by both sides as required by Rule 26(a)(1). This includes exchanging the names and contact information of every person who is likely to have information about the issues, certain documents (described in Rule 26(a)), and various other information described in that section; and

4. Develop a proposed discovery plan.

The meet-and-confer is also referred to as a "Rule 26(f) conference."

What is the proposed discovery plan?

The proposed discovery plan is a proposal that the parties make to the court, about how each thinks discovery should be conducted in the case. Federal Rule of Civil Procedure 26(f) requires that the parties submit a joint proposed discovery plan, along with their joint case management conference statement and proposed case management order. This plan must be prepared in collaboration with the lawyers for the other party or parties. The court will review the plan, and discovery will proceed as the judge decides and sets out in the case management order.

The parties must make a good faith effort to agree on a joint proposed discovery plan, which must include each parties' views and proposals about:

1. Any changes that should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be done in phases or be limited to or focused upon particular issues;

3. Any changes that should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or the Civil Local Rules, and what other limitations should be imposed; and

4. Any other orders that should be entered by the court under Rule 26(c) or Rule 16(b) and (c).

What is the case management statement?

Civil Local Rule 16-9 requires the parties to file a joint case management statement and proposed case management order (all in one document) on the form approved by the Court. The clerk's office has both the form, and instructions for preparing a case management statement and proposed case management order. The form and the instructions are provided to the plaintiff at the time the complaint is filed. You can also find the form in Appendix A to the Civil Local Rules.

Under Civil Local Rule 16-9 and Rule 26(f) of the Federal Rules of Civil Procedure, the joint case management statement and proposed case management order must be filed no later than seven (7) days before the case management conference, unless the judge orders otherwise.

This Court's form requires you to describe the results of your discussions with the other side about ADR, or alternative dispute resolution, in the joint case management statement.

The joint case management statement and proposed order should be prepared and filed jointly by all of the parties. However, if preparing a joint statement can't be done because of some special hardship, then the parties may file separate case management statements. Those separate statements must describe the undue hardship that prevented them from preparing a joint statement. Although the court allows parties to file separate case management statements, it is better for the parties to file a joint statement, because it gives the parties more control. If the parties cannot agree on a schedule for the case, the judge may impose his or her own schedule, which may not be the schedule that either party would have wanted.

What about ADR and arbitration?

The joint case management statement also must include a section entitled "Alternative Dispute Resolution" or ADR. ADR is a way of saving time and money by working out parties' differences without going through all of the formality of civil litigation and trial. This Court offers different kinds of ADR as an alternative to a formal trial; one of them is arbitration, where the parties argue their positions to a neutral person who is not a judge, but is usually a lawyer. This Court's ADR programs are described in a handbook entitled "Dispute Resolution Procedures in the Northern District of California," which is provided to you when the complaint is filed. You can get more copies of the handbook at the clerk's office, and you can also find the same information on the Court's website at http://www.adr.cand.uscourts.gov.

In some cases, you have to try ADR first. Under ADR Local Rule 4-2, certain types of cases are automatically referred to a court ADR program called "non-binding arbitration." Non-binding arbitration is like a very quick mini-trial, which allows the parties to see how a judge (known as an arbitrator) might decide the case. While the parties do not have to accept the arbitrator's decision, it often helps parties decide to settle their differences. Under Civil Local Rule 16-8 (b), if your case is not referred to non-binding arbitration, you must sign, serve and file an ADR Certification (along with an extra copy for the court's ADR Unit) by the date given in your Order Setting Initial Case Management Conference. The form for the ADR Certification can be found at Appendix C to the Civil Local Rules. By signing the ADR Certification, you are telling the Court that:

1. You have read the handbook entitled "Dispute Resolution Procedures in the Northern District of California" or certain portions of the ADR internet site, at http://www.adr.cands.uscourts.gov, described in Civil Local Rule 16-8(b);

2. You have met with the other side and discussed the available ADR programs provided by the Court and by other ADR providers; and

3. You have personally considered whether your case might benefit from any of these ADR programs.

You must attach to the ADR Certification either a "Stipulation and (Proposed) Order Selecting ADR Process" or a "Notice of Need for ADR Phone Conference" on the form established by the Court. You can find these forms at Appendix C and D to the Civil Local Rules.

What happens at the initial case management conference?

At the case management conference, the judge will discuss the case management conference statement with the parties, and may also discuss other issues in the case. The judge is also likely to discuss the form of ADR most appropriate for your case. You must attend the case management conference in person, unless you file a written request to participate in the conference by telephone. Under Civil Local Rule 16-10(a), requests to participate in the case management conference by telephone must be filed and served no later than five (5) days before the conference, or at the time stated in your judge's standing order. Whether you attend the case management conference in person or by telephone, you must be prepared to discuss all aspects of your case with the judge.

What is the case management order?

During or after the case management conference, the judge will issue a case management order, which will set a schedule for the rest of the case. Sometimes the judge will sign the proposed case management order submitted by the parties. Sometimes the judge will change that order or write an entirely new order. The case management order signed by the judge will control the schedule for the rest of the case unless it is changed later by the judge.

What should I do before other conferences with the judge?

If the judge schedules a subsequent case management conference, Civil Local Rule 16-10(d) requires the parties to file a joint supplemental case management statement at least ten (10) days before the conference. The joint statement must report progress or changes in the case since the last statement was filed, identify any problems with meeting the existing deadlines, and suggest any changes to the schedule for the rest of the case. Your judge's standing order may require other things as well. You should check the judge's standing order. You can find a form for the joint supplemental case management statement and proposed order at Appendix B to the Civil Local Rules. You must attend the subsequent case management conference in person, unless the judge permits you to appear by telephone, and you must come to court prepared to discuss all aspects of the case with the judge.

CHAPTER 10
WHAT INFORMATION DO I HAVE TO GIVE TO THE OTHER PARTIES, EVEN IF THEY DON'T ASK FOR IT?

Before the parties begin the process of discovery, or the formal process of information exchange governed by certain procedural rules, they are required to give each other certain classes of information even if not requested. The information you have to give the other parties, even if they don't ask for it, is called a "disclosure." Rule 26(a) of the Federal Rules of Civil Procedure lists three types of disclosures which you must provide to the other parties at different times during the course of the lawsuit: (1) initial disclosures; (2) expert disclosures; and (3) pretrial disclosures.

What are initial disclosures?

Initial disclosures are the ones you have to serve early in the case.

Timing: Initial disclosures must be served within fourteen days after your Rule 26(f) meet and confer, unless:

1. The parties stipulate to a different time; or

2. The court orders a different time; or

3. A party objects during the conference that initial disclosures are not appropriate under the circumstances of the lawsuit, and states the objection in the Rule 26(f) discovery plan.

Initial disclosures are required in all cases, except for the categories of cases listed in Rule 26(a)(1)(E) of the Federal Rules of Civil Procedure.

Content: Unless your case is in one of the categories listed in Rule 26(a)(1)(E), you must serve the following information on the other parties in your lawsuit:

1. The name and, if known, the address and telephone number of each individual likely to have information that you may use to support your claims and defenses, unless that information will be used solely for impeachment. You also must identify the type of information that each individual has. "Information used solely for impeachment" is information that is used only to attack the believability or credibility of a witness, rather than information used to prove your position directly.

2. A copy, or a description by category and location, of all documents or other things that you have in your possession or control that you may use to support your claims or defenses, unless they will be used solely for impeachment.

3. A calculation of any category of damages you claim to have suffered. You also must make available to the other parties, for inspection and copying, all documents and other things that support your calculation, including documents and other things showing the nature and extent of your injuries. You do not, however, have to disclose documents and other things that are privileged or otherwise protected from disclosure.

4. You also must make available to the other parties, for inspection and copying, any insurance agreement which may apply to any award of damages in the lawsuit.

Form: Under Rule 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, these initial disclosures must be made in writing, and must be served on all of the other parties to the lawsuit. They must be signed by you, and must include your address. By signing the disclosure, you are certifying to the court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

Additional requirements: Your initial disclosures must be based on the information that is reasonably available to you. You must serve your initial disclosures even if:

1. You have not fully completed your investigation of the case; or

2. You think another party's initial disclosures are inadequate; or

3. Another party has not made any initial disclosures.

Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes on you a duty to supplement your initial disclosures if you learn that the information you disclosed is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

What are expert disclosures?

In an expert disclosure, you reveal to the other parties the identity of any expert witness you may use at trial. Expert disclosures are required by Rule 26(a)(2) of the Federal Rules of Civil Procedure. An expert witness is a person who has scientific, technical, or other specialized knowledge that can help the court or the jury understand the evidence.

If you hired or specially employed the expert witness to give testimony in your case, or if the expert witness is your employee and regularly gives expert testimony as part of his or her job, this disclosure also must be accompanied by a written report prepared by and signed by the expert witness, unless the court orders otherwise, or the parties stipulate otherwise. This written report is usually referred to as an "expert report."

Timing: Expert disclosures must be made by the time ordered by the court. If the court does not set a time for expert disclosures and the parties do not stipulate to a date for expert disclosures, the disclosures must be made at least ninety days before the trial date. If your expert disclosures are intended solely to contradict or rebut another party's previously disclosed expert disclosures, your disclosures must be made no later than thirty days after the disclosure made by the other party.

Content: Under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, the expert report must contain:

1. A complete statement of all opinions the expert witness intends to give at trial, and the basis and reasons for those opinions;

2. The data or other information considered by the expert witness in forming those opinions;

3. Any exhibits to be used as a summary of, or support for, the opinions;

4. The qualifications of the expert witness, including a list of all publications authored by the witness within the preceding ten years;

5. The compensation to be paid for the study and testimony of the expert witness; and

6. A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Form: Under Rules 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, these expert disclosures must be made in writing and must be served on all of the other parties to the lawsuit. They must be signed by you and the expert witness, and include your address. By signing the disclosure, you are certifying to the court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

Additional requirements: Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes on you a duty to supplement your expert disclosures if you learn that the information you disclosed is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. If your expert is required to prepare an expert report under Rule 26(a)(2)(B), this duty extends to supplementing both the expert report and any information provided by the expert during a deposition. Any supplement to your expert disclosures must be served no later than the time your pretrial disclosures under Rule 26(a)(3) are due.

What are pretrial disclosures?

In a pretrial disclosure each party files with the court and serves on the other parties certain kinds of information about evidence it may present at trial. Evidence that will be used solely for impeachment is not included. The requirements for pretrial disclosures are governed by Rule 26(a)(3) of the Federal Rules of Civil Procedure.

Timing: These pretrial disclosures must be made at least thirty days before trial, unless otherwise ordered by the court.

Content: The following information about evidence you may use at trial should be included in your pretrial disclosures:

1. The name and, if not previously provided, the address and telephone number of each witness. You must identify separately the witnesses you intend to present at trial and those whom you may present at trial if the need arises.

2. The identity of those witnesses whose testimony you expect to present at trial by means of a deposition, rather than by having the witness testify in person. You must also serve a transcript of the relevant portions of the deposition testimony.

3. An appropriate identification of each document or other exhibit, including summaries of other evidence, that you may use at trial. You must identify separately the exhibits you intend to use at trial and those which you may use if the need arises.

Form: Under Rule 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, these pretrial disclosures must be made in writing and must be served on all of the other parties to the lawsuit. They must be signed by you, and include your address. By signing the disclosure, you are certifying to the court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

CHAPTER 11
WHAT IS DISCOVERY?

"Discovery" is the process by which parties exchange information about the issues in their case before trial. Several different ways to ask for and get this information are described below. These include depositions, interrogatories, requests for document production, requests for admission, and physical or mental examinations. Each of these methods is explained in more detail in this chapter.

"Depositions" are question-and-answer sessions held before trial, in which one party to a lawsuit asks another person questions about the issues raised in the lawsuit.

"Interrogatories" are written questions served on another party to the lawsuit, which must be answered under oath.

In a "request for document production," you write out descriptions of documents you think another party has that would provide information about the issues in the lawsuit, and ask them to provide you with copies of any of their documents that satisfy your descriptions.

In a "request for admissions," you write out statements of fact you believe are true, and ask the other party to admit that those statements are true or to admit the application of any law to any fact.

A mental examination is an examination by an expert of another person's mental condition.

A physical examination would usually be an examination of a person's physical condition.

You may use the different methods of discovery in any order or at the same time. The fact that the other party asks you for information does not affect your right to ask for information from them, or mean that you have to wait to make your requests.

Are there any limits to discovery?

Under Rule 26(b) of the Federal Rules of Civil Procedure, any party may ask for another party to disclose any non-privileged matter that is relevant to the claim or defense of any party to the lawsuit. In other words, you may get (and, if asked, you must provide) any material that is reasonably likely to lead to the discovery of admissible evidence. The court can limit the use of any discovery method, however, if it finds that:

1. The discovery sought unreasonably seeks information that has already been provided, or that is already available from some other source which is more convenient, less burdensome, or less expensive; or

2. The party seeking discovery has already had enough chances to get the information sought; or

3. The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount of money the parties are fighting over, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues.

Sometimes you might request information from the other side and get an answer back that you have asked for privileged information, or information you cannot have because it is protected by various confidentiality agreements. In addition, there are some limits to how many requests you can make. These limits are discussed in the more detailed explanation of each method of discovery.

When can discovery begin?

If your case is in one of the categories of cases listed in Rule 26(a)(1)(E) of the Federal Rules of Civil Procedure, Civil Local Rule 16-7 states that discovery cannot begin until the judge sends out a case management order setting deadlines for discovery.

In all other cases, Rule 26(d) of the Federal Rules of Civil Procedure states that discovery cannot begin until the parties have had their Rule 26(f) meet and confer, unless:

1. Earlier discovery is allowed by another part of the Federal Rules of Civil Procedure; or

2. A court issues an order that lets you take earlier discovery; or

3. All parties agree that discovery can be taken earlier.

As noted above, all parties can conduct discovery at the same time.

DEPOSITIONS

How does a deposition work?

A deposition is a question-and-answer session before trial. One party to a lawsuit asks another person, who is under oath, questions about the issues raised in the lawsuit. Rule 30 of the Federal Rules of Civil Procedure explains the procedures for taking a deposition.

When you get to ask someone questions about his or her knowledge of the case in a deposition, that process of questioning is called deposing the person, or taking a deposition. The person who answers the questions in a deposition is referred to as the deponent. The deponent answers all questions under oath, which means that he or she swears that all of the answers are true. The deponent can be any person who may have information about the lawsuit, including eye witnesses, expert witnesses, or another party to the lawsuit.

The questions and answers in a deposition must be recorded. The party taking the deposition, the one asking the questions and seeking information, may choose the method for recording the deposition. The deposition can be recorded in a written record, or videotaped. The written record of a deposition is called the transcript of the deposition, and the person who

records what everyone says is usually referred to as a court reporter or a court stenographer. Rule 30(b) of the Federal Rules of Civil Procedure explains the ways the deposition can be recorded, the role of a court officer in recording the deposition, and other important details.

The person taking the deposition must pay the cost of recording the deposition.

Do I need the court's permission to take a deposition?

You usually do not need the court's permission to take a deposition. However, under Rule 30(a) of the Federal Rules of Civil Procedure, you do need the court's permission to take a deposition in any of the four following situations:

1. The deponent is in prison.

2. Your side of the lawsuit has already taken ten other depositions, and the other parties have not stipulated in writing that you can take more depositions. Rule 30(a) allows all of the plaintiffs, or all of the defendants, to take no more than ten depositions without the court's permission. For example, if you are one of two plaintiffs, and the other plaintiff has taken nine depositions and you have taken one deposition, neither you nor the other plaintiff can take any more depositions without the court's permission.

3. The deponent has already been deposed in the same case, and the other parties have not stipulated in writing that the deponent can be deposed again.

4. You want to take a deposition before the parties' "meet and confer" (a meeting that is required under Rule 26(f)), and the other parties will not agree in writing to let you take the early deposition. However, this exception has its own exception; you may not need to get court permission for an early deposition if your notice of deposition contains a certification, with supporting facts, that the deponent is expected to leave the United States and therefore will be unavailable for deposition in this country after the Rule 26(f) meet and confer occurs.

How do I arrange for a deposition?

Under Civil Local Rule30-1, the first thing you must do is consult with opposing counsel to choose a convenient time for the deposition. The convenience of the lawyers, the parties, and the witnesses must be taken into account, if possible.

Once you have picked a convenient time for the deposition, you must also give written notice of the deposition to the deponent, and to all of the other parties in your lawsuit, a reasonable amount of time before the deposition. This document is referred to as the *notice of deposition*. You must serve the notice of deposition on the deponent and all of the parties' counsel, even if you have already discussed the deposition with them. The notice of deposition may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail. You should not file the notice of deposition with the court.

What do I say in a notice of deposition?

Under Rules 30(b) and 26(g)(2) of the Federal Rules of Civil Procedure, the notice of deposition must include:

1. The time and place where the deposition will be held.

2. The name and address of the deponent, if known. If you don't know the name of the deponent, you must describe the person well enough that the other side can identify the person you wish to depose (for example, you may not know a witness's name, but know that he was "the store manager who was on duty that evening after 6:00 p.m."). If you do not know which person at a business or government agency has the information that you need, Rule 30(b)(6) of the Federal Rules of Civil Procedure allows you to name the business or government agency as the deponent, and describe the subjects you want to discuss at the deposition. The business or government agency then must tell you the persons who will testify on its behalf, and the subjects on which each person will testify.

3. The method by which the deposition will be recorded.

4. Your address and signature. By signing the notice of deposition, you are certifying to the court that:

    a. The deposition you are requesting is either allowed by the Federal Rules of Civil Procedure and existing law, or you have a good faith argument for extending, modifying, or reversing existing law to allow that deposition; and

    b. You are not serving the notice of deposition for any improper purpose, such as to harass anyone or to cause unnecessary delay or to needlessly increase the cost of the litigation; and

    c. Taking this deposition is not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

In addition, as noted in an earlier discussion, in some unusual circumstances your notice of deposition also has to explain why you don't think you need a court order to take an early deposition of the particular person.

When do I need to get a subpoena for a deposition?

You do not need a subpoena to depose a party; you can just go through the procedure to file a notice of deposition described above. If the deponent is not a party to the lawsuit, a so-called "non-party deponent" or a "non-party witness," you must also serve the deponent with a subpoena. A subpoena is a document issued by the court which requires a person to appear for a court proceeding at a specific time and place. Rule 45 of the Federal Rules of Civil Procedure discusses the requirements for subpoenas.

You can get a blank subpoena from the clerk's office for any deposition that will take place in the Northern District of California. If the deposition is going to be taken outside the Northern District of California, however, you must get the subpoena from a different court. In that case, you should contact the court in the district where the deposition is going to take place. A subpoena may be served (that is, hand-delivered) on the deponent by any person who is not a party and who is at least 18 years old. A subpoena must be hand-delivered to the deponent, along with the fees and mileage allowance required by law. Under 28 U.S.C. § 1821, a non-party deponent must be paid $40 per day for deposition testimony.

If the non-party deponent travels to the deposition by mass transit, such as by bus or by train, you also must pay the deponent's actual travel expenses, as long as he or she takes the shortest practical route and travels at the most economical rate reasonably available. You do not have to pay the travel expenses until the deponent provides you with a receipt or other evidence of the actual travel cost.

If the non-party deponent does not travel to the deposition by bus, train, or other common carrier, then you must pay a mileage fee. The mileage fee is set in 28 U.S.C. § 1821 and 41 C.F.R. § 301-10.303 at 36.5 cents per mile, plus any toll charges and parking fees.

What does it mean if the deponent files a motion to quash the subpoena?

After being served with a subpoena, a person can ask that the court *quash the subpoena*. Quashing basically means that the court decides that the person doesn't have to obey the subpoena. Therefore, if the court quashes the subpoena, the deponent does not have to appear for the deposition at the time and place listed on the subpoena.

Under Rule 45(c)(1) of the Federal Rules of Civil Procedure, you are required to take reasonable steps to avoid imposing an undue burden or expense on any person that you subpoena for a deposition. If the deponent thinks there is something improper in your subpoena, he can try to get the court to quash it for that reason. In addition, under Rule 45(c)(3)(A)(ii), if your deposition subpoena requires a non-party deponent to travel more than 100 miles from his or her home or work address, and the deponent objects, the court must quash the subpoena. Therefore, it is a good idea to take the deposition at a location within 100 miles of the non-party deponent's home or business address.

Can I ask a deponent to bring documents to a deposition?

If the deponent is a party to the lawsuit, Rule 30(b)(5) of the Federal Rules of Civil Procedure lets you serve a request for document production along with the notice of deposition.

Rule 34 of the Federal Rules of Civil Procedure states the rules for requests for document production. Those rules are discussed in a separate section below, entitled "Requests for Document Production."

What is a subpoena duces tecum and why would I need one?

A "subpoena duces tecum" is a court order requiring someone to give another person copies of papers, books, or other things that the court orders. It is a discovery tool you can use with a deposition, or by itself. If the deponent is not a party to the lawsuit, you must serve the deponent with a subpoena duces tecum if you want the deponent to bring documents to the deposition.

Under Rule 30(b)(1), the documents you want the deponent to bring to the deposition must be listed in both the notice of deposition and the subpoena duces tecum. Rule 45 of the Federal Rules of Civil Procedure discusses the requirements for a subpoena duces tecum, and those requirements are discussed in a separate section below, entitled "Requests for Document Production."

How long can a deposition last?

Under Rule 30(d)(2) of the Federal Rules of Civil Procedure, a deposition may last no longer than seven hours. If a party thinks the deposition should go more than seven hours, they must either get all parties to agree, or get authorization from the court.

Does the deponent have to answer all questions?

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.

Under Rule 30(c), the deponent is entitled to state any legal objections he or she has to any question. There are specific types of objections that are proper. You may, for example, object to the form of a question (that is, the question is vague, the question is really several questions all together, the question is argumentative), or you may object that the question asks for information that you are not obliged by law to give. In most cases, the deponent still must answer the question. Under Rule 30(d)(1), the deponent may refuse to answer a question only in the following three situations:

1. When answering would violate a confidentiality privilege, such as the attorney-client or doctor-patient privilege; or

2. When the court has already ordered that the question does not have to be answered; or

3. To let you present a motion to the court under Rule 30(b)(4). Rule 30(b)(4) allows a deponent or a party to present a motion to the court arguing that the deposition should be stopped, that certain questions should not be answered, or that some other limitation should be placed on the way in which the deposition is being taken. The deponent or the party making the

motion must show that the deposition is being conducted in bad faith or in an unreasonable manner to annoy, embarrass, or oppress the deponent or party.

Who is allowed to ask the deponent questions?

Under Rule 30(c) of the Federal Rules of Civil Procedure, any party may ask questions at the deposition. Usually, the party who noticed the deposition asks all of their questions first. Then any other party may ask questions, including the attorney for the person being deposed.

Can the deponent change his or her deposition testimony after the deposition?

Under Rule 30(e) of the Federal Rules of Civil Procedure, once the court reporter notifies the deponent that the deposition transcript is completed, the deponent then has 30 days to review the deposition transcript and to make changes. To make changes to the deposition, the deponent must sign a statement listing the changes and the reasons for making them. The original transcript is not actually changed, but the court reporter must attach the list of changes to the official deposition transcript. That way the court can see where any changes are being made.

INTERROGATORIES

What are interrogatories?

Interrogatories are written questions sent by one party to any other party to the lawsuit, and these questions must be answered under oath. Unlike depositions, which can be taken of any person with knowledge about a case, interrogatories can only be served on parties. Rule 33 of the Federal Rules of Civil Procedure states the rules for serving interrogatories. Interrogatories may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

Do I need the court's permission to serve interrogatories?

Under Rule 33(a) of the Federal Rules of Civil Procedure, you do not need the court's permission to serve interrogatories unless you have already served 25 or more interrogatories on the same party.

If you want to serve more than 25 interrogatories on a party, you must file a motion with the court asking for the Court's permission. Civil Local Rule33-3 requires that any motion to serve additional interrogatories must be filed with a memorandum which lists each additional interrogatory that you want to serve and explains in detail why you need to ask each additional question.

How many interrogatories can I serve?

As noted, under Rule 33(a), you can serve only 25 interrogatories on each party unless you get permission from the court to serve more. Note that you can serve different interrogatories on different parties. Thus, for example, if there are three defendants, the plaintiff can serve up to 25 interrogatories on each of the three defendants without permission of the court or the other parties.

Parties cannot get around the 25 interrogatory limit by putting several questions all together. Each question is one interrogatory. If your questions have separate subparts, then each subpart is counted as a separate interrogatory.

What kinds of questions can I ask?

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.

Are there any requirements for the form of interrogatories?

Usually, parties write out each interrogatory with a separate number.

Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the interrogatories and state your address. By signing the interrogatories, you are certifying to the court that:

1. The questions seek information that is allowed by the Federal Rules of Civil Procedure and existing law, or you have a good faith argument for extending, modifying, or reversing existing law to allow you to get this information; and

2. You are not serving the interrogatories for any improper purpose, such as to harass anyone or to cause unnecessary delay or to needlessly increase the cost of the litigation; and

3. The interrogatories are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

How do I answer interrogatories served on me?

The party answering interrogatories must respond to interrogatories within 30 days. A responding party can either answer the question or object to the question, or both. If a party needs more than 30 days to respond, it can ask the other party to agree to give him or her more than the 30 days provided for under Rule 33(b) of the Federal Rules of Civil Procedure. Often parties will agree to a reasonable extension of time. If the party that served the interrogatories will not agree to give the answering party more time, then the party needs to file a motion with the court requesting additional time. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. Any objections also must be stated in writing, and must include the reasons for the objection. If you object to only part of a question, you must answer the rest of the question.

Under Civil Local Rule 33-1, answers and objections to interrogatories must set forth each question in full before each answer or objection.

Rule 33(a) of the Federal Rules of Civil Procedure requires a party who is served with interrogatories to answer them with all information that the party has available. "Available" means more than simply information that a party remembers without doing research. Under Rule 33(d), if the answer to an interrogatory can be found in your business records or some other place that is available to you, then you must look for the answer. If the burden of finding the answer in those records would be about the same for you or for the party who served the interrogatories, you may answer the interrogatory by simply telling the other side the records in which the answer can be found, and then allowing that party to look through those records. You must identify the records in sufficient detail to permit the party who served the interrogatories to locate and to identify the records in which the answer can be found. You must also give the party who served the interrogatories a reasonable opportunity to review and copy those records. Discovery depends upon people giving complete answers to questions. So, it is not appropriate to answer "I don't know" to an interrogatory, if the information you need to answer the question is available to you.

If a party responds to interrogatories with any objections, the lawyer making the legal objections must sign the response with the objections. If the responding party does not have a lawyer, the party should sign. If a party responds to interrogatories with the substantive answer, the party must sign the answers whether or not the party has a lawyer.

Duty to supplement answers to interrogatories

If you have already answered an interrogatory question, but later you learn something that changes your answer, you must let the other side know by supplementing your original answer. Rule 26(e)(2) of the Federal Rules of Civil Procedure imposes a duty on all parties to supplement their answers to interrogatories if he or she learns that the response is incomplete or incorrect.

REQUESTS FOR DOCUMENT PRODUCTION

In a request for document production, you write out descriptions of documents you think another person has. These should be documents that you reasonably believe would have information in them about the issues in the lawsuit. You then ask that person to provide you with copies of any of their documents that satisfy your descriptions. Document requests can be served on any other person, not just parties to the lawsuit. Different types of requests must be used, however, depending upon whether you are trying to get documents from a party or from another person.

How do I get documents from the other parties?

If the person who has the documents you want is a party to the lawsuit, you must follow Rules 34(a) and (b) of the Federal Rules of Civil Procedure. Under Rule 34(a), any party can serve on another party:

1. A request for production of documents, seeking to inspect and copy any documents which are in that party's possession, custody, or control; or

2. A request for production of tangible things (i.e., physical things that are not documents), seeking to inspect and copy, test, or sample any thing which is in that party's possession, custody, or control; or

3. A request for inspection of property, seeking entry onto property controlled or possessed by that party for the purposes of inspecting and measuring, surveying, photographing, testing, or sampling the property or any object on that property.

The request must list the items that you want to inspect and describe each one in enough detail that it is reasonably easy for the party to figure out what you want. The request also must specify a reasonable time, place, and manner for making the inspection and performing any related acts such as photocopying the materials.

Form

Ordinarily, you should number each request for documents separately. Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the requests for document production and state your address. By signing the requests for document production, you are certifying to the court that:

1. They are either permitted by the Federal Rules of Civil Procedure and existing law, or you have a good faith argument for extending, modifying, or reversing existing law to allow you to request these documents; and

2. You are not serving them for any improper purpose, such as to harass anyone or to cause unnecessary delay or needless increase in the cost of the litigation; and

3. The requests for document production are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

A request for document production from a party to the lawsuit may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

How do I answer a request for document production served on me?

The party who has been served with the request must a written response within 30 days after the request is served, unless the court or a written stipulation of the parties has set a shorter or longer time for responding.

Civil Local Rule 34-1 provides that you must write out each request for documents in your response to a request for production or inspection under Rule 34(a). Therefore, you must write out each request in full before your response or objection to that request.

The response must state, with respect to each item requested, that you will allow the inspection and related activities that were requested, unless you make an objection to the request. If there is an objection, you must state the reasons for the objection. If you object to only part of the request, you must state your objection to that part and permit inspection of the rest.

A party who produces documents for inspection must either:

1. Produce the documents as they are kept in the usual course of business, or

2. Organize and label the documents to correspond with the categories in the request.

If, after you have responded to a document request, you discover more documents (or create more documents) that respond to the request, you need to provide those documents as well. Rule 26(e)(2) of the Federal Rules of Civil Procedure requires parties to supplement their responses to a request for document production if they learn that the response is incomplete or incorrect.

How do I get documents from persons who are not parties?

If the person that you want to give you documents is not a party to the lawsuit, you need to follow Rules 34(c) and 45 of the Federal Rules of Civil Procedure. Under Rule 34(c), you can ask the court to compel a person who is not a party to the lawsuit to produce documents and things, or to submit to an inspection, according to the procedures stated in Rule 45. Rule 45 sets out the rules for issuing, serving, protesting and responding to subpoenas, including subpoenas duces tecum. As discussed above, a subpoena duces tecum is a document issued by the court which requires a person to produce documents or submit to an inspection at a specific time and place.

Form

The same form is used for subpoenas duces tecum and for deposition subpoenas. If you want a non-party to produce documents at their deposition, you only need to fill out one subpoena form directing that person to appear at the deposition and to bring certain documents with them. You may also serve a deposition subpoena and a subpoena duces tecum separately, so that the person will appear for a deposition at a certain time and produce documents at a different time. You may also choose to serve only a deposition subpoena, or only a subpoena duces tecum, depending on what information you need for your lawsuit.

You can get a blank subpoena from the clerk's office for any production of documents or inspection that will occur in the Northern District of California. If the document or thing is outside the Northern District of California, however, you will need to get the subpoena from the court in the district where the document production or inspection will take place.

Is there anything else to keep in mind about subpoenas duces tecum?

Under Rule 45(b)(1) of the Federal Rules of Civil Procedure, a subpoena duces tecum may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

Under Rule 45(c)(1) of the Federal Rules of Civil Procedure, you must take reasonable steps to avoid imposing an undue burden or expense on the person receiving the subpoena duces tecum.

What kind of a response can I expect if I serve a subpoena duces tecum?

Under Rule 45(c)(2)(A), a person who has received a subpoena duces tecum does not have to appear in person at the time and place for the production of documents or inspection, unless he or she also has been subpoenaed to appear for a deposition, hearing or trial at the same time and place. He can, for example, simply send documents instead of having you show up to inspect them.

Under Rule 45(c)(2)(B), a person who has been served with a subpoena duces tecum has 14 days to serve any written objections to inspection or copying. The time is shorter if the time for production or inspection is less than 14 days after service. The party who served the subpoena must then get a court order before he or she can inspect or copy any of the materials to which an objection has been made.

Under Rule 45(d)(1), a person who is producing documents that have been subpoenaed must either:

1. Produce the documents as they are kept in the usual course of business, or

2. Organize and label them to match the categories of documents asked for in the subpoena.

REQUESTS FOR ADMISSION

What is a request for admission?

In a request for admissions, you write out statements of fact you believe are true, and ask the other party to admit that those statements are true. Or you write out the application of any law to any fact, and ask the other party to admit that they agree. Requests for admission can only be used on other parties to the suit. If the other party admits to anything you requested under this procedure, the court will treat that fact as having been proven.

Form

Rule 36 of the Federal Rules of Civil Procedure establishes the requirements for requests for admission.

Requests for admission may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

Each request for admission must be stated separately, and should be numbered in order. Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the requests for admission and state your address. By signing the requests for admission, you are certifying to the court that:

a. They are permitted by the Federal Rules of Civil Procedure and existing law, or you have a good faith argument for extending, modifying, or reversing existing law to allow the requests to be made; and

b. You are not serving them for any improper purpose, such as to harass anyone or to cause unnecessary delay or needless increase in the cost of the litigation; and

c. The requests for admission are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

How many requests for admission can I serve?

There is no limit to the number of requests for admission that you may serve, as long as they are not unreasonable, unduly burdensome, or expensive.

What kind of a response can I expect to my requests for admission?

Civil Local Rule 36-1 provides that responses to requests for admission must state each request in full before each response or objection. If a party objections to a request for admission, he or she must state the reasons for the objection. Responses to requests for admission must be signed by the party or by the party's attorney.

What happens if I do not respond to a request for admission in time?

The party who receives a request for admission has 30 days to respond under Rule 36(a) of the Federal Rules of Civil Procedure. That time can be increased or decreased by agreement of the parties or if the court orders a different time for responding. If no response is served within 30 days (or the time otherwise set by the court or by agreement), all of the requests for admission are automatically considered to be admitted.

How do I respond to a request for admissions served on me?

An answer to a request for admission must either admit or deny the request, or explain in detail the reasons why the answering party cannot truthfully admit or deny it. If you can't either simply admit or deny a particular request, then you must admit the part that is true and either deny (or explain why you can't admit) the rest. In some cases you may not know the answer, and in those cases you may answer that you do not have enough information to admit or deny the requested information. But you may not respond that you do not have the information or knowledge to admit or deny the request, unless you also state that you have made a reasonable

search for the information and that you still do not have enough information to admit or deny the request.

Any matter that is admitted is treated as if it has been proved for the purpose of rest of the lawsuit, unless the court allows the answering party to withdraw or change the admission. An admission is only for the purposes of the litigation, and is not an admission for any other purpose. An admission in one lawsuit cannot be used against that party in any other proceeding.

What if I don't want to admit to the truth of a request for admission?

Under Rule 37(c)(2) of the Federal Rules of Civil Procedure, if a party fails to admit a fact in a request for admission and the other party later proves that the fact is true, the requesting party may file a motion requesting the court to order the answering party to pay the reasonable expenses incurred in making that proof, including attorneys' fees. The court *must* grant the motion unless it finds that:

1. The request was objectionable under Rule 36(a);

2. The admissions were not important;

3. The party who did not admit the matter had reasonable ground to believe that it might prevail on that matter; or

4. There was other good reason for the failure to admit.

Duty to supplement responses

After a party has responded to a request for admission, that party is under an on-going duty to correct any omission or mistake in that response. If a party later obtains information that changes their response, Rule 26(e)(2) of the Federal Rules of Civil Procedure requires them to supplement that earlier response if it is incomplete or incorrect.

PHYSICAL AND MENTAL EXAMINATIONS

When the mental or physical condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, Rule 35 of the Federal Rules of Civil Procedure allows the court to order that person to submit to a physical or mental examination. The examination must be done by a suitably licensed or certified examiner, such as a physician or psychiatrist. The party who requested the examination must pay for it.

Is a court order required for a mental or physical examination?

Yes, unless the other party agrees to the examination without an order.

Unlike other discovery procedures, mental or physical examinations can be obtained only by filing a motion with the court, or by agreement of the parties. If a motion is filed, all of the ordinary rules for filing motions apply. The motion must:

1. Explain why there is a need for the examination;

2. Specify the time, place, manner, conditions, and scope of the proposed examination; and

3. Identify the person or persons who will conduct the examination.

What happens to the results of the examination?

If the court orders a mental or physical examination, the party or other person who is to be examined has the right to request a detailed written report from the examiner explaining the examiner's findings, including the results of all tests made, diagnoses and conclusions, together with similar reports of all earlier examinations of the same condition.

Because a medical or physical examination may raise new issues that the parties did not think of earlier, a party that has obtained an examination may also ask for related information. After the party who asked for the examination delivers reports to the party that opposed the examination, he or she may ask for any similar report of any examination that party has about the same condition. If the person who was examined is not the party, the party need not produce any report that the party shows it is unable to obtain.

If an examiner does not produce a report, the court can exclude the examiner's testimony at trial.

These requirements for examiners' reports also apply to mental or physical examinations that are agreed to by the parties, unless their agreement specifically states otherwise.

CHAPTER 12
WHAT CAN I DO IF THERE ARE PROBLEMS WITH DISCLOSURES OR DISCOVERY?

It is not uncommon for the parties to have disagreements about disclosures or discovery. There are several ways to get help from the court when these disputes arise.

What is the first step?

First, you need to try to resolve the dispute on your own. Under Civil Local Rule 37-1(a), the court will not hear any motions about disclosures or discovery unless the parties or their counsel have previously tried to resolve all issues on their own.

What if the parties can't resolve the problem, and discovery is still due?

If you receive a discovery request and believe the discovery sought is inappropriate or too burdensome, or you need more time to respond, you may file a motion for a protective order. A protective order is a court order limiting discovery or requiring discovery to proceed in a certain way. The Federal Rules of Civil Procedure provide for protective orders in Rule 26(c).

A motion for a protective order must be filed in either the court where the lawsuit is being heard or, if the motion involves a deposition, in the federal district court in the district where the deposition is to be taken.

A motion for a protective order must include:

1. A certification that you have tried to confer in good faith with the other parties to resolve the dispute without help from the court, or that you met together but were still unable to resolve it;

2. An explanation of the dispute and what you want the court to do; and

3. An explanation of the facts and/or law that make it appropriate for the court to grant your motion.

What if the parties are stuck on a problem in the middle of a discovery event?

A "discovery event" is any activity or proceeding where you meet with the other side and expect to exchange discovery information, for example, a deposition or inspection. If a dispute arises at such a time, and you believe that it would save a lot of time or expense if the dispute were resolved immediately, Civil Local Rule 37-1(b) permits you to call the chambers of the judge who is assigned to your case to request that he or she address the problem through a telephone conference with the parties.

Before calling the judge, you must discuss the issues with the other parties and attempt to resolve the problems on your own. You may call the judge's chambers only if your negotiations with the other parties do not resolve the problem.

The judge is not required to hold a telephone conference. He or she may be busy with other cases when you call, or may decide that the issue is not urgent and should be addressed in a written motion.

What do I do if they don't respond, or if the response is inadequate?

When a dispute arises over disclosures, or over a response or a failure to respond to a discovery request, there are two types of motions that may be appropriate: a motion to compel or a motion for sanctions. Before filing either type of motion, you must confer with the party or person you think is refusing to cooperate and try to resolve the dispute on your own.

What is a motion to compel?

A motion to compel is a motion asking the court to order a person to make disclosures or to respond to a discovery request, or to provide more detailed disclosures or a more detailed response to a discovery request. Rule 37 of the Federal Rules of Civil Procedure and Civil Local Rule 37-2 address the requirements for motions to compel.

How do I file a motion to compel?

Under Rule 37(a)(1), a motion to compel a **party** to make disclosures or to respond to discovery must be filed in the court where the lawsuit is pending. A motion to compel a **non-party** to respond to discovery must be filed in the court in the district where the discovery is being taken.

Content: A motion to compel must include:

1. A certification that you have conferred in good faith, or tried to confer in good faith, with the other parties to resolve the dispute without help from the court;

2. An explanation of the dispute, and what you want the court to do;

3. If the dispute involves discovery, you must include the complete text of each disputed discovery request immediately followed by the complete text of the objections or disputed responses to that request; and

4. An explanation of the facts and/or law that make it appropriate for the court to grant your motion.

Paying for the motion to compel: If the court grants a motion to compel, or if the requested disclosure or discovery was provided after the motion to compel was filed, the court must require the person against whom the motion was filed, or that person's lawyer, or both, to pay the reasonable expenses involved in making the motion, including attorney's fees, unless the court finds that:

1. The motion was filed without first making a good faith effort to obtain the disclosure or discovery without court action; or

2. The opposing party's nondisclosure, failure or objection was substantially justified; or

3. Other circumstances make an award of expenses unjust.

A party who does not have a lawyer may not receive an award of attorneys' fees.

What is a motion for sanctions?

A motion for sanctions asks the court to punish a person for failing to make required disclosures, refusing to respond to a discovery request, or refusing to obey a court order to respond to a discovery request. Rule 37(b) through (g) of the Federal Rules of Civil Procedure and Civil Local Rule 37-3 address the requirements for motions for discovery sanctions.

Under what circumstances can I ask for discovery sanctions?

A motion for discovery sanctions may be brought only if a person:

1. Fails to provide required disclosures; or

2. Fails to obey a court order to respond to a discovery request; or

3. Fails to appear for a deposition that has been properly noticed; or

4. Fails to answer interrogatories that have been properly served; or

5. Fails to respond to a request for document production or inspection that has been properly served.

A motion for discovery sanctions must be filed as a separate motion, and not as part of another motion. It must be filed on the normal thirty-five day hearing schedule, and must be made as soon as possible after you learn about the circumstances that made the motion appropriate. Unless otherwise ordered by the court, a motion for sanctions may not be filed more than fourteen days after entry of judgment.

Content: A motion for sanctions must include the following:

1. If the motion involves a failure to respond to interrogatories or request for document production or inspection, it must include a certification that you have conferred in good faith, or tried to confer in good faith, with the other parties to resolve the dispute without help from the court;

2. An explanation of the dispute, and what you want the court to do;

3. An explanation of the facts and/or law that make it appropriate for the court to grant your motion;

4. Competent declarations which explain the facts and circumstances that support the motion;

5. Competent declarations which describe in detail the efforts you made to secure compliance without intervention by the court; and

6. If attorneys' fees or other costs or expenses are requested, competent declarations itemizing in detail the otherwise unnecessary expenses, including attorneys' fees, directly caused by the alleged violation or breach, and an appropriate justification for any attorney-fee hourly rate claimed.

What kinds of things will a court do as a discovery sanction?

If the court grants a motion for sanctions, it may issue any order that is just and appropriate to address the problem. Rule 37(b)(2) lists some of the types of orders that may be appropriate:

1. An order resolving certain issues or facts in favor of the party who made the motion;

2. An order refusing to allow the disobedient person to support certain claims or defenses, or prohibiting that party from introducing certain evidence;

3. An order striking certain documents or parts of documents from the case, or staying the lawsuit until the order is obeyed, or dismissing the lawsuit or any part of the lawsuit, or rendering a default judgment against the disobedient party; or

4. An order holding the disobedient party in contempt of court for failing to obey an order, except an order to submit to a physical or mental examination.

In addition, if a party fails to make required disclosures under Rule 26(a) or 26(e)(1), or to supplement a prior response under Rule 26(e)(2), that party cannot use as evidence at the trial, at a hearing, or on any motion, any information or witness that was not disclosed, unless the failure to disclose was harmless.

Paying for the motion for sanctions: If the court grants a motion for discovery sanctions, it must require the disobedient person or that person's lawyer, or both, to pay the reasonable expenses, including attorney's fees, caused by their disobedience, unless the court finds that the conduct was substantially justified or that other circumstances make an award of expenses unjust. A party who does not have a lawyer may not receive an award of attorneys' fees.

CHAPTER 13
WHAT HAPPENS AT A COURT HEARING?

What is a hearing?

A hearing is a relatively formal court proceeding where the parties discuss issues with the judge and have their arguments on the relevant issues heard by the judge. Sometimes witnesses can be presented, but that depends on the legal issues the judge is covering at the particular hearing.

What do I do before a hearing

Before the hearing, take time to review all of the papers that have been filed for the hearing. The judge will expect you to be able to answer questions about the issues that are being addressed at the hearing and about anything else that has been happening in the lawsuit. Bring with you to court any papers that you might need to answer the judge's questions.

What does a courtroom look like?

Although each courtroom is slightly different, the courtroom is generally arranged as follows.

a. In the front of the courtroom is a large desk area where the judge sits. This is called "the bench."

b. In front of the judge and over to one side is a chair where witnesses sit when they testify. This is called the "witness box."

c. In front of the judge, there will usually be a person seated in front of a small machine. This is the court reporter. The court reporter uses the machine to create a record of everything that is said at the hearing. Occasionally, the court will use a tape recorder instead of a court reporter to record the hearing.

d. There will often be another person seated in front of the judge. This is the courtroom deputy, who assists the judge. If you need to show a document to the judge during a hearing, you should hand the document to the courtroom deputy, who will then hand it to the judge.

e. There may be other court staff members seated off to the side.

f. In the center of the courtroom in front of the bench is a podium with a microphone. This is where lawyers, and parties who do not have lawyers, must stand when they speak to the judge.

g. At one side of the courtroom, against the wall, there are two rows of chairs. This is the jury box, where jurors sit during a trial. During a hearing, court staff members may be sitting in the jury box.

h. In the center of the courtroom, there will be several long tables with a number of chairs around them. This is where the lawyers and the parties sit during a hearing and during trial. The plaintiffs sit at the table that is closest to the jury box. The defendants sit at the table next to the plaintiffs.

i. In the back of the courtroom are several rows of benches where anyone can sit and watch the hearing or trial.

How should I behave at a hearing?

1. When attending a hearing, it is customary to show respect for the court by dressing nicely and conservatively, as if you were going to a job interview.

2. The judge will expect you to be on time. It is much better to arrive at the hearing a few minutes early than to arrive a few minutes late.

3. Often the court has several short hearings scheduled for the same time. When you enter the courtroom, you should sit in the benches in the back of the courtroom until your case is announced. If your hearing is the only one scheduled, you may sit at the plaintiffs' or defendants' table in the center of the courtroom, instead of sitting in the benches at the back of the room.

4. When the judge enters the courtroom, you must stand and remain standing until the judge sits down.

5. When you hear your case announced, go immediately to the podium in front of the bench. You can bring with you any papers that you may need to refer to during the hearing. When you get to the podium, state your name, and indicate whether you are the plaintiff or the defendant. It is customary to say either:

a. "May it please the court, my name is [your name] and I am the [plaintiff or defendant] in this case."

or

b. "Good [morning or afternoon], your honor, my name is [your name] and I am the [plaintiff or defendant] in this case."

6. When you speak to the judge, it is customary to refer to the judge as "Your Honor" instead of using the judge's name.

7. If the judge is holding a case management conference or status conference, you should remain standing at the podium, ready to answer any questions the judge may have, unless the judge asks you to sit down. Always answer the judge's questions completely, and never interrupt the judge when he or she is speaking. When the judge is finished asking questions, he or she will usually ask if the parties have anything else they want to discuss.

How does a motion hearing work?

If the judge is hearing a motion, the hearing usually goes through the following sequence of events. First, the party who filed the motion has a chance to argue why the motion should be granted. Then, the opposing party will argue why the motion should be denied. Finally, the party who filed the motion has an opportunity to explain why he or she believes the opposing party's argument is wrong.

You should try not to repeat all the arguments that you made in your motion or opposition papers, but instead simply highlight the most important parts.

It is not appropriate to make new arguments that are not in the papers you filed with the court, unless you have a very good reason why you could not have included the argument in your papers.

You can refer to notes during your argument, if you need to, but it is usually more effective to speak to the judge rather than read an argument that you have written down ahead of time.

When one party is speaking, the other party should sit at the table. Never interrupt the other party. Instead, always wait until it is your turn to speak.

The judge may ask questions before you begin your argument, and may also ask questions throughout your argument. If the judge asks a question, always stop your argument and answer the judge's question completely. When you are finished answering the question, you can go back and finish the other points you wanted to make.

If the judge asks you a question when you are seated at the table, stand and walk up to the podium before you answer the question.

General advice for hearings

1. Be sure to have a pen and paper with you, so that you can take notes about anything that the judge asks you to do.

2. When the hearing is over, you should immediately leave the courtroom, or, if you want, you can return to one of the benches in the back of the room to watch the rest of the hearings. If you need to discuss something with opposing counsel, you must leave the courtroom and discuss the matter in the hall so that you do not disturb the other people who are in the courtroom.

CHAPTER 14
WHAT IS A MOTION FOR SUMMARY JUDGMENT?

A motion for summary judgment is a way to end a case without going through a trial, because the important **facts** are not really in dispute. Ordinarily, a case must go to trial because the parties do not agree about the facts, and they are not able to reach a compromise. A court does not need to have a trial if the parties agree about the facts, or if one side does not have any evidence to support its version of what actually happened. In that case, the Court can decide the issue based on the papers that are filed by the parties alone. A motion for summary judgment filed by a party asks the court to decide a lawsuit without having a trial because, based on all of the evidence, there is no real dispute about the key facts.

When plaintiffs file a motion for summary judgment, they are trying to show that the undisputed facts prove that the defendant violated the law. When defendants file a motion for summary judgment, they are trying to show the opposite: that the undisputed facts prove that they did **not** violate the law.

Summary judgment will be granted in favor of the party who moved for summary judgment only if the evidence is so one-sided that a jury could not reasonably find in favor of the opposing party. In deciding a motion for summary judgment, the court must consider all of the admissible evidence from both parties. Because summary judgment means that there is no chance to hear live witnesses and decide who is credible, the court has to consider evidence in the light most favorable to the party that does not want summary judgment. That means that if evidence could be interpreted in many ways, the court must interpret it in the way that favors the party who opposes summary judgment.

If the court grants a motion for summary judgment, the lawsuit is over. If the court denies a motion for summary judgment the case will go to trial unless the parties decide to compromise and end the case themselves. By denying summary judgment, a court does **not** decide that it believes one side over the other. Rather, denying summary judgment means that there is a real dispute about the facts that will have to be decided in a trial.

Rule 56 of the Federal Rules of Civil Procedure explains the requirements for filing motions for summary judgment. Not every motion for summary judgment tries to end the entire case. A motion for summary judgment may try to end the whole lawsuit, or it may try to decide one or more individual claims. A motion for summary judgment may also be brought to decide if the defendant is liable (that is, violated the law), even if there is still a dispute over the amount of money or other kinds of damages that the plaintiff should get.

Under what circumstances is a motion for summary judgment granted?

Under Rule 56(c), the Court will grant a motion for summary judgment if:

1. The evidence presented by the parties in their papers shows that there is no real dispute about any material fact (in other words, the evidence that actually matters all leads to the same conclusion),

and

2. The undisputed facts mean, under the law, that the party who filed the motion should prevail (that is, the undisputed evidence proves or disproves the plaintiff's legal claim).

What does each side argue to get the result they want on summary judgment?

If the plaintiff files a motion for summary judgment, the plaintiff must do two things:

1. The plaintiff must provide admissible evidence. That evidence must show that there is no real factual dispute about any element of his or her claim. Evidence includes things like sworn statements, medical records, and physical things. Evidence is admissible if the Federal Rules of Evidence (or other federal law) allows that evidence to be considered for the purpose for which it was offered.

and

2. The plaintiff must also show that that the defendant does not have any admissible evidence that, if true, would prove any of the defendant's defenses to the plaintiff's claims. Usually, this is done by showing that the defendant has admitted that it does not have any other evidence.

To counter the plaintiff's motion for summary judgment, the defendant must either:

1. Submit admissible evidence showing that there is a factual dispute about one or more elements of the plaintiff's claims or the defendant's defenses,

or

2. Show that the plaintiff has not submitted sufficient admissible evidence to prove one or more elements of the plaintiff's claims.

If the defendant files a motion for summary judgment, the defendant may win summary judgment in one of two ways:

1. A defendant may win summary judgment if he or she can show that the plaintiff simply does not have the evidence necessary to prove one of the elements of the plaintiff's claims. An element is one of the building blocks of a legal claim. For example in a claim about a contract, one element that a plaintiff must prove is that the parties reached an agreement; another element is that each side agreed to provide something of value to the other. If the plaintiff cannot prove one of those elements, their claim for breach of contract may be dismissed.

or

2. A defendant may win summary judgment by showing–with admissible evidence–that there is no real factual dispute on any of the elements of his or her defenses against the plaintiff's claims. A defense (sometimes called an "affirmative defense") is a complete excuse for doing what the defendant is accused of doing. For example, in a breach of contract case, evidence that it would have been illegal to perform the contract may be a complete defense.

To counter the defendant's motion for summary judgment, plaintiffs must:

1. Submit admissible evidence showing that they *do* have sufficient admissible evidence to prove every element of their claims, or that there is a factual dispute about one or more elements of their claims,

and

2. If the defendant has moved for summary judgment on its defenses, one must submit admissible evidence showing that there is a factual dispute about one or more elements of those defenses. A plaintiff can also simply point out that the defendant has not put forward admissible evidence needed to prove at least one element of its defenses.

If a party does nothing in response to a motion for summary judgment, the party risks losing the motion and the case.

What evidence does the court consider for summary judgment?

The court considers only the admissible evidence provided by the parties for or against the motion for summary judgment. The Court does not have to search for other evidence that may have been provided by you at some other point in the case. The court also does not have to look at any evidence that is not mentioned in your briefs. Therefore, you should file copies of all evidence that you want the court to consider when it decides a motion for summary judgment, and refer to it in your papers. Even if you have already filed the same evidence with the court in another matter, you must file it with your summary judgment motion (or opposition to summary judgment) as well. In addition, when you cite to a document, you should point the court to the exact page and line of the document where the court will find the information that you think is important. You should remember that by making it easier for the court to find this material, you are ensuring that this material receives the fullest consideration available.

Every fact that you rely upon must be supported by evidence. It is not enough to repeat your opinion that a fact is true or to point to arguments you've written about in other papers you filed earlier; you need to show the court the admissible evidence that supports what you've said.

Affidavits as evidence on summary judgment

Affidavits are written statements (sometimes called "declarations") of fact. They are written by an actual witness to those facts and are signed under oath. An affidavit must be sworn before a Notary Public. A declaration is also a written statement of fact and is signed under penalty of perjury. Either affidavits or declarations may be used as evidence in supporting or opposing a motion for summary judgment. In a general sense, they are written versions of what a person would testify to if they were in court on the witness stand. Rule 56(e) of the Federal Rules of Civil Procedure explains how affidavits and declarations are used for summary judgment. According to Rule 56(e), any affidavits or declarations submitted by the parties on summary judgment must:

1. Be made by someone who has personal knowledge of the facts contained in the written statement;

2. State facts that are admissible in evidence; and

3. Show that the person making the statement is competent to testify to the facts contained in the statement.

All documents referred to in an affidavit or declaration must be attached to it as exhibits.

Hearsay and summary judgment

Generally, portions of a declaration or affidavit that are based on hearsay may not be used for summary judgment, and so will be disregarded by the judge. Hearsay is an attempt to prove that a statement is true by offering a declaration by a person who swears that they heard the statement from someone else. For example, it is generally not appropriate to claim something happened because you have a declaration from a person who heard someone else say it happened. There are many exceptions to this prohibition on hearsay, however. The rules on the use of hearsay statements can be found in Rules 801 through 807 of the Federal Rules of Evidence.

The hearsay rules do not just apply to things that people have said. They also apply to other documents that you may wish to submit as evidence. This goes to the general requirement that you must prove your case on evidence that is admissible in court. You cannot use hearsay any more in summary judgment than you can at a trial.

Authentication and summary judgment

Some of your evidence may be in the form of documents such as letters, records, emails, contracts, etc. Those documents are "exhibits" to your motion. Just because you attach a document to your papers, however, does not make it admissible. For one thing, documents can be hearsay too, so the hearsay rules in Rules 801-807 of the Federal Rules of Evidence apply. In addition, even if a document is admissible under the hearsay rules, a document may not be admissible for other reasons. For example, any exhibits that are submitted as evidence must be authenticated before they can be considered by the Court.

Rules 901 and 902 of the Federal Rules of Evidence discuss the requirements for authentication. Generally, a document is authenticated either by:

1. Submitting a statement under oath from someone who can testify from personal knowledge that the document is authentic (that is, it is a real, genuine document); or

2. Demonstrating that the document is self-authenticating, as described in Rule 902 of the Federal Rules of Evidence.

What is the statement of undisputed fact, and why would I file one?

A joint statement of undisputed facts is a list of facts that **all** parties agree are true, and it contains citations to the evidence that shows the judge that the facts are true. A statement is not a joint statement unless it is signed by all of the parties. All facts contained in a joint statement of undisputed facts will be taken as true by the court.

A separate statement of undisputed facts is a list of the facts that **one** party believes are true, and citations to that one party's evidence to support each fact. Facts contained in one party's separate statement of undisputed facts will be taken as true by the court **only** if the evidence cited there actually does support the truth of the matter and no other party has submitted evidence disputing it.

Civil Local Rule 56-2 permits each judge to choose whether to make the parties file a joint statement of undisputed facts or separate statements of undisputed facts in connection with a motion for summary judgment. Be sure to check your judge's standing order to find out if he or she requires separate statements. You may not file a joint statement of undisputed facts or a separate statement of undisputed facts unless requested by your judge.

When can a motion for summary judgment be filed?

A defendant can file a motion for summary judgment at any time, as long as the motion is filed before any deadline set by the court for filing motions for summary judgment. A plaintiff must wait at least twenty days after the complaint is filed before he or she can file a motion for summary judgment, unless the defendant has already filed a motion for summary judgment before then. As a practical matter, parties rarely file a motion for summary judgment until they have taken some significant discovery. Most motions for summary judgment rely heavily on evidence obtained in discovery.

What if my opponent files a motion for summary judgment before I have all my discovery?

If the opposing party files a motion for summary judgment before you have finished discovery, and you need more discovery in order to show why summary judgment should not be granted, you may file a motion under Rule 56(f) of the Federal Rules of Civil Procedure for an extension of time (or continuance). In order to get a continuance, you must show what specific facts you need, why those facts will defeat summary judgment, and why you need discovery to get those facts. You must be specific, and describe exactly what sort of information you need from discovery, and why.

CHAPTER 15
WHAT HAPPENS AT A TRIAL?

The last stage of a lawsuit in district court is a trial. If the court does not dismiss the case or grant a motion for summary judgment, and if the parties do not agree to a settlement, then the case will go to trial. Trial is a hard process that requires a good deal of preparation, skill, and dedication by all parties involved in order to assure its fairness.

What is the difference between a jury trial and a bench trial?

There are two types of trials: jury trials and bench trials.

At a jury trial, a jury reviews the evidence presented by the parties, figures out which evidence to believe, and decides what it thinks actually happened. The court will instruct the jury about the law, and the jury will then apply the law to the facts that they have found to be true, and determine who wins the lawsuit. A jury trial occurs when:

1. The lawsuit is a type of case that the law allows to be decided by a jury

and

2. At least one of the parties asked for a jury trial within the right timeframe. The timeframe is set forth in Rule 38. A party that does not make a jury trial demand on time forfeits that right.

At a bench trial, there is no jury. The judge will determine the law, the facts, and the winner of the lawsuit. A bench trial is held when:

1. None of the parties asked for a jury trial (or did not ask at the right time);

or

2. The lawsuit is a type of case that the law does not allow a jury to decide;

or

3. The parties have agreed that they do not want a jury trial.

When does the trial start?

The judge sets the date that the trial will begin. Often, the trial date is picked very early in the process, at the case management conference (discussed in Chapter 9). Sometimes the trial date will not be picked until later in the case. In this Court, trial is usually scheduled to begin within twelve to eighteen months after the complaint is filed.

What do I have to do to prepare for trial?

There is a lot of work to do when preparing for trial, and a lot of documents to be filed with the court. This handbook is not intended to guide you through all the details and

complicated issues that come up as you go to trial. Besides looking for resources at a law library about preparing for trial, one thing you should be looking at is the court's case management order or any other order that sets a schedule for pretrial events.

When the judge sets the trial date, he or she usually sends out an order setting pretrial deadlines for filing or submitting various documents associated with the trial. For example, the judge will probably set dates for submitting copies of exhibits, objections to exhibits, and proposed jury instructions, among other things. Usually, the judge also will set a date for a pretrial conference shortly before trial, at which the court will discuss its requirements for conducting trials, and resolve any final issues that have arisen before trial.

The court's orders may also set a last date (or "cut-off date") for filing motions in limine. A motion in limine asks the court to decide whether specific evidence can be used at trial. You could find yourself opposing the other side's motions in limine or wanting to file your own. Either way, Rules 103 and 104 of the Federal Rules of Evidence help explain, in part, how to present admissible evidence questions to the court. Other rules of evidence can also apply, depending on the exact issue. The court's ruling on evidence may have a big effect on how either side's case looks at trial, so researching, filing and opposing motions in limine can be an important part of preparing for trial.

Preparing for trial is very time consuming, so be sure to read the pretrial schedule carefully. Give yourself enough time to file all of the necessary documents on or before the deadlines.

Besides submitting documents, you also need to arrange for all of your witnesses to be there at trial. If a witness does not want to come to trial, you can make them attend by serving them with a trial subpoena. A trial subpoena is a court document which requires a person to show up at trial on a particular date. Generally, the same rules that apply to subpoenaing a witness to show up at a deposition also apply to trial subpoenas. (Subpoenas are discussed in general in Chapter 11 of the Northern District of California's *Handbook for Litigants Without Lawyers* and in the pamphlet "What Is Discovery").

What happens during trial?

On the first day of trial, the judge will usually meet with the parties briefly to resolve any last minute problems. Then, if the trial is a jury trial, the first order of business is to pick a jury.

Jury selection

The purpose of jury selection is to pick a jury that can be completely fair to both parties. This is accomplished by a process called voir dire, during which each potential juror is asked a series of questions by the attorneys or the judge. The questions are designed to show any biases that the juror may have that would prevent him or her from being fair and impartial. Usually, the judge asks the questions. Some of the questions are taken from lists of questions that the parties give the judge before trial. Sometimes the judge lets the lawyers for each party (or any party who does not have a lawyer) ask additional questions.

Once the questioning is completed, the judge will excuse (that is, send home) any jurors who the judge thinks are too biased to be fair. The judge will also excuse any other jurors who he or she believes will not be able to perform their duties as jurors for other reasons. The parties also will have an opportunity to convince the judge that other additional jurors should be excused because they are too biased to be fair and impartial, or cannot perform their duties as jurors for other reasons. This is called challenging for cause.

After all of the jurors that have been challenged for cause have been excused, the parties have an opportunity to use peremptory challenges to request that additional jurors be excused. A peremptory challenge is used to excuse a juror without having to give any reason. The judge will give each party a certain number of peremptory challenges that each party can use to eliminate jurors who may not be clearly biased, but who the party still does not want to have on the jury.

After the jury is chosen, the judge will read some instructions to the jury. These initial instructions tell the jurors about their duties as jurors, explain to them how to deal with evidence, and give some understanding about the law that applies to the lawsuit that they are about to hear.

Opening statements

After the jury is chosen, each party may present an opening statement. The opening statement is a speech made by each side's lawyer or representative, or you yourself if you do not have a lawyer. The purpose of the opening statement is for each party to describe the issues in the case and state what they expect to prove during the trial. An opening statement is neither evidence nor a legal argument. It is simply a roadmap of the evidence you believe will come out at trial. The purpose of the opening statement is to help the jury understand what to expect and what you consider important.

In the trial, which side puts on witnesses first?

After the opening statements, the plaintiff presents his or her side of the case to the jury first. The plaintiff begins by asking a witness all of his or her questions. This is called direct examination. Then the opposing party has the opportunity to cross-examine the witness, by asking additional questions about the topics covered during the direct examination. Then, the plaintiff can ask additional questions about the topics covered during the cross-examination. This is called re-direct examination. Usually, a judge will allow this process to continue until both sides state that they have no further questions for the witness. The plaintiff will present all of his or her evidence before the defendant has a turn to put on his or her own case. The defendant is still involved, however, by making objections and preparing to cross-examine the plaintiff's witnesses.

What if the other side wants to put on improper evidence?

All evidence that is presented by either party during trial must be admissible. The Federal Rules of Evidence are a very detailed set of rules for the admissibility of evidence.

If one party tries to present evidence that is not allowed under the Federal Rules of Evidence or tries to ask improper questions of a witness, the opposing party may object. It is the

opposing party's duty to object to evidence that it thinks should not be admitted. If the opposing party does not object, the judge may allow the improper evidence to be presented. At that point, the other party will not be able to protest that decision on appeal. It is important to remember that it is the parties' job to bring errors to the trial judge's attention and to give that judge an opportunity to fix the problem through objections.

The way to object is to stand and briefly state your objection to the judge. Objections should be brief, but must contain the basis for your objection. For example, a proper objection might be: "Objection, your honor, inadmissible hearsay." It is not appropriate to give long arguments, unless the judge specifically asks you to explain your objection. If the judge wants to discuss the objection with you, he or she may ask you to come up to the bench where the judge sits, away from the jury's view to talk to you quietly. This is called a side bar. The judge will either sustain or overrule the objection. If the judge sustains the objection, the evidence will not be admitted or the question may not be asked. If the judge overrules the objection, the evidence will be admitted or the question may be asked, unless the judge later sustains a different objection.

What is a motion for judgment as a matter of law, and why do some parties make that motion right after the plaintiff's case in the middle of the trial?

In a jury trial, after the plaintiff has presented all of his or her evidence, the defendant has an opportunity to make a motion for judgment as a matter of law. Rule 50(a) of the Federal Rules of Civil Procedure explains the procedures for making a motion for judgment as a matter of law.

A motion for judgment as a matter of law is a request to the judge to decide the outcome of the case. The idea of the motion for judgment as a matter of law is that enough facts have been shown to entitle one side to win, because those facts fit with the law in only one way and in one party's favor. A motion for judgment as a matter of law brought by the defendant after the close of the plaintiff's evidence argues that the plaintiff failed to provide enough evidence that any jury could reasonably decide the as a matter of law, the case is over.

When does the defendant get to present his or her case?

Sometimes parties don't file motions for judgment as a matter of law. Or if they do file motions as a matter of law, sometimes they lose or the judge puts off ruling until later. If any of these things happen, the case moves forward. In that case, after the plaintiff has completed examining each of its witnesses, the defendant then presents all of the witnesses that support his or her defenses to the plaintiff's case. The same procedure of direct examination, cross-examination, and re-direct examination that was used during presentation of the plaintiff's evidence also applies here.

What is rebuttal?

Rebuttal is the final stage of presenting evidence in a trial. It begins only after both sides have had a chance to present their case. In the rebuttal stage, whichever party has the burden of proof (usually the plaintiff) tries to undermine or explain the opposing party's evidence. This evidence is called rebuttal evidence. Rebuttal is limited, however. The plaintiff, for example,

cannot just present his or her case over again. Rebuttal is limited to countering only what the other side argued as evidence. For example, a rebuttal witness might testify that the other party's witness could not have seen the events he reported to the court. So, after the defendant has finished examining each of his or her witnesses, the plaintiff may call a new witness solely to show that one of those witnesses was not telling the truth. Not all cases have a rebuttal; it depends on what the party with the burden of proof wants to do and what the court allows.

What happens after both sides have finished presenting their evidence?

In a jury trial, after all evidence has been presented, either party may make a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure.

A motion for judgment as a matter of law at the end of trial argues that there is so little evidence supporting the other side's case, that no jury could reasonably decide the case in favor of that party. If the court grants a motion for judgment as a matter of law, the case is over.

If the judge does not grant judgment as a matter of law, or if no party asks for it, then the court will hear closing arguments. In jury trials the judge will instruct the jury about the law and the jury's duty, and then the jury will take some time to think and consider the case before coming up with a decision.

Instructing the jury

After all witnesses have finished testifying, the judge will instruct the jury about the law that applies to the case. Sometimes the judge will wait until after closing arguments to instruct the jury about the law.

Closing arguments

Each party may present a closing argument. The purpose of the closing argument is to summarize the evidence, and argue how the jury (or, in a bench trial, the judge) should decide the case based on that evidence.

In a jury trial, what is the jury doing after closing arguments?

After both sides make their closing arguments, the jury go back to the jury room alone. There, they will discuss the case in private. This is called "deliberating." After thinking about and discussing the law and the facts, each juror votes about who he or she thinks should win the case. Because the decision of the jury must be unanimous in federal court trials, the jurors must continue to deliberate until they all agree. Sometimes juries have to deliberate for many days before they reach a decision.

When the jury reaches its decision (the verdict), they will fill out a verdict form and let the judge know that they have completed their deliberations. The judge will then bring the jury into the courtroom, where the verdict will be read aloud. The court then issues a written judgment announcing the verdict and stating the remedies, if any, that will be ordered. The judgment is the official decision of how the case has come out. When the judgment on a jury verdict is issued, the case is usually over. In some cases, a party must file what are called post-

trial motions. These can include a renewed motion for judgment as a matter of law or a motion for a new trial. Unless the court grants a post-trial motion, the case will be over unless one or more parties takes an appeal to the United States Court of Appeal for the Ninth Circuit.

In a bench trial, what does the judge do after closing arguments?

If the trial is a bench trial, the judge will end (adjourn) the trial after closing arguments. The judge will then review the evidence and write findings of facts and conclusions of law, which is a document that explains what facts he or she found to be true and what the legal consequences of those facts are. In addition to that document, the court will then issue a written judgment stating the remedies, if any, that will be ordered. The judgment is the official decision of how the case has come out. This process often takes weeks, or even months. The court's findings of fact and conclusions of law and judgment usually are mailed to the parties. When the judgment is issued, the case is over, unless the court grants a motion for a new trial (Chapter 16) or one or more parties takes an appeal to the United States Court of Appeals for the Ninth Circuit.

CHAPTER 16
WHAT CAN I DO IF I THINK THE JUDGE OR JURY MADE A MISTAKE?

There are a number of different procedures in the trial court that you can use if you believe the judge or jury made a serious mistake in your lawsuit. In addition, you can appeal the final judgment. This handbook does not address how to pursue an appeal.

What is a motion for reconsideration?

A motion for reconsideration asks the court to consider changing a previous decision. A motion for reconsideration must be made **before** the trial court enters a judgment. Civil Local Rule 7-9 explains the rules for filing a motion for reconsideration.

Under what circumstances can I file a motion for reconsideration?

No party is permitted to file a motion for reconsideration without first getting permission from the court. Therefore, before filing a motion for reconsideration, the party must file a motion for permission to file a motion for reconsideration. The court will not give permission to file a motion for reconsideration unless the party seeking permission shows:

1. The facts or law that the parties presented to the court are significantly different from the actual facts or law and the party applying for reconsideration could not reasonably have known the true facts or law before the court entered the order that the party now wants the court to change; or

2. Material new facts have emerged, or a significant change in the law has occurred, since the order was entered; or

3. The court clearly failed to consider material facts or key legal arguments that were presented to the court before the order was issued.

A motion for permission to file a motion for reconsideration may not simply repeat the same arguments that you made previously to the court. If you file such a motion, the court may impose sanctions against you.

No response needs to be filed to a motion for permission to file a motion for reconsideration unless the court requests it.

If the court grants a motion for permission to file a motion for reconsideration, the motion will be scheduled for hearing on the normal thirty-five day schedule, unless the court sets a different schedule. The parties may file opposition briefs and reply briefs, as with any other motion.

If the court grants a motion for reconsideration, it will vacate the original order, which will have no further effect. The court either will issue an entirely new order, or will issue an amended version of the original order, changing its original decision.

Can I get a Magistrate Judge‘s order or report reviewed?

If the judge who is assigned to your case has referred a pretrial matter to a magistrate judge for a decision or for a report and recommendation, it is possible to get the magistrate judge‘s orders or report and recommendation reviewed. The parties can file objections to the magistrate judge‘s decision or report with the judge who referred the matter. The procedure depends on the type of matter that was referred to the magistrate judge.

Am I allowed to object to the magistrate judge‘s decisions in general, or just the final decision on the merits?

If the matter that was referred to the magistrate judge does not dispose of any party’s claim or defense on the merits, it is described as a “nondispositive matter.” You can object to the magistrate’s decisions on nondispositive matters. To learn more about how to handle that situation, read Rule 72(a) of the Federal Rules of Civil Procedure, the federal statute 28 U.S.C. § 636(b)(1)(A), and Civil Local Rule 72-2. A party’s objections to the magistrate judge‘s order must be filed with the judge who referred the matter no later than ten days after the party is served with a copy of the magistrate judge‘s order. The opposing party need not file a response to the objections unless the referring judge sets a briefing schedule.

If the judge does not set a briefing schedule or deny the objections within fifteen days after the objections are filed, the objections are considered to be denied. If the referring judge requests the opposing party to respond to the objections, the referring judge must set aside, vacate, or change any part of the magistrate judge‘s order that he or she finds is clearly erroneous or contrary to law.

How do I get review of a magistrate judge‘s final decision on the merits of a claim?

A decision on the merits that disposes of an entire claim on the merits is called a “dispositive matter.” What you do if you think that decision was in error depends on whether the parties consented earlier to the case being handled by a magistrate.

A magistrate can handle and decide issues like a judge only if the parties consented earlier in accordance with the rules, such as Rule 72(b) of the Federal Rules of Civil Procedure, the federal statute 28 U.S.C. § 636(b)(1)(B) and (C), and Civil Local Rule 72-3. If the parties did not consent, the magistrate can only oversee discovery and make recommendations to the federal trial judge. You need to read the rules to understand what a magistrate can and cannot do.

Let’s say the parties did not consent to a magistrate, what then?

If the parties did not consent to the referral of the matter to the magistrate judge, then Rule 72(b) of the Federal Rules of Civil Procedure, the federal statute 28 U.S.C. § 636(b)(1)(B) and (C), and Civil Local Rule 72-3 apply. The magistrate judge is not permitted to issue an order on the matter, but must instead prepare a report and recommendation for the referring judge.

If you think the magistrate made a decision he or she was not allowed to make, you must file objections to the magistrate judge‘s report and recommendation with the judge who referred

the matter no later than ten days after you were served with a copy of the magistrate judge‘s report. The opposing party may respond to your objections within ten days after being served with them.

At the time the objections, or the opposing party’s responses, are filed, either party may also file a motion asking the judge to hear additional evidence not considered by the magistrate judge.

The referring judge then will make a de novo review of any portion of the magistrate’s report to which an objection has been made. A “de novo review“ means that the judge will review those portions of the report from scratch, and make his or her own decision. Unless the judge grants a motion to consider additional evidence not considered by the magistrate judge, the judge will consider only the evidence that was presented to the magistrate judge.

The judge may accept, reject, or modify the magistrate judge‘s recommendation, or send the matter back to the magistrate judge for further review with additional instructions.

Let’s say the parties did consent to a magistrate, what then?

If all of the parties have consented to having a magistrate judge decide all issues in the lawsuit, you may not file objections to the magistrate judge‘s decisions for review by another judge. Instead, if you believe the magistrate judge made an error, you must file one of the motions listed in this section with the magistrate judge who made the original decision, or file an appeal with the United States Court of Appeals for the Ninth Circuit.

What is a renewed motion for judgment as a matter of law?

After a jury trial, if you believe the jury made a serious mistake **and** you had made a motion for judgment as a matter of law earlier that was denied, you may make a renewed motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. You can **only** make a renewed motion if you have made a motion for judgment as a matter of law at the close of all evidence.

A renewed motion for judgment as a matter of law must be filed no later than ten days after entry of judgment. The renewed motion must argue that the jury erred in reaching the decision that it made because the evidence was so one-sided that no reasonable jury could have reached that decision.

When the court rules on a renewed motion for judgment as a matter of law, it may:

1. Refuse to disturb the verdict;

2. Grant a new trial; or

3. Direct entry of judgment as a matter of law.

What is a motion for a new trial, and what is a motion to amend or alter the judgment?

After a jury trial or a bench trial, either party may file a motion for a new trial. A motion for a new trial asks to do the trial all over again, on every claim or on just some of them, because the first one was flawed. Either party can also file a motion to alter or amend the judgment. A motion to alter or amend the judgment does not ask to do the trial over. Rather, it asks the judge to change something in the final judgment because of errors during the trial. Both types of motions are allowed under Rule 59 of the Federal Rules of Civil Procedure. Both types of motions must be filed no later than ten days after entry of the judgment.

The way these motions are handled differs slightly between bench and jury trials.

After a jury trial, the court is permitted to grant a motion for a new trial if the jury's verdict is against the clear weight of the evidence. The judge can weigh the evidence and assess the credibility of the witnesses, and does not have to view the evidence from the perspective most favorable to the party who won with the jury. The judge generally should not overturn the jury's verdict unless, after reviewing all the evidence, he or she is definitely and firmly convinced that a mistake has been made. If the court grants the motion for a new trial, a new trial will be held with a new jury, and the trial is conducted as if the first trial had never occurred.

After a bench trial, the court is permitted to grant a motion for a new trial if the judge made a clear legal error or a clear factual error, or there is newly discovered evidence that could have affected the outcome of the trial. If the court grants the motion for a new trial, the court need not hold an entirely new trial. Instead, it can take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A motion to amend or alter the judgment is usually granted only if the court is presented with newly discovered evidence, has committed clear error, or if there is an intervening change in the controlling law.

What is a motion for relief from judgment or order?

A motion for relief from judgment or order does not argue with the reason the court decided the way it did. Instead, it asks the court not to require the party to obey it. The authority for this type of motion is Rule 60 of the Federal Rules of Civil Procedure.

Rule 60(a) allows the court to correct clerical errors in judgments and orders at any time, on its own initiative, or as the result of a motion filed by one of the parties. This authority is usually viewed as limited to very minor errors, such as typos. If an appeal has already been docketed in the court of appeals, the error may be corrected only by obtaining permission from the court of appeals.

Rule 60(b), however, permits any party to file a motion for relief from a judgment or order for any of the following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

3. Fraud, misrepresentation, or other misconduct by an opposing party;

4. The judgment is void;

5. The judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer fair that the judgment should be applied; or

6. Any other reason justifying relief from the judgment. Relief will be granted under this last category only under extraordinary circumstances.

A motion based on the first three reasons must be made within one year after the judgment or order was entered. A motion based on the other three reasons must be made within a reasonable time.

What about an appeal?

All final judgments can be appealed to the United States Court of Appeals for the Ninth Circuit. Most orders issued before judgment (which are referred to as "interlocutory orders") cannot be appealed until a judgment is entered. Some of the interlocutory orders that can be appealed are listed in federal statute 28 U.S.C. § 1292. The idea is that another court gets involved once everything is done, rather than stepping in at every stage in the proceedings.

Just as the Federal Rules of Civil Procedure set forth the procedures for litigating a lawsuit in this court, the Federal Rules of Appellate Procedure set forth the procedures for litigating an appeal in the Ninth Circuit. You can find the Federal Rules of Appellate Procedure in any law library, or on the internet at http://www.law.cornell.edu/topics/appellate_procedure.html.

The Ninth Circuit also has its own set of local rules, which you can obtain from the Ninth Circuit clerk's office, or on the Ninth Circuit's website at http://www.ce9.uscourts.gov. The rules for filing appeals are explained in Rules 3 through 6 of the Federal Rules of Appellate Procedure and Ninth Circuit Rules 3-1 through 5-2.

Generally, appeals must be filed within thirty days after entry of the judgment or the appealable order, although there are exceptions to this general rule.

Be sure to read carefully Rules 3 through 6 of the Federal Rules of Appellate Procedure and Ninth Circuit Rules 3-1 through 5-2 if you want to file an appeal.

GLOSSARY

action	A lawsuit may also be called the *action*, or the case.
adjourn	In the context of a trial, when the judge ends trial proceedings, he or she is said to *adjourn* the trial.
admissible evidence	*Admissible evidence* is evidence that the court must allow to be introduced at trial; the Federal Rules of Evidence govern the admissibility of evidence in federal court.
ADR	The acronym *ADR* stands for "alternative dispute resolution," which refers generally to methods other than a trial by which a complaint can be resolved.
ADR Certification	An *ADR Certification* in federal courts is a form that the court requires you sign, serve, and file with the court affirming that you have read the court's ADR handbook, discussed ADR options with the other parties, and considered whether your case might benefit from any form of alternative dispute resolution.
affidavit	An *affidavit* is a statement of fact written by a witness, which the witness swears before a Notary Public.
amending a document	Changing a document that has been filed with the court is known as *amending* the document. The change itself is called an amendment.
amount in controversy	The *amount in controversy* refers to the dollar value of what the plaintiffs ask the court to do in their complaint.
answer	The written response to a complaint is referred to as an *answer*.
application to proceed in forma pauperis	An *Application to Proceed in Forma Pauperis* is the form plaintiffs who cannot afford the fee to file a Complaint must file with the court to ask permission to file their Complaint without paying the fee.
arbitration	An *arbitration* is a form of alternative dispute resolution in which the parties argue their positions in a less formal "mini-trial" to an arbitrator instead of a judge. Even when the outcome of the *arbitration* is not binding on the parties, it can be useful to see how a judge might view the issues to encourage the parties to resolve their without trial.
arbitrator	An *arbitrator* is the third-party, neutral person who serves as a judge for an arbitration. Most *arbitrators* are attorneys.

authentication of evidence	Before evidence is admissible in court, the party submitting it must establish that the evidence is what the party says it is, that is, that the evidence is authentic; the requirements for *authentication of evidence* are found in Rules 901 and 902 of the Federal Rules of Evidence.
bench	The large desk area, usually located at the front of the courtroom, where the judge sits is referred to as the *bench.*
bench trial	At a *bench trial*, there is no jury, and the judge determines the law, the facts, and the winner of the lawsuit.
breach	When individuals fail to perform as they have agreed, or contracted, to do, they commit a *breach* of the agreement or contract.
brief	A *brief* is a written statement filed with the court by a party arguing for or against a motion.
caption	The *caption* is a formatted listing on the front of every document filed with the court, listing the parties and the name of the case and other identifying information. The specific information that must be included in the *caption* is explained in Rule 10(a) of the Federal Rules of Civil Procedure and this court's Civil Local Rule 3-4.
caption page	The cover page of the document containing the caption, always the first page of any document a party to a lawsuit files with the court, is called the *caption page*.
case	A lawsuit may also be called the action, or the *case*.
case file	The court maintains the original copy of every document filed with it in a *case file*, also referred to as the permanent case file.
case management conference	A *case management conference* is a hearing with the judge at which the judge, with the help of the parties, sets a schedule for various events in the case.
case management order	The *case management order* is the court's written order scheduling certain events in the lawsuits; the court requires that the parties, prior to the case management conference, together file a single proposed *case management order*, in the same document with the case management statement, which, if signed by the judge, will become the *case management order*.

case management statement	The court requires that the parties, prior to the case management conference, together file a single form, called a *case management statement*, along with a proposed case management order in the same document, providing certain information to be discussed at the case management conference.
certificate of service	The *certificate of service* is a document showing that a copy of a particular document–for example, a motion–has been provided to (in other words, served on) all of the other persons who are named as parties in the lawsuit.
challenge for cause	During jury selection, the parties have an opportunity to ask the court to excuse any jurors who they believe are too biased to be fair and impartial, or cannot perform their duties as jurors for other reasons; making such a request is called *challenging for cause*.
chambers	The private office of an individual judge is called his or her *chambers*.
chambers copy	Whenever parties file documents with the court, they provide the original and one *chambers copy*. The original is stored in the main court files, but the *chambers copy* is marked "Chambers" and sent to the judge's own office file.
citation	A reference to a law, rule, or case is called a *citation*.
citing	When you refer to a law, rule, or case in a brief, you are *citing* that law, rule, or case.
claim	A *claim* is a statement, made in a complaint, in which the plaintiffs argue that the defendants violated the law in a specific way; *claims* are sometimes also referred to as counts.
closing arguments	At the end of the presentation of all evidence at trial, each party has an opportunity to make a *closing argument*, the purpose of which is to summarize the evidence and argue how the jury (or, in a bench trial, the judge) should decide the case.
complaint	The *complaint* is a legal document in which the plaintiffs tell the court and the defendants how and why the plaintiffs believe the defendants violated the law in a way that has injured them.
compulsory counterclaim	A *compulsory counterclaim* is a claim by the defendant against the plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant.

contempt of court	*Contempt of court* refers to acts found by the court to have been committed in willful violation of the court's authority or dignity, or to interfere with or obstruct its administration of justice.
continuance	A *continuance* is a grant by the court of an extension of time, for example, of the time when your opposition brief is due on a motion.
counsel	Attorneys, also called lawyers, are sometimes referred to as *counsel*; for example, the attorneys for an opposing party may be referred to as "opposing counsel."
count	A *count* is a statement, made in a complaint, in which the plaintiffs argue that the defendants violated the law in a specific way; *counts* are sometimes also referred to as claims.
counterclaim	When a defendant files a complaint against the plaintiff, it is called a *counterclaim.*
court of appeals	The *court of appeals* is the court to which a party can go to get relief from a judgment and some interlocutory orders; for example, all judgments by the United States Court for the Northern District of California, can be appealed to the United States Court of Appeals for the Ninth Circuit.
court reporter	A person authorized by law to record testimony, whether in the courtroom or outside it (for example, at depositions) is called a *court reporter*, or a court stenographer.
court stenographer	A person authorized by law to record testimony, whether in the courtroom or outside it (for example, at depositions) is called a court reporter, or a *court stenographer*.
courtroom deputy	A *courtroom deputy* is a person who assists the judge in the courtroom, and usually sits at a desk in front of the judge.
cross-examination	At trial, after a party's direct examination of his or her witness, the opposing party gets to ask the witness additional questions about the topics covered during the direct examination; this process is called *cross-examination* of the witness.
damages	The money that can be recovered in the courts by plaintiffs for their loss or injury due to the defendants' violation of law is referred to as *damages.*

deliberating	*Deliberating* is when the jury goes back to the jury room to discuss the case and make their decision.
de novo review	A *de novo review* means the court will consider the matter before it from scratch, making its own determination; for example, if a referring judge gives a de novo review to a magistrate judge's report and recommendation, he or she considers the same evidence reviewed by the magistrate judge and comes to his or her own conclusion.
declarant	The *declarant* is a person making a declaration.
declaration	A *declaration* is a written statement signed under penalty of perjury by a person who has personal knowledge that what he or she states in the *declaration* is true; *declarations* may contain only facts, and may not contain law or argument.
default	When defendants who have been properly served with the complaint do not file an answer or other response within the required amount of time, they are said to be in *default.*
default judgment	If a defendant does not file an answer or other response to the complaint, the court may enter a *default judgment* against the defendant, which means the plaintiff has won the case.
defendants	The *defendants* are the people the plaintiffs claim injured them in violation of the law.
defendants' table	In the center of the courtroom, there are several sets of long tables and chairs where the lawyers and parties sit during hearings and trial; the table farthest from the jury box is where the defendants sit and is called the *defendants' table.*
defenses	The reasons defendants give for why plaintiffs' claims against them should be dismissed are referred to as *defenses*.
deponent	The person who answers the questions in a deposition is referred to as the *deponent*, or witness; a *deponent* can be any person who may have information about the lawsuit, including one of the other parties to the lawsuit.
deposing	The process of taking a deposition is called *deposing* the deponent or witness.

deposition	A *deposition* is a question-and-answer session, before trial and outside the courtroom, in which one party to the lawsuit asks another person, who is under oath, questions about the issues raised in the lawsuit.
direct examination	At trial, when a party calls witnesses and asks them all of his or her questions, this process is called *direct examination.*
disclosures	*Disclosures* are information that you must give the other parties to your lawsuit even if they do not ask for it.
discovery	*Discovery* is the formal court process of asking other people to give you information about the issues in your case; *discovery* methods include depositions, interrogatories, requests for document production, requests for admission, and physical or mental examinations.
discovery plan	Rule 26(a) of the Federal Rules of Civil Procedure requires that prior the initial case management conference, the parties agree on a joint proposed *discovery plan*, which must include the parties' views and proposals about various aspects (listed in Rule 26(a)) of how discovery should proceed in the lawsuit.
diversity jurisdiction	Federal courts are authorized to hear lawsuits in which none of the plaintiffs live in the same state as any of the defendants and the amount in controversy exceeds $75,000. This subject matter jurisdiction is referred to as *diversity jurisdiction.*
division	The Northern District of California has three *divisions,* San Francisco, Oakland and San Jose, and a separate courthouse for each.
docket	The *docket* is the computer file, maintained by the court, for each case, which lists the title of every document filed, the date each document was filed, and the date each document was entered into the *docket*.
drop box	This court maintains a *drop box*, where documents can be left at certain times before and after the clerk's office is open for filing with the court.
ECRO	The court employee who tape records a court hearing is called an *ECRO*, which stands for "electronic court recorder operator."

elements (of a claim or defense)	The individual components of a plaintiffs' claim or defendants' defense, each of which must be proved or the claim or defense cannot be proved, are referred to as the *elements* of the claim or defense.
entry of default	*Entry of default* is a formal action taken by the clerk of the court in response to a plaintiff's request against a defendant who has not responded to a properly served complaint; the clerk must *enter default* against the defendant before the plaintiff can file a motion for default judgment.
ex parte motion	An *ex parte motion* is a motion that is filed without giving notice to the opposing party.
ex parte	When you have contact with the judge without giving notice to the other parties and without them being present, you are said to have approached the court *ex parte.*
exhibits	*Exhibits* are documents or other materials that are presented as evidence at trial or as attachments to motions or declarations.
expert disclosures	The disclosures required by Rule 26(a)(2) to the other parties of the identity of and additional information about any expert witnesses you may use at trial are referred to as *expert disclosures.*
expert report	An *expert report* is a written report, signed by the expert witness, that must accompany the expert disclosures for any expert witness whom you may use to give testimony in your case; Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure lists what must be included in an *expert report*.
expert witness	An *expert witness* is a person who has scientific, technical, or other specialized knowledge that can help the court or the jury understand the evidence.
federal question jurisdiction	Federal courts are authorized to hear lawsuits in which at least one of the plaintiffs' claims arises under the Constitution, laws, or treatises of the United States, and this subject matter jurisdiction is referred to as *federal question jurisdiction*.
Federal Rules of Civil Procedure	The *Federal Rules of Civil Procedure* set forth the procedural law that applies to every federal court in the country.
Federal Rules of Evidence	The *Federal Rules of Evidence* set forth the rules for submitting evidence in the federal courts.

filing	*Filing* means that a document submitted to the court by a party is kept by the court, to be considered in resolving the case. Papers not properly prepared may be rejected for *filing*.
filing fee	The courts charge parties money to process and file the papers that the parties submit, called a *filing fee*. In federal court, the *filing fees* are set by the United States Congress and the Judicial Conference of the United States.
findings of fact and conclusions of law	In a bench trial, after hearing all the evidence and the closing arguments and adjourning the trial, the judge writes *findings of fact and conclusions of law* explaining what facts he or she found to be true and what the legal consequences of those facts are to be issued with his or her written judgment.
fraud	*Fraud* is a false representation of a past or present fact by a person on which another person or persons rely, resulting in their injury.
good faith	Acting in *good faith* means having honesty of intentions; for example, negotiating in *good faith* would be to come to the table with an open mind and a sincere desire to reach an agreement.
grounds	The reason or reasons for something is sometimes referred to in legal documents as the *ground* or *grounds* for that thing; for example, if you present the reasons you object to another party's discovery requests, you are giving the *grounds* for your objections.
hearing	A *hearing* is a formal meeting of the parties to a lawsuit with the judge for the purpose of resolving some issue, often with evidence being presented and witnesses being heard; *hearings* are typically open to the public and held in the courtroom.
hearsay	*Hearsay* is a statement made by someone other than the witness or declarant, which is offered to prove the truth of the matter asserted in the statement.
impeachment	When you call into question a witness' truthfulness, you are said to be attempting the *impeachment* of the witness.
initial disclosures	The disclosures that the parties are required to serve within fourteen days of their initial case management conference, in accord with Rule 26(a)(1)(E) of the Federal Rules of Civil Procedure, are referred to as their *initial disclosures.*

interlocutory order	Court orders issued before judgment are referred to as *interlocutory orders.*
interrogatories	*Interrogatories* are written questions served on another party in the lawsuit, which must be answered (or objected to) in writing and under oath.
intradistrict assignment	The *intradistrict assignment* refers to the assignment by this court of a lawsuit to one of its three locations or "divisions" (San Francisco, Oakland, or San Jose), and Civil Local Rule 3-4(b) requires a complaint to include a paragraph entitled "*Intradistrict Assignment*" identifying any basis for assigning the case to a particular location or division of the court.
joint statement of undisputed facts	A *joint statement of undisputed facts* is a list of facts that all *parties* believes are true, that contains citations to the evidence that those facts are true, and is signed by all the parties; either a statement of undisputed facts or a *joint statement of undisputed facts* must be filed with a summary judgment motion.
judgment	At the conclusion of a trial, after the verdict has been announced in the courtroom, the judge issues a written *judgment* stating the verdict and the remedies, if any, that are ordered.
jury box	The two rows of chairs, usually located against a side wall in the middle of the courtroom, where the jury sits during a trial are referred to as the *jury box*.
jury deliberations	At trial, after having heard all the evidence, closing arguments from the parties, and instructions from the judge, the jurors go to the jury room to deliberate in secret and decide who will win the case; this process is referred to as *jury deliberations.*
jury instructions	*Jury instructions* are what the judge, at different points in the trial, tells the jury about their duties, how to approach the evidence, and about the law that applies to the lawsuit; before the trial begins, the parties are required to submit proposed jury instructions that the judge may read, in whole or part, to the jury at some point during the trial.
jury selection	*Jury selection* is the process by which the jury is chosen; usually *jury selection* includes a type of questioning referred to as voir dire.

jury trial	At a *jury trial*, a group of citizens, the jury will weigh the evidence presented by the parties, decide which evidence to believe, and determine what actually happened; in addition, the court will instruct the jury on the law, and the jury will apply the law to the facts that they have found, and determine who wins the lawsuit.
litigants	The plaintiffs and the defendants both are referred to as the parties to or the *litigants* in the lawsuit.
Local Rules	The *Local Rules* set forth additional requirements that a specific federal court has that supplement the Federal Rules of Civil Procedure; for example, the *Local Rules* of the United States District Court for the Northern District of California explain some of the additional procedures that apply only to this court.
magistrate judge	A federal *magistrate judge* is a judicial officer that has some but not all of the powers of a federal judge; for example, a *magistrate judge* may be designated by a judge to hear a variety of motions and other pretrial matters, and may, with the consent of the parties, preside over civil and misdemeanor criminal trials.
material fact	A fact that makes a difference in your lawsuit is referred to as a *material fact*.
meet and confer	When the parties get together to discuss an issue or issues, they *meet and confer*.
memorandum of points and authorities	The portion of a motion that contains your arguments and the supporting law for why the court should grant your motion is called the *memorandum of points and authorities*, sometimes also referred to as a brief.
mental examination	If the physical or mental condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, the court may order that person to submit to a physical or mental examination by a suitably licensed or certified examiner, such as a physician or psychiatrist; unlike other discovery procedures, physical or *mental examinations* can be obtained only by filing a motion with the court, or by agreement of the parties.

motion	When you apply to the court for a ruling or an order that something be done, your application is called a *motion*; *motions* usually are submitted in writing, but in certain limited circumstances—for example, during a hearing or trial—may be oral (sometimes called a "speaking motion").
motion for a more definite statement	In a *motion for a more definite statement*, a defendant argues that the complaint is so vague, ambiguous, or confusing that he or she cannot respond to it, and asks for the details that the defendant needs in order to respond to the complaint.
motion for a new trial	A *motion for a new trial* argues that another trial should be held because of a deficiency in the current trial, for example, because the jury's verdict in the current trial is against the clear weight of the evidence.
motion for default judgment	If the defendant does not answer the complaint, the plaintiff can file a *motion for default judgment*, asking the court to grant judgment in favor of the plaintiff. If the court grants the motion, the plaintiff has won the case.
motion for judgment as a matter of law	In a jury trial, *motion for judgment as a matter of law* argues that the opposing party's evidence is so legally deficient that no jury could reasonably decide the case in favor of the opposing party. Defendants may bring such a motion after plaintiffs have presented all their evidence, and after all the evidence has been presented, either party may bring such a motion; if the court grants the *motion for judgment as a matter of law*, the case is over.
motion for permission to file a motion for reconsideration	Before filing a motion for reconsideration, a party must ask the court for permission to file such a motion, which is done through a *motion for permission to file a motion for reconsideration*.
motion for protective order	If you receive a discovery request and believe the discovery sought is inappropriate or too burdensome, or you need more time to respond, you may file a *motion for protective order* to ask the court to order that the discovery be limited or proceed in a certain way.
motion for reconsideration	A *motion for reconsideration* asks the court to consider changing a previous decision, and cannot be filed without the permission of the court.

motion for relief from judgment or order	A *motion for relief from judgment or order* argues that a judgment or order should not be given effect or should be changed for one of the reasons permitted by Rule 60(b) of the Federal Rules of Civil Procedure.
motion for sanctions	A *motion for sanctions* asks the court to punish a person; for example, in the context of discovery, a *motion for sanctions* asks the court to punish a person for failing to make required disclosures, refusing to respond to a discovery request, or refusing to obey a court order to respond to a discovery request.
motion for summary judgment	A *motion for summary judgment* asks the court to decide a lawsuit without a trial because the evidence shows that there is no real dispute about the key facts.
motion to amend or alter the judgment	After entry of judgment, either party may file a *motion to amend or alter the judgment* if the party believes a mistake was made in the judgment that could be corrected by changing it.
motion to compel	A *motion to compel* is a motion asking the court to order a person to make disclosures or to respond to a discovery request, or to provide more detailed disclosures or a more detailed response to a discovery request.
motion to dismiss	A *motion to dismiss* the complaint argues that there are legal problems with the way the complaint was written, filed, or served, and asks the court to order the portions of the complaint with the legal problems dismissed.
motion to extend time	A *motion to extend time* is a motion asking the court to give you more time, or a continuance, before a due date, for example, to submit your brief on a motion.
motion to shorten time	A *motion to shorten time* is a motion asking that the court hear another motion on a faster than normal schedule.
motion to strike (portions of the complaint)	A motion in which you ask the court to order certain parts of the complaint deleted because they are redundant, immaterial, impertinent, or scandalous is called a *motion to strike.*
moving party	The party who files a motion is referred to as the *moving party*.

non-binding arbitration	One of the court's alternative dispute resolution (ADR) programs is *non-binding arbitration*, in which a neutral third-party (an arbitrator) gives a non-binding decision on the complaint after a hearing at which both parties have an opportunity to be heard.
non-party deponent	A deponent who is not a party to the lawsuit is called a *non-party deponent*, or a non-party witness.
non-party witness	A person who has information relevant to your lawsuit, but who is not a party, is called a *non-party witness*.
notice of deposition	Before you can take a deposition, you must serve a reasonable amount of time in advance of the deposition all of the other parties in your lawsuit with a written *notice of deposition*, giving them all of the information required under Rules 30(b) and 26(g)(2) of the Federal Rules of Civil Procedure.
Notary Public	A *Notary Public* is a public officer who is authorized by the state or federal government to administer oaths and to attest to the authenticity of signatures.
notice of motion	The *notice of motion*, contained in the first paragraph of a motion, is a statement telling the other parties what type of motion you have filed and when you have asked the court to hold a hearing on the motion.
opening statements	At the beginning of the trial, after the jury has been selected, if it is a jury trial, the parties have an opportunity to make individual *opening statements*, in which they can describe the issues in the case and state what they expect to prove during the trial.
opposing party	In the context of motions, the party against whom a motion is filed is called the *opposing party*; more generally, the party on the other side from you is referred to as the *opposing party*.
opposition brief	The party opposing a motion files a statement with the court, called an *opposition brief*—sometimes called an opposition, for short—explaining his or her arguments against the motion.
overrule (an objection)	During examination of witnesses at trial, if a party objects to evidence being admitted or a question being asked, the judge may *overrule* the objection, which means that the evidence will be admitted or the question may be asked, unless the judge later sustains a different objection.

PACER system	Docket information is available on the internet through the *PACER system*; *PACER* stands for "Public Access to Electronic Court Records."
parties	The plaintiffs and the defendants both are referred to as the *parties* to or the litigants in the lawsuit.
peremptory challenge	During jury selection, after all of the jurors challenged for cause have been excused, the parties will have an opportunity to request that additional jurors be excused without having to give any reason for the request; making such a request is called a *peremptory challenge.*
perjury	A person is guilty of *perjury* if he or she makes a false statement under oath or equivalent affirmation, when the statement matters and the person does not believe it to be true.
permanent case file	The court maintains the original copy of every document filed with it in a case file, also referred to as the *permanent case file.*
permissive counterclaim	A *permissive counterclaim* is a claim by the defendant against the plaintiff that is not based on the same events or transactions as the plaintiff's claim against the defendant.
physical examination	If the physical or mental condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, the court may order that person to submit to a physical or mental examination by a suitably licensed or certified examiner, such as a physician or psychiatrist; unlike other discovery procedures, *physical* or mental *examinations* can be obtained only by filing a motion with the court, or by agreement of the parties.
plaintiffs	The *plaintiffs* are the people who file the complaint and who claim to be injured by a violation of the law.
plaintiffs' table	In the center of the courtroom, there are several sets of long tables and chairs where the lawyers and parties sit during hearings and trial; the table nearest the jury box is where the plaintiffs sit and is called the *plaintiffs' table.*
prayer for relief	The last section of a complaint is entitled the *prayer for relief*, and in it the plaintiffs tell the court what they want it to do to relieve the injuries stated in their claims.

pretrial conference	The *pretrial conference* is a hearing shortly before trial at which the court discusses its requirements for conducting trial and resolves any final issues that have arisen before trial.
pretrial disclosures	The disclosures required by Rule 26(a)(3) of the Federal Rules of Civil Procedure of certain information about evidence that you may present at trial (except for evidence that will be used solely for impeachment) is referred to as the *pretrial disclosures*.
procedural law	*Procedural law* sets forth the requirements for how lawsuits must be conducted in the courts.
process server	A *process server* is a person authorized by law to serve process on the defendant; usually *process servers* are professionals.
proof of service	The document by which you can prove that a certain document was served is called the *proof of service*; for example, a certificate of service is *proof of service.*
proposed jury instructions	Before the trial begins, the parties are required to submit *proposed jury instructions* that the judge may read, in whole or part, or in modified form, to the jury at some point during the trial, usually just before the jury deliberations, to instruct the jury on the law relevant to the lawsuit.
protective order	A *protective order* is a court order limiting discovery or requiring discovery to proceed in a certain way.
quash the subpoena	If a court *quashes the subpoena*, the deponent does not have to appear for the deposition and/or produce documents at the place and time listed on the subpoena.
rebuttal	*Rebuttal* is the final stage of presenting evidence in a trial
rebuttal testimony	At trial, after defendants have completed examining each of their witnesses, plaintiffs can call additional witnesses solely to counter—or "rebut"—testimony given by the defendants' witnesses, that is, to give *rebuttal testimony.*
re-direct examination	At trial, after the opposing party has cross-examined a witness, the party who called the witness gets to ask the witness questions about topics covered during the cross-examination; this process is referred to as *re-direct examination.*
referring judge	A federal judge who refers some matter or matters within a lawsuit to a magistrate judge is called the *referring judge.*

remedies	In the context of a civil lawsuit, *remedies* are actions the court can take to redress or compensate a violation of rights under the law.
renewed motion for judgment as a matter of law	After a jury trial, if you believe the jury made a serious mistake and you had a motion for judgment as a matter of law at the close of all evidence, then you may bring a *renewed motion for judgment as a matter of law* to argue that the jury erred in reaching the decision that it made because the evidence was so one-sided that no reasonable jury could have reached that decision.
reply	Both the answer to a counterclaim and the response to the opposition to a motion are referred to as a *reply*.
reply brief	The moving party usually will file a *reply brief*—sometimes called a reply, for short—responding to the opposing party's opposition brief.
report and recommendation	A federal judge may refer a matter within a lawsuit to a magistrate judge for a *report and recommendation*; that is, the magistrate judge is not permitted to issue an order on the matter, but rather must file with the referring judge a written *report and a recommendation* for how the matter should be decided.
request for entry of default	The first step for the plaintiff to get a default judgment granted by the court against a defendant is to file a *request for entry of default* with the clerk of the court, showing that defendant has been served with the complaint and summons, and has not filed a written response to the complaint in the required time.
request for inspection of property	In order to enter the property controlled or possessed by a party to your lawsuit for the purposes of inspecting and measuring, surveying, photographing, testing or sampling the property or any object on the property relevant to your lawsuit, you ask the *party* in writing in a document referred to as a *request for inspection of property*.
request for production of tangible things	In order to inspect and copy, test, or sample anything relevant to your lawsuit which is in the possession, custody, or control of another party to the lawsuit, you ask the party to make the items available to you in a document referred to as a *request for production of tangible things.*

request for waiver of service	A *request for waiver of service* is a form with which you ask the defendant to accept the summons and complaint without formal service.
requests for admission	A *request for admission* is a court procedure in which one party may ask another party in writing to admit the truth of any statement, or to admit the application of any law to any fact.
requests for document production	In order to obtain copies of documents that are relevant to your lawsuit from parties to the lawsuit, you ask the parties for them in writing in a document referred to as a *request for document production*.
ruling from the bench	If the court announces its decision on a motion during the hearing on the motion, it is said to be *ruling from the bench.*
sanction	A *sanction* is a punishment the court may be asked to impose on a person in certain circumstances, for example, if a person refuses to obey a court order, or refuses to respond to discovery requests.
self-authenticating	Certain documents do not need any proof of authentication beyond the documents themselves, to be admissible evidence in accord with Rule 902 of the Federal Rules of Evidence; these documents are said to be *self-authenticating.*
serve, service	When you provide a document to a party in accord with the requirements found in Rule 5 of the Federal Rules of Civil Procedure, you are said to have *served* or provided *service* to the party.
service of process	*Service of process* is when the original complaint in the lawsuit is provided to the defendants in accord with the requirements for service found in Rule 5 of the Federal Rules of Civil Procedure.
side bar	A *side bar* is when the judge calls the lawyers (or the parties if they don't have lawyers) to one side of the bench to discuss any issue away from the jury's view.
standing order	A judge's *standing order* explains certain procedures, in addition to those found in the Federal Rules of Civil Procedure and the Local Rules, that apply only to lawsuits that are heard by that particular judge.

Statement of Nonopposition	If the opposing party does not oppose a motion, he or she must file a written statement telling the court he or she does not oppose the motion, which is referred to as a *Statement of Nonopposition*.
statement of undisputed facts	A *statement of undisputed facts* is a list of facts that one party believes are true and that contains citations to the party's evidence that those facts are true; either a *statement of undisputed facts* or a joint statement of undisputed facts must be filed with a summary judgment motion.
status conference	A *status conference*, which may also be referred to as a subsequent case management conference, is a hearing the judge may call during the course of the lawsuit to assess the progress of the case, or address problems the parties are having.
statute of limitations	The *statute of limitations* is the amount of time the plaintiffs have to file a complaint after they have been injured, or, in some cases, after they have become aware of the cause of the injury.
stipulation	A *stipulation* is a written agreement signed by all the parties to the lawsuit or their attorneys.
strike	If the court orders that a document or a portion of a document be deleted, then it is said to *strike* the document or portion of it.
subject matter jurisdiction	If the law permits a court to hear a certain type of lawsuit, the court is said to have *subject matter jurisdiction* over that type of lawsuit.
subpoena	A *subpoena* is a document issued by the court which requires a person to appear for a court proceeding at a specific time and place, and/or to make available at a specific time and place documents specified in the *subpoena*.
subpoena duces tecum	A *subpoena duces tecum* is the form of subpoena used to require a non-party deponent to bring documents specified in the *subpoena duces tecum* to the deposition; the same form is used for a *subpoena duces tecum* as for a deposition subpoena.

substantive law	*Substantive law* determines whether the facts of each individual lawsuit constitute a violation of the law for which the court may order a remedy.
summary judgment	*Summary judgment* is a decision by the court to end a lawsuit, usually before trial, because the evidence shows that there is no real dispute about the key facts.
summons	A *summons* is a document from the court that you must serve along with your original complaint to start your lawsuit.
sustain (an objection)	During examination of witnesses at trial, if a party objects to evidence being admitted or a question being asked, the judge may *sustain* the objection, which means that the evidence will not be admitted or the question will not be asked.
taking a motion under consideration	If the court decides to consider a motion further after a hearing, or without a hearing, and send the parties a written opinion, it is said to be *taking a motion under consideration.*
time-barred	When the time limit has passed by which plaintiffs must make their claim (or, in other words, when the statute of limitations has run), the claim is said to be *time-barred*.
transcript	The written record taken down by a court reporter, or court stenographer, of what was said in a deposition or court proceeding is called a *transcript*.
trial subpoena	A *trial subpoena* is a type of subpoena that requires a witness to appear at trial on a certain date.
undisputed fact	A fact about which all the parties agree is an *undisputed fact.*
vacate	When a court sets aside an order it previously made so that the order has no further effect, it is said to have *vacated* the order.
venue	*Venue* refers to the place where the lawsuit is filed.
verdict	When the jury—or in a bench trial, the judge—decides who wins the trial, the decision is call a *verdict.*
verdict form	In a jury trial, the form the jury fills out to record their verdict is called a *verdict form*.

voir dire	*Voir dire* is a jury selection process in which each potential juror is asked a series of questions designed to show any biases that the juror may have that would prevent him or her from being fair and impartial; usually, the judge asks questions selected from a list the parties have submitted before trial, but sometimes the judge allows the lawyers for the parties (or any party without a lawyer) to ask additional questions.
waiver of service	If a party agrees that he or she does not require a document be provided in accord with the service requirements of Rule 5 of the Federal Rules of Civil Procedure, this agreement is called a *waiver of service.*
with prejudice	If a court dismisses claims in your complaint *with prejudice*, you may not file another complaint in which you assert those claims again.
without prejudice	If a court dismisses claims in your complaint *without prejudice*, you may file another complaint in which you assert these claims again. Dismissal *without prejudice* is sometimes also referred to as dismissal "with leave to amend" because you are permitted to file an amended complaint.
witness	A *witness* is a person who has personal knowledge regarding facts relevant to your lawsuit
witness box	The chair where witnesses sit when they are testifying in court, usually located in front of the courtroom and to the side of the judge's bench, is referred to as the *witness box.*

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The Court wishes to acknowledge and thank Bob Orlowsky and Jeff Bleich, Sarah Kurtin, & Paul Davis of Munger, Tolles & Olson for their invaluable assistance in putting this Manual together. This Manual is dedicated to the memory of Paul Davis.

APPENDIX M

Materials Relevant to Self-Represented Litigants

PRO SE EDUCATION SUBCOMMITTEE
Materials Relevant to Self-Represented Litigants Which
Currently Are Available in the District Courts of the Ninth Circuit

Alaska No information submitted.

Arizona The Court distributes packets containing information and forms entitled "For Filing a Complaint/Petition on Your Own Behalf" which is sent to all the jails and prisons, is available upon request at the Clerk's office, and is attached to every order dismissing a petition/complaint with leave to amend. The non-prisoner information is available on the Court's website and includes local rules, alternate dispute resolution information, sentencing guideline case law, trial court guidelines, schedule of fees, and miscellaneous legal resources.

California, Central The Court provides form petitions (28 U.S.C. §§ 2241, 2254, 2255) and form complaints (42 U.S.C. § 1983) with instructions on how to file and how to obtain in forma pauperis status. These forms are available through the Clerk's office, on-line and by request. The Court's website also contains various information which although not directed to self-represented litigants, is helpful to all litigants, such as Local Rules, instructions for filing by mail, answers to frequently asked questions, tips on practice in federal court, check-list for filing civil documents, recently issued opinions, and information on alternate dispute resolution. A pro se manual directed at non-prisoner civil litigants currently is being drafted and discussed.

California, Eastern The District provides forms and instructions for prisoner civil rights complaints and habeas petitions under § 2254. *See* Appendix A. When a case is filed, a "litigant letter" is sent to the plaintiff. The letter contains *Wyatt* and *Rand* warnings as well as general instruction on such matters as service on counsel for other parties, signing of documents, address changes, etc. Similar information is also presented in orders issued at various stages of the case. For example, the order directing service of the complaint contains the warnings required by *Wyatt* and *Rand* and directs the clerk to serve a copy of the local rules on the plaintiff. A discovery and scheduling order sets forth the rules that govern discovery and discovery disputes. The Eastern District does not produce a pro se or prisoner handbook.

California, Northern The Court provides "Instructions for Filing a Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254;" "Instructions for Filing a Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. § 1983;" and "Instructions for Prisoner's In Forma Pauperis Application." With respect to non-prisoner pro se litigation, the Court provides a "Pro Se Handbook."

California, Southern The Court distributes 42 U.S.C. § 1983 forms and habeas corpus forms with a brief description of the filing procedures to all the jails and prisons, and attaches a copy to nearly every order which dismisses a petition or complaint with leave to amend. A general civil information package is available from the Clerk's office by pick-up or mail by request, which is directed both at attorneys and the general public and contains general information about the court, a directory of judge's staff and related agencies, general procedures of the clerk's office, a detailed description of filing procedures and requirements, and copies of forms. The Court web site has copies of forms and information on local rules, general orders, forms, and filing procedures generally aimed at non-prisoner civil litigation. There is also a copy of a pro se habeas handbook and a general filing procedures handbook available on the Court website. The division between prisoner and non-prisoner materials is about equal.

Guam The Court makes available on the Court website or upon request through the mail or at the Clerk's office, a handout entitled "Filing a Civil Case on Your Own Behalf." The handout is also relevant to pro se prisoners filing civil rights suits.

Hawaii Upon request, the Court provides 42 U.S.C. § 1983 application forms; § 1983 form instructions; habeas corpus application forms; habeas corpus form instructions; in forma pauperis application forms; pro se litigant guides; and Local Rules. The Local Rules, habeas corpus application, and in forma pauperis application forms are available on the Court's website.

Idaho The following three self-help pro se manuals are available on the Court's website, over the counter at the customer service desk in the Clerk's office, mailed upon request or when it might be helpful in aiding a prisoner to amend a complaint or petition: (1) "The State Prisoner Self-Help Packet for Federal Habeas Corpus Petitions under 28 U.S.C. § 2254;" 2) "The Prisoner Self-Help Packet for Civil Rights Complaints under 42 U.S.C. § 1983;" and (3) "The Prisoner Pro Se Handbook." The habeas corpus and civil rights packets are placed at all prison inmate resource centers. The civil rights packet also is placed at the county jail law library.

Montana The District provides blank forms on request for a civil complaint, a habeas petition under § 2254, a habeas petition under § 2241, a motion under § 2255, and application for forma pauperis status. The habeas petitions are tailored to Montana law. The instructions for each form are embedded within the text of the form, so that if the instructions are changed, the Court knows what instructions each plaintiff/petitioner was given. See Appendix B. Because so many cases are dismissed on pre-screening, the District does not send out a informational letter or order at the beginning of each case. Instead, specific instruction on certain issues is provided by order as litigation proceeds. For example, instruction on service of motions, briefs and notices on opposing counsel is provided in the order directing service of the pleading. When an Answer is submitted, a scheduling order is issued, and pro se litigants receive a copy of the discovery chapter and Forms 24

	and 25 of the Federal Rules of Civil Procedure as well as pertinent local rules, one of which includes a Rand warning. (Wyatt motions have been rare, so warnings are handled on a case-by-case basis.) If the case is not disposed of on motions, a detailed trial scheduling order is issued, including, for example, instruction on preparation of the final pretrial order, submitting jury instructions, and obtaining the presence of witnesses. Montana does not produce a pro se or prisoner handbook.
Nevada	Nevada does not produce a pro se or prisoner handbook. When a new pro se case is filed, the District issues a letter to the litigant giving the case number and advising that the pre-screening process will take some time. Forms and instructions are provided for § 2254 petitions in non-capital cases, prisoner civil rights complaints, motions under § 2255, and forma pauperis application. See Appendix C.
Oregon	The Court distributes two packets (one civil rights and one habeas) to the prisons and jails and make them available on request from the Clerk's office. These packets contain forms and information on the procedural filing requirements. Also available on the Court's website are a variety of materials, including local rules, alternate dispute resolution information, sentencing guideline case law, trial court guidelines, schedule of fees, and miscellaneous legal resources. All the physical materials distributed are for prisoners and all non-prisoner materials are available on the website.
Washington, Eastern	The Court provides a pro se packet, available on their website, that includes filing instructions as well as sample and blank forms. Also available online are instructions and forms related to IFP, prisoner civil rights, § 2255, § 2254, and § 2241 filings, as well as the application for leave to file second or successive petition.
Washington, Western	No information submitted

PRO SE EDUCATION SUBCOMMITTEE
California Courts' Programs For Self-Represented Litigants
(See www.courtinfo.ca.gov/programs/cfcc/resources/publications/actionplanfinal)

1. Family Law Facilitators

   Effective January 1, 1997, an Office of the Family Law Facilitator was established in each California county (see Cal. Family Code § 10002). The Facilitators assist self-represented litigants with procedures related to child support, maintenance of health insurance and spousal support. The Facilitators serve both parties, but do not represent either party or create an attorney-client relationship.

2. Family Law Informational Centers

   Since January 1, 1998, there are three pilot project centers in the Superior Courts of Los Angeles, Sutter and Fresno Counties. Attorneys supervise the project centers and assist low-income self-represented litigants in the area of divorce, separation, child and spousal support, property division, custody and visitation.

3. Self-Help Centers

   Five Model Self-Help Centers have been budgeted, with funding which began in May 2002. "Regional Model" - County of Butte; "Urban Collaboration Model" - County of Los Angeles; "Technology Model" - County of Contra Costa; "Spanish-Speaking Model: County of Fresno; and "Multilingual Model" - County of San Francisco.

4. Court Established Self-Help Centers

   a. Ventura County Self Help Legal Access Center (adoption, conservatorship, guardianship, name change, small claims, unlawful detainer, civil harassment, appeals, civil, traffic).

   b. Nevada County Public Law Center (general and substantive legal information in the areas listed above).

   c. Santa Clara Self-Service Center (access to computer workstations to use legal websites and other law-related on-line resources and assistance from an attorney and other staff members).

5. Website
   Online Self-Help Center - www.courtinfo.ca.gov/selfhelp/

6. Publications

   The Administrative Office of the Courts distributes the following publications:

a. Summary Dissolution Information;

b. How to Adopt a Child in California;

c. Emancipation Pamphlet;

d. What's Happening in Court? An Activity Book for Children Who Are Going to Court in California;

e. Guardianship Pamphlet;

f. Juvenile Court Information for Parents; and

g. Dependency Court: How It Works.

PRO SE EDUCATION SUBCOMMITTEE
Relevant Websites for Pro Se Litigants

1. www.icandocs.org/newweb

I-CAN! describes itself as follows:

"I-CAN! is a kiosk and web-based legal services system designed to provide convenient and effective access to vital legal services for lower income people. I-CAN! modules create properly formatted pleadings; provide court tours; and educate users on the law and the steps needed to pursue their matter."

2. www.courts.co.riverside.ca.us/kiosks/kiosk.htm

According to the Riverside County Superior Court:

"This website will help you find assistance and information, work better with an attorney, and represent yourself in some legal matters. Our goal is to provide equal justice and access to the law to all, whether you have a lawyer or not. The information in this site is one of many things the courts have done to give you information about how to access court services. This site can help you understand what happens at court. You will learn about court procedures, find forms, and links to other important resources. This site does not give legal advice. If you need legal
advice seek out the assistance of a lawyer."

3. www.selfhelpsupport.org

Self-helpsupport.org states that it is:
"a membership site for pro se practitioners and serves as an online national clearinghouse of information relating to self-representation."

4. www.angelfire.com - "The Jailhouse Lawyer"

This site provides information and case law for self-represented litigants, including prisoners and also addresses prison-related subjects such as habeas corpus.

5. www.nolo.com

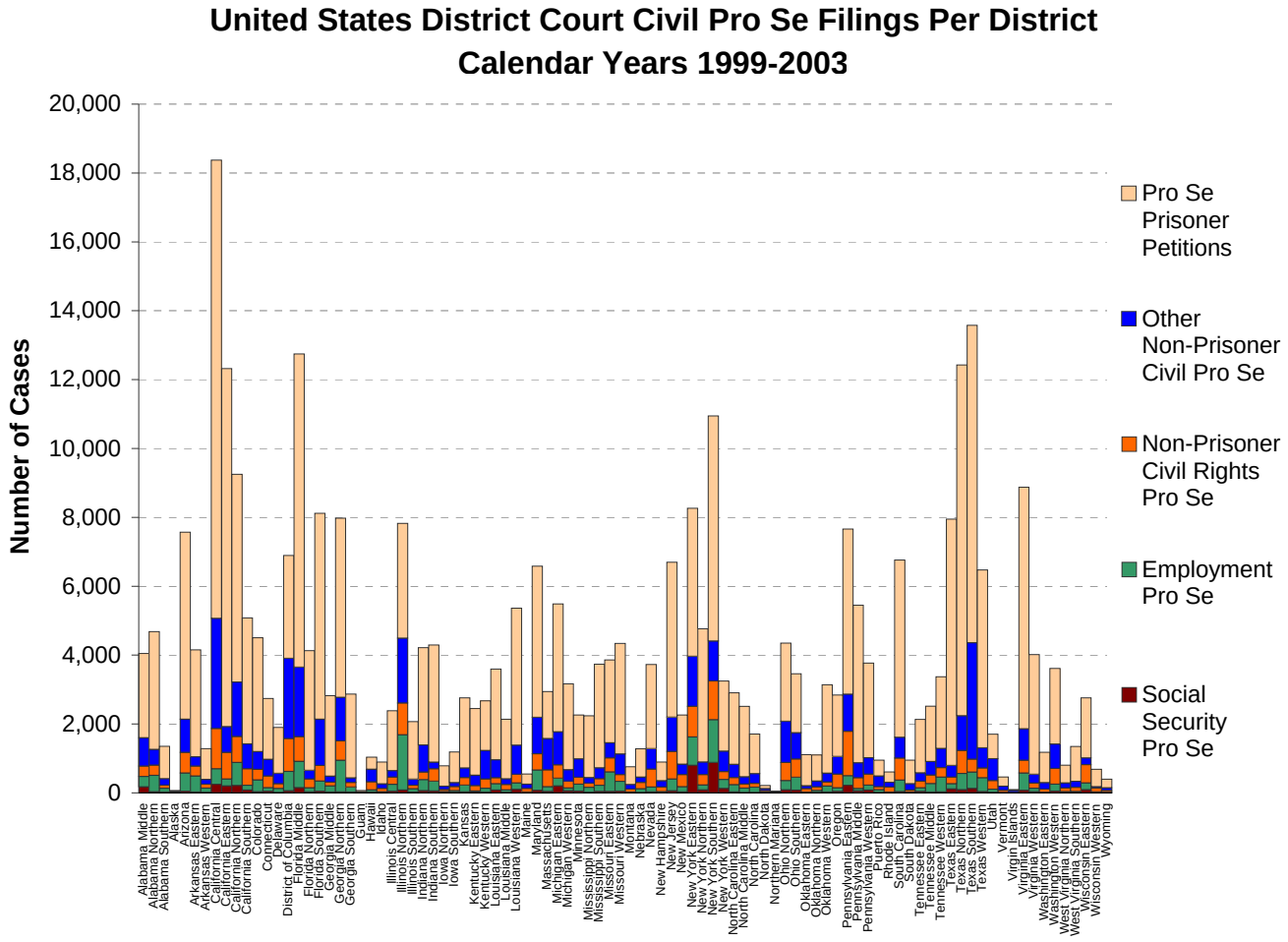
According to nolo.com, the site is designed to:
... help people handle their own everyday legal matters -- or learn enough about them to make working with a lawyer a more satisfying experience -- we publish reliable, plain-English books, software, forms and this website.

APPENDIX N

Data on Pro Se Filings in Federal Court

CHARTS ON PRO SE CASELOAD AS OF SEPTEMBER 2004

Provided by Tim Reagan, Federal Judicial Center


United States District Court Civil Pro Se Filings Per District
Calendar Years 1999-2003
Number of Cases
20,000
18,000
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
Pro Se Prisoner Petitions
Other Non-Prisoner Civil Pro Se
Non-Prisoner Civil Rights Pro Se
Employment Pro Se
Social Security Pro Se
Alabama Middle
Alabama Northern
Alabama Southern
Alaska
Arizona
Arkansas Eastern
Arkansas Western
California Central
California Eastern
California Northern
California Southern
Colorado
Connecticut
Delaware
District of Columbia
Florida Middle
Florida Northern
Florida Southern
Georgia Middle
Georgia Northern
Georgia Southern
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Hawaii
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Illinois Southern
Indiana Northern
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Kansas
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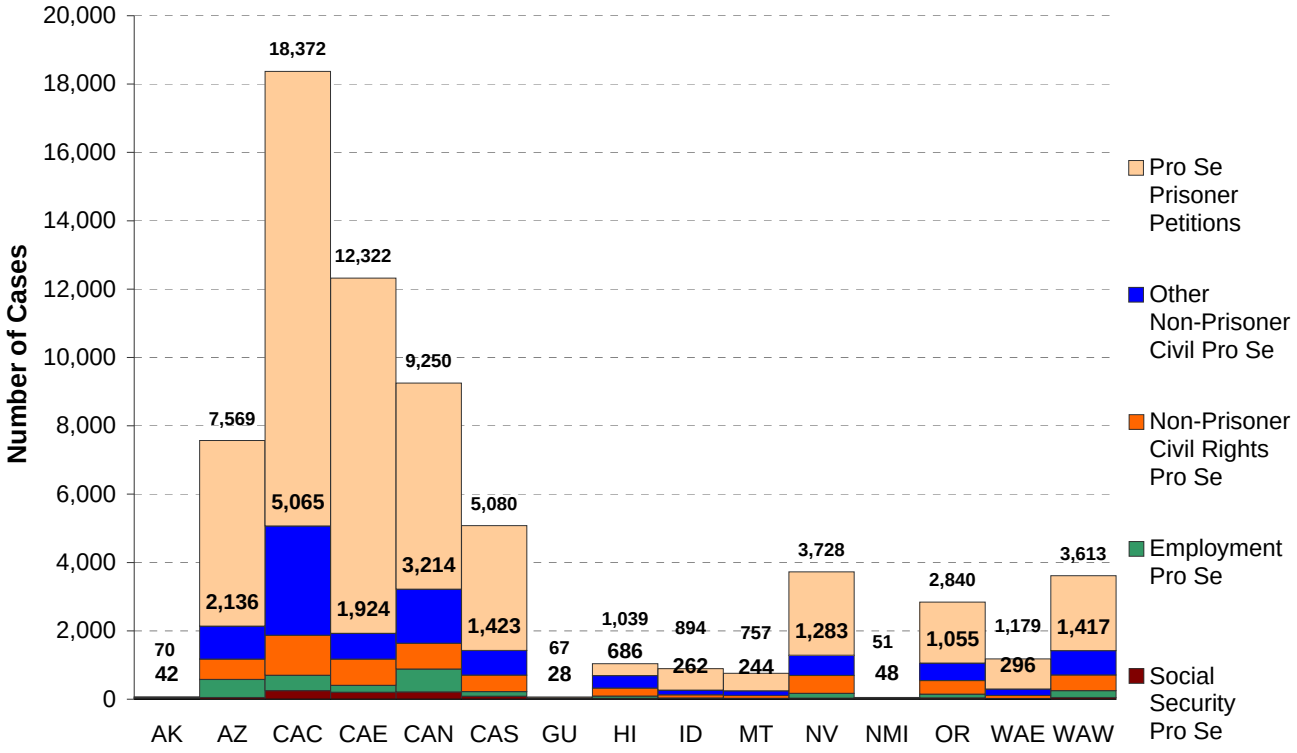
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York Eastern
New York Northern
New York Southern
New York Western
North Carolina Eastern
North Carolina Middle
North Carolina Western
North Dakota
Northern Mariana
Ohio Northern
Ohio Southern
Oklahoma Eastern
Oklahoma Northern
Oklahoma Western
Oregon
Pennsylvania Eastern
Pennsylvania Middle
Pennsylvania Western
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee Eastern
Tennessee Middle
Tennessee Western
Texas Eastern
Texas Northern
Texas Southern
Texas Western
Utah
Vermont
Virgin Islands
Virginia Eastern
Virginia Western
Washington Eastern
Washington Western
West Virginia Northern
West Virginia Southern
Wisconsin Eastern
Wisconsin Western
Wyoming

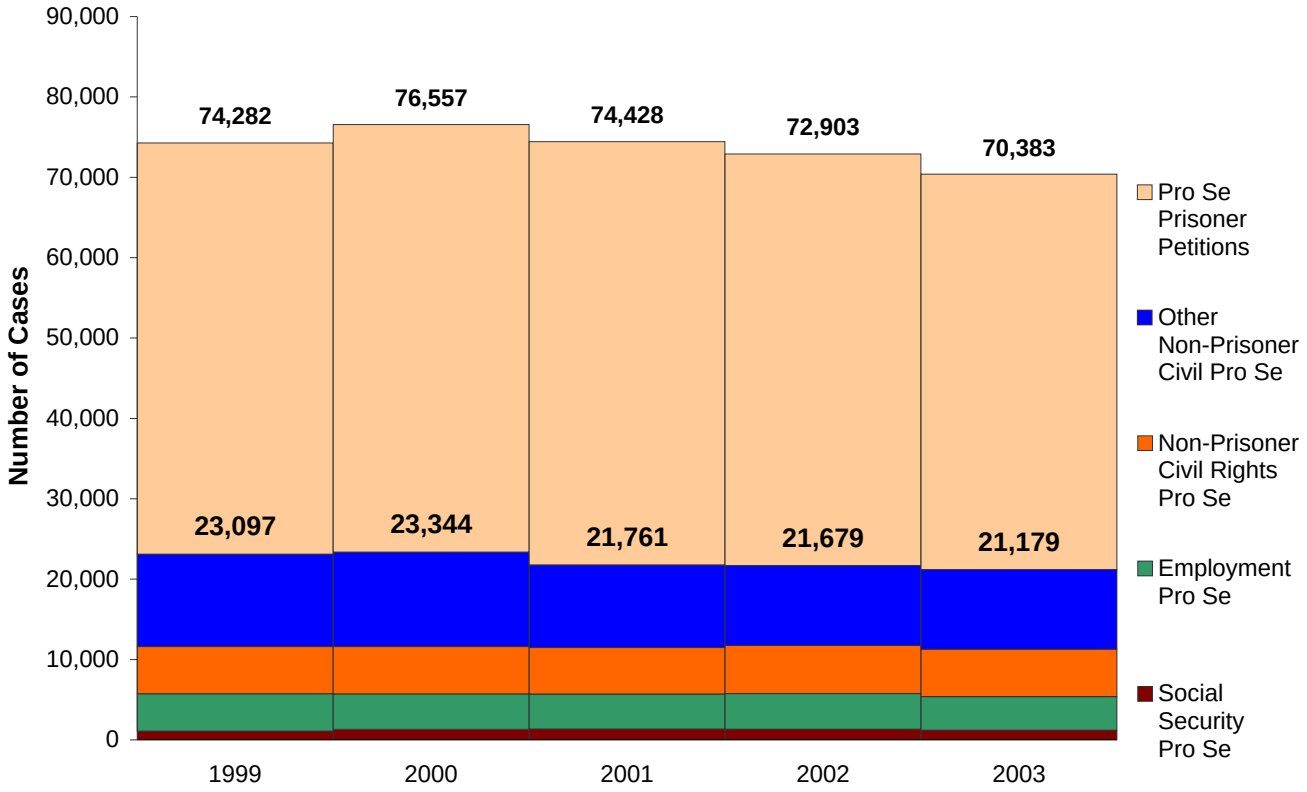
United States District Court Civil Pro Se Filings Per District
Ninth Circuit

Calendar Years 1999-2003



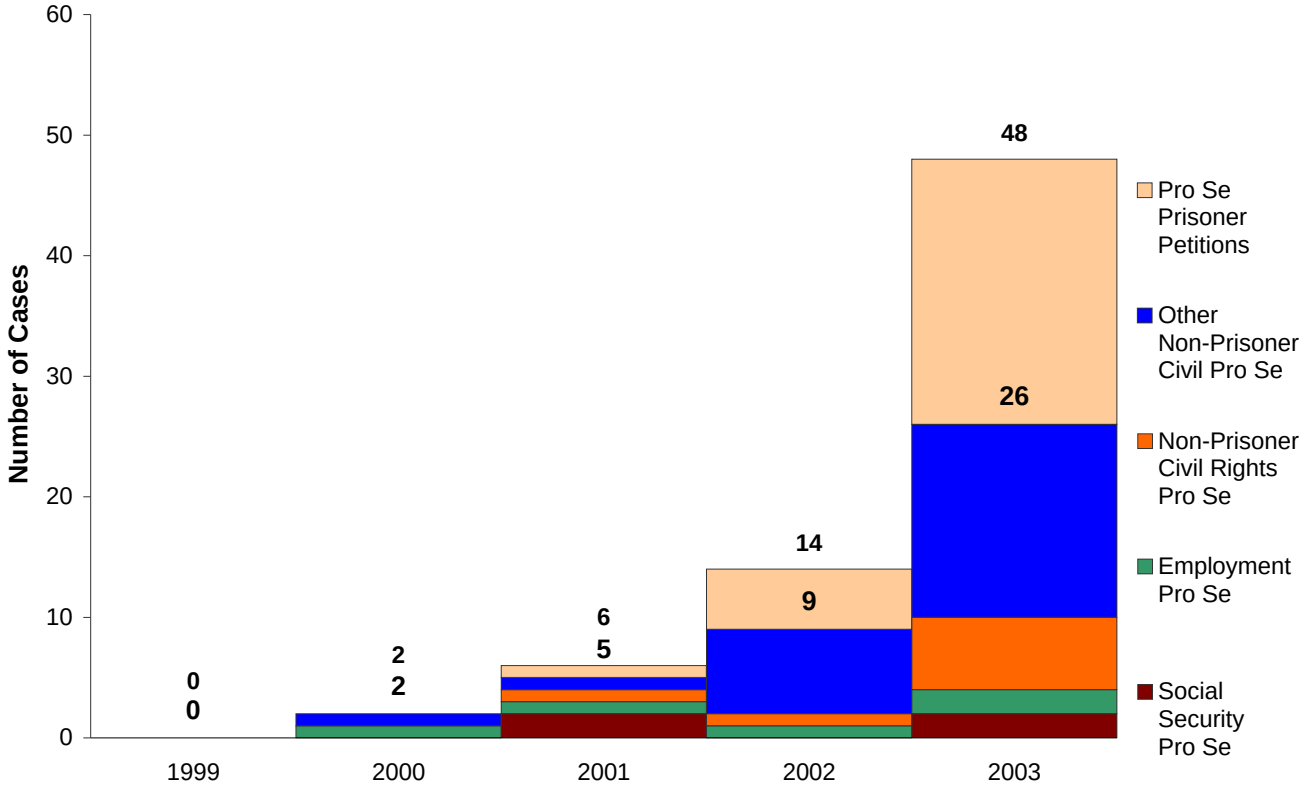
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
All Districts



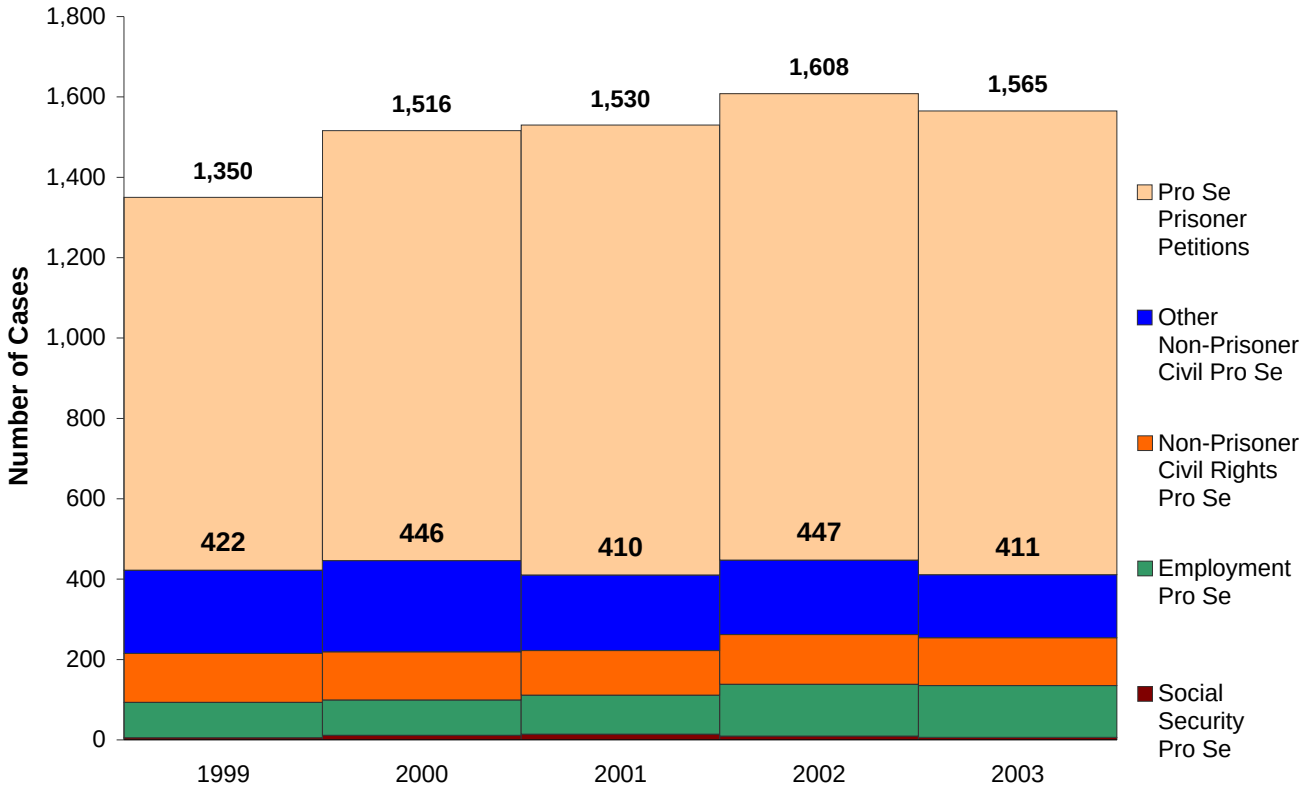
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Alaska



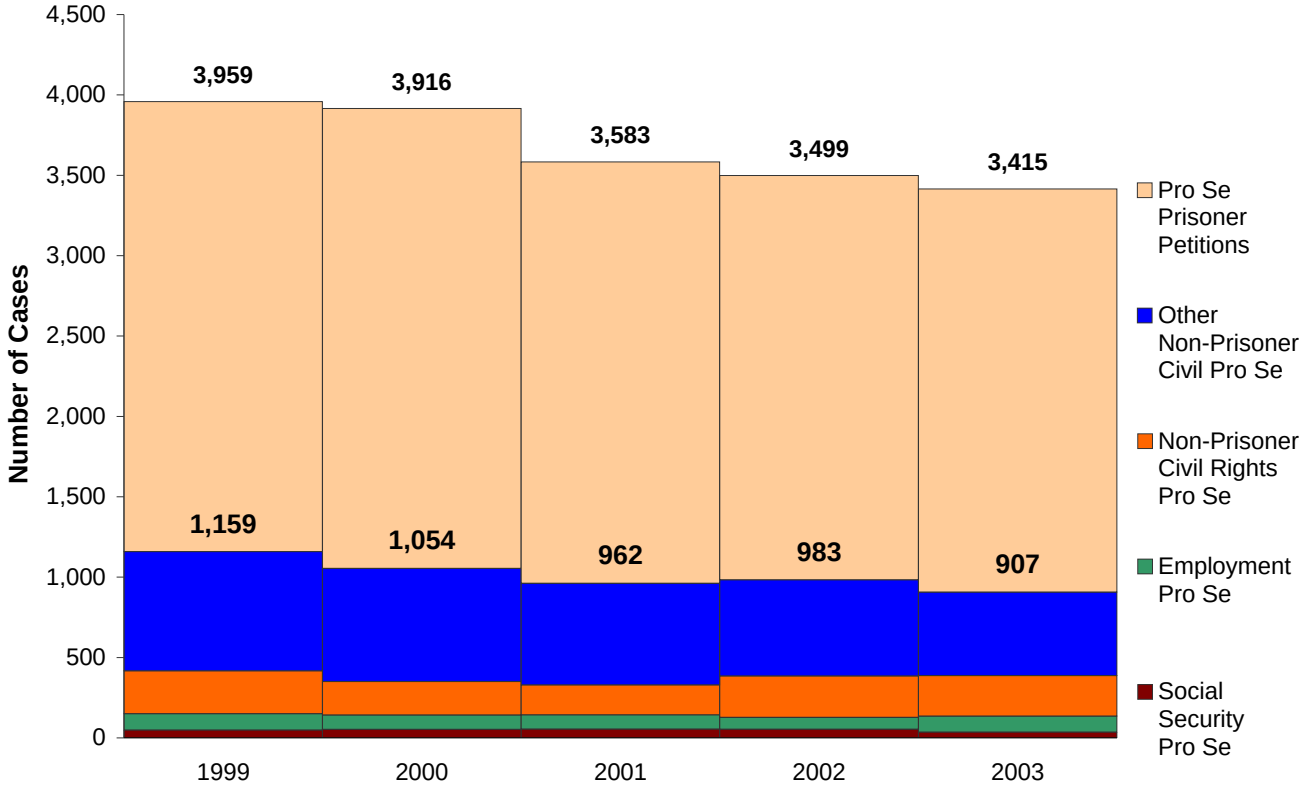
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Arizona



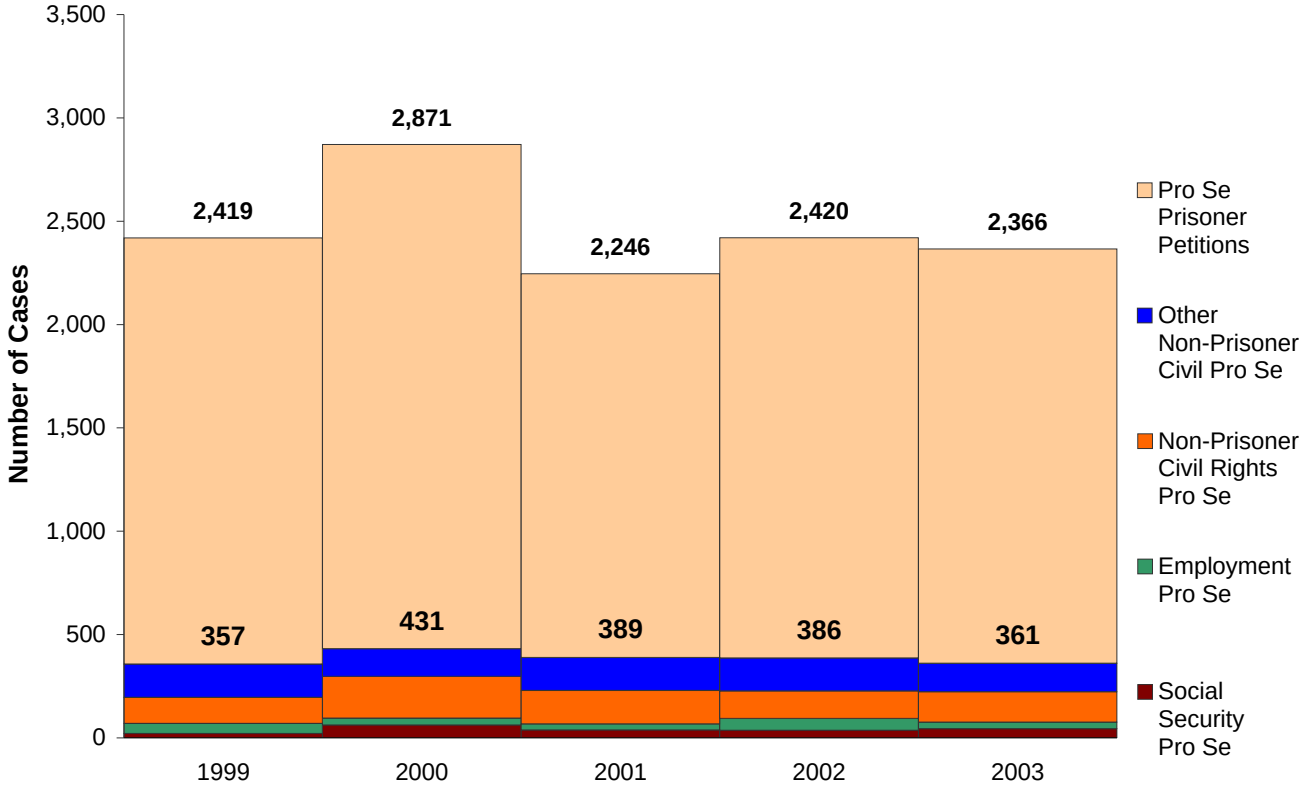
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Central District of California



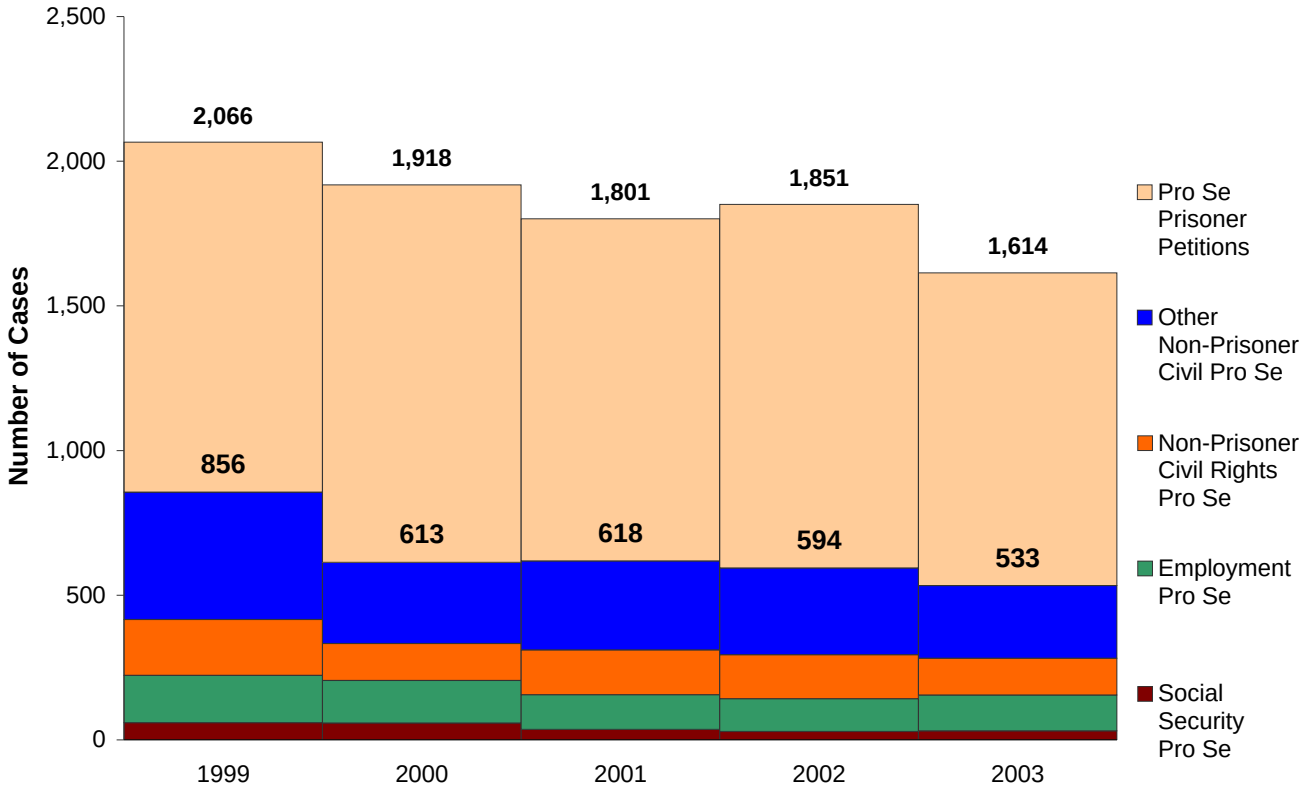
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Eastern District of California



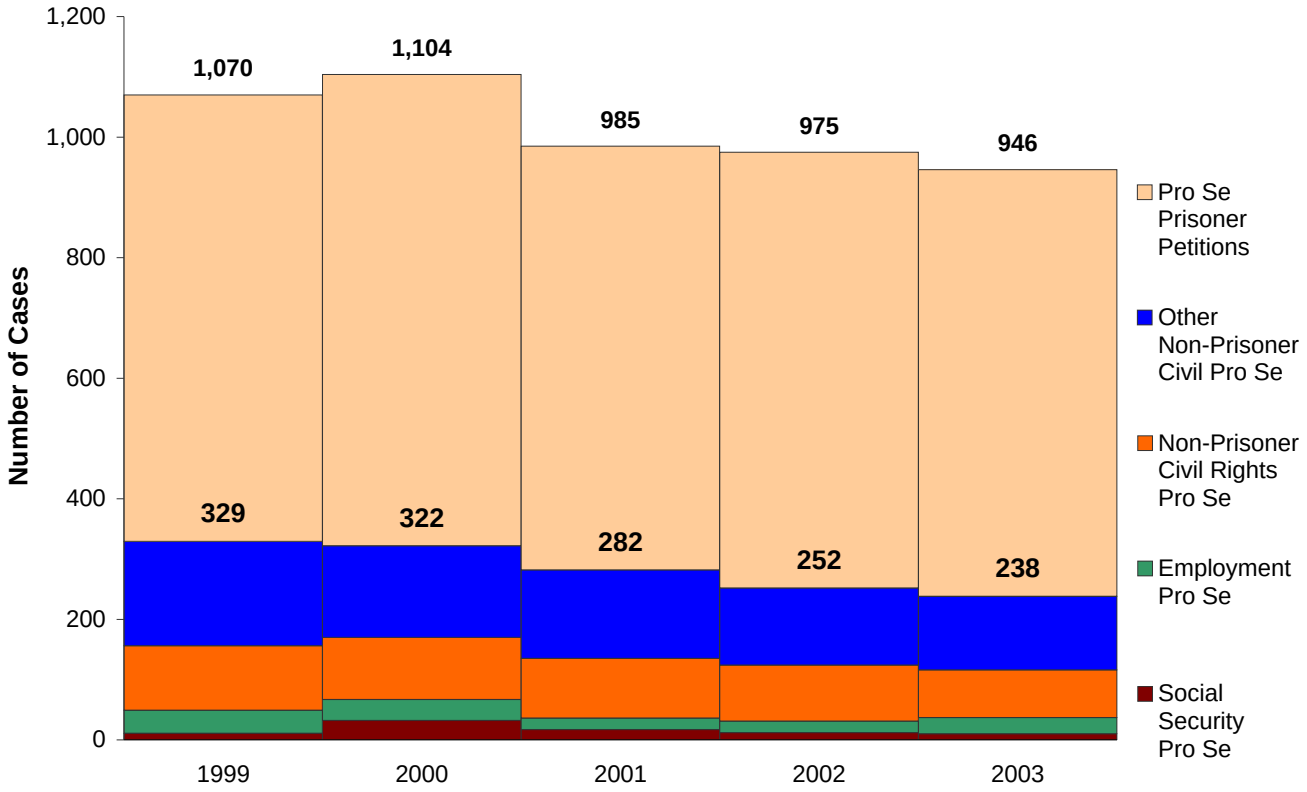
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Northern District of California



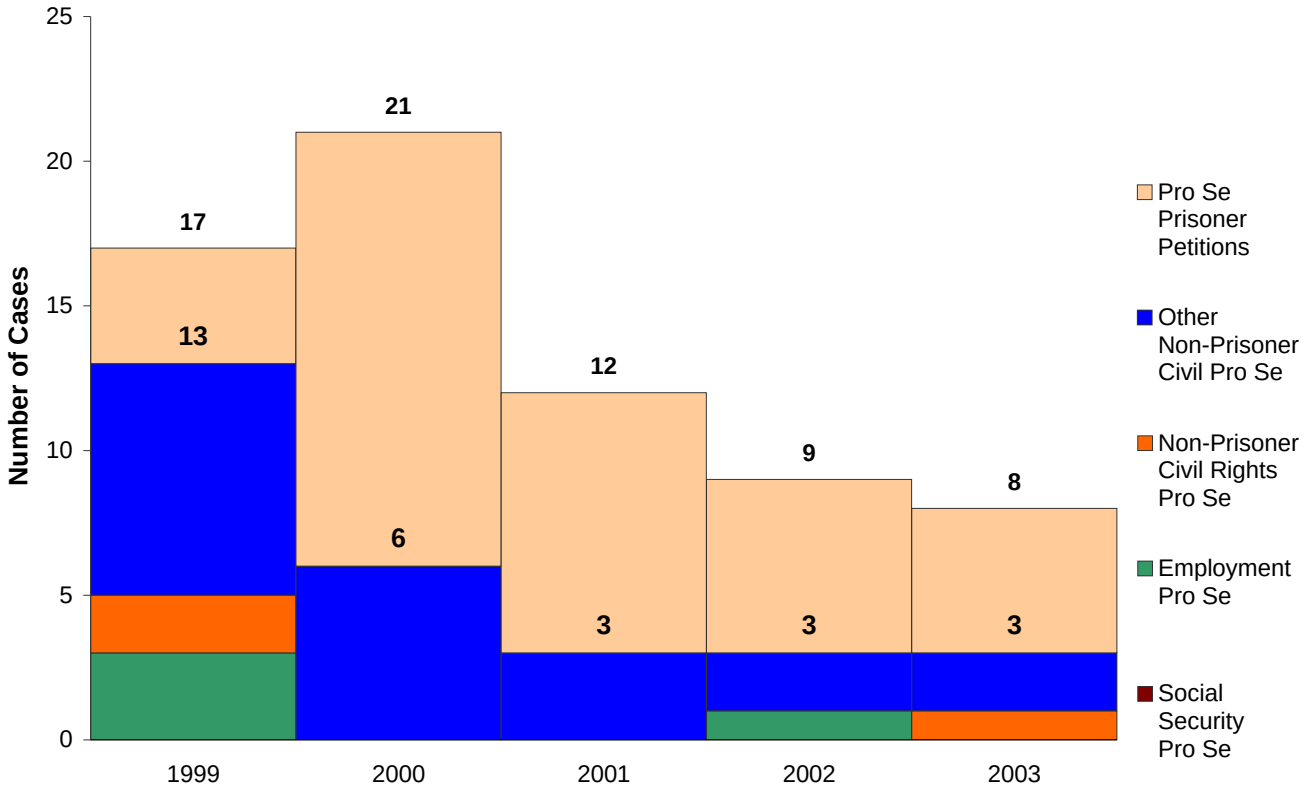
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Southern District of California



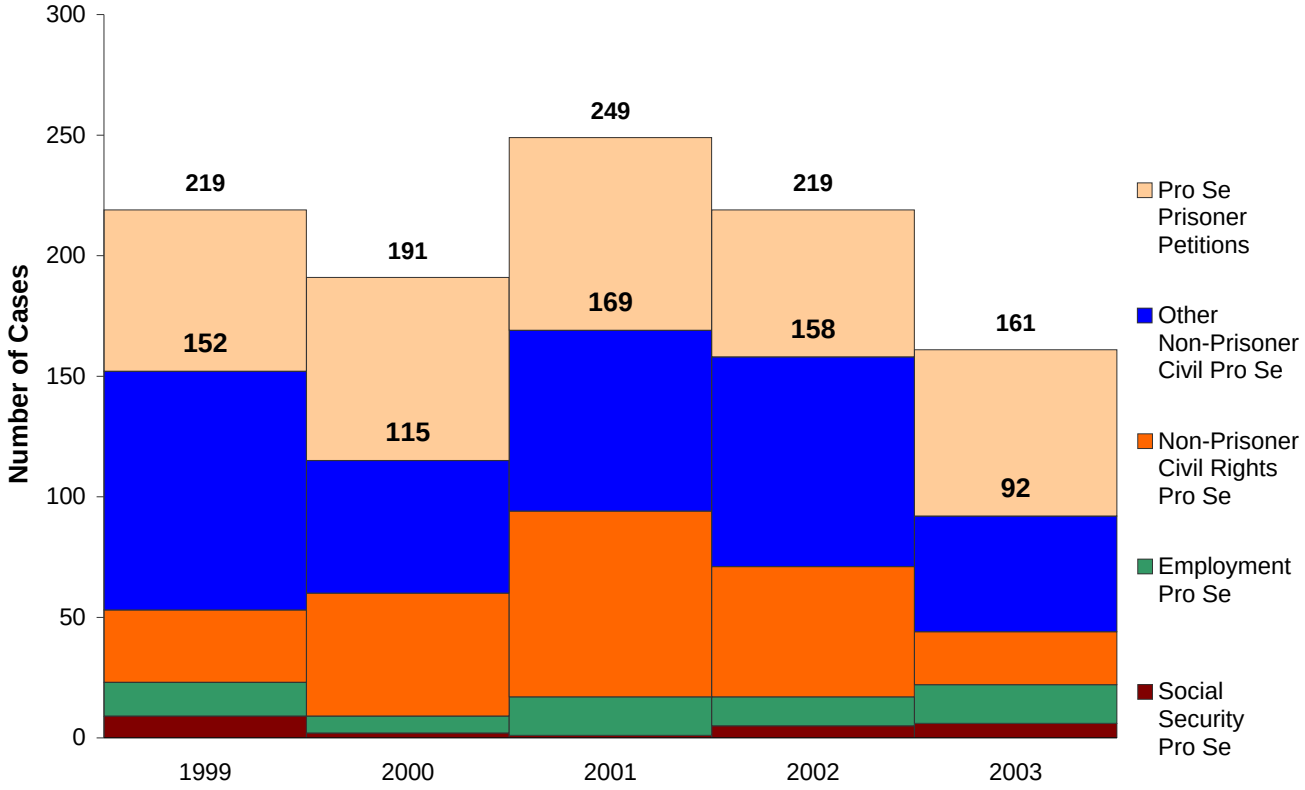
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Guam



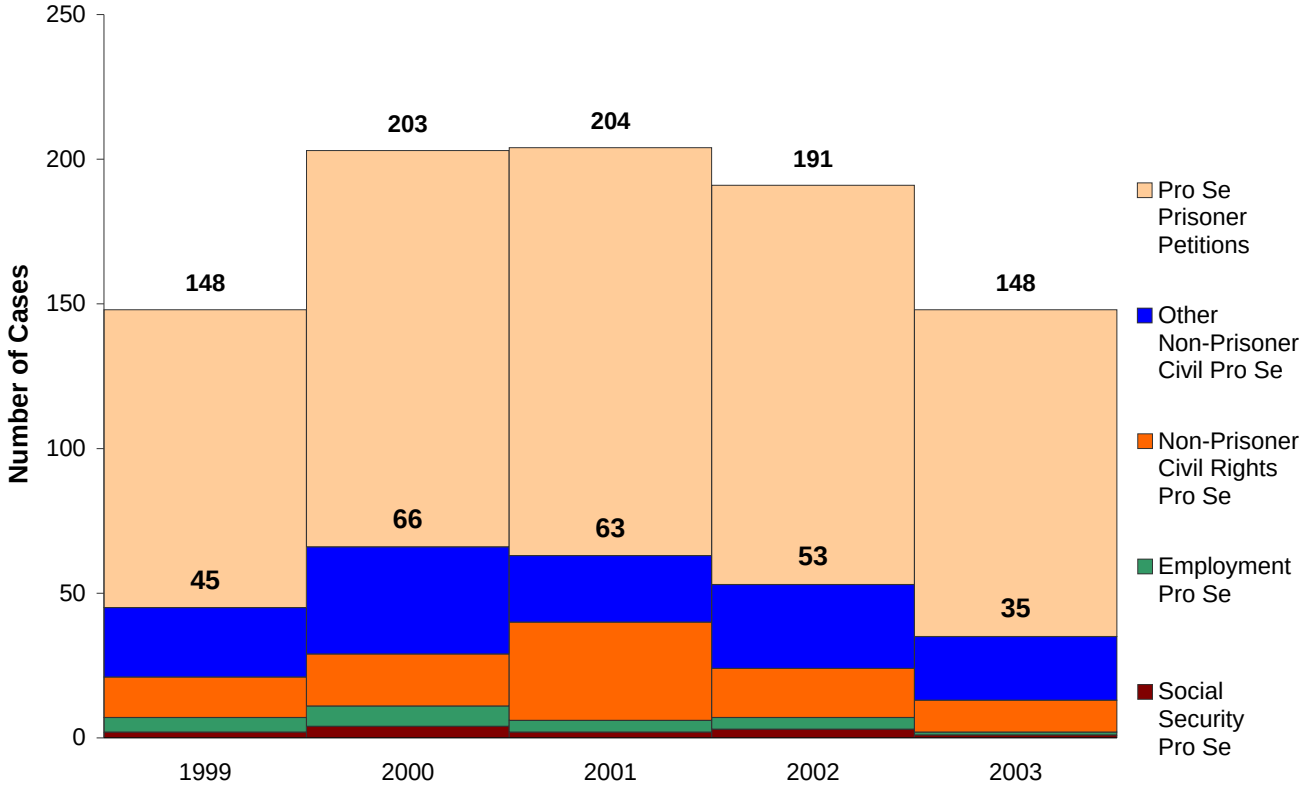
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Hawaii



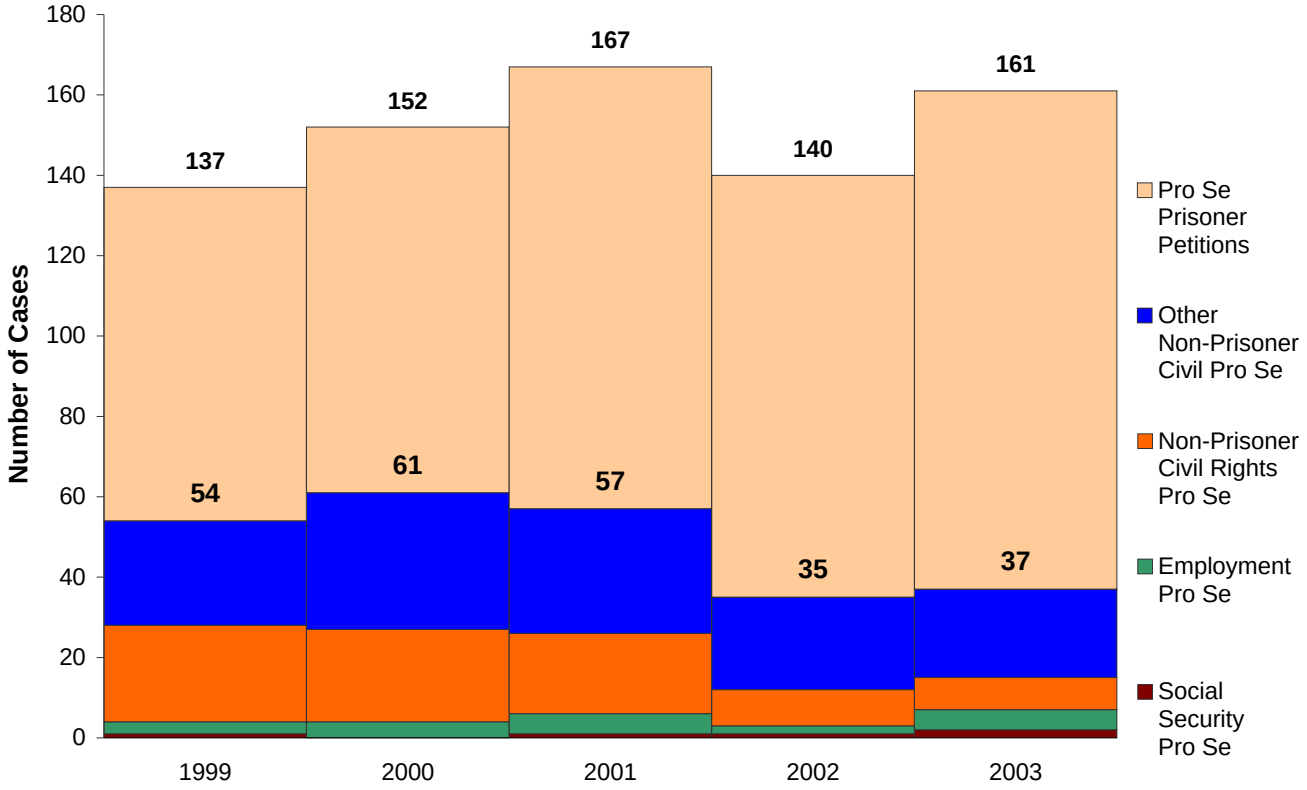
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Idaho



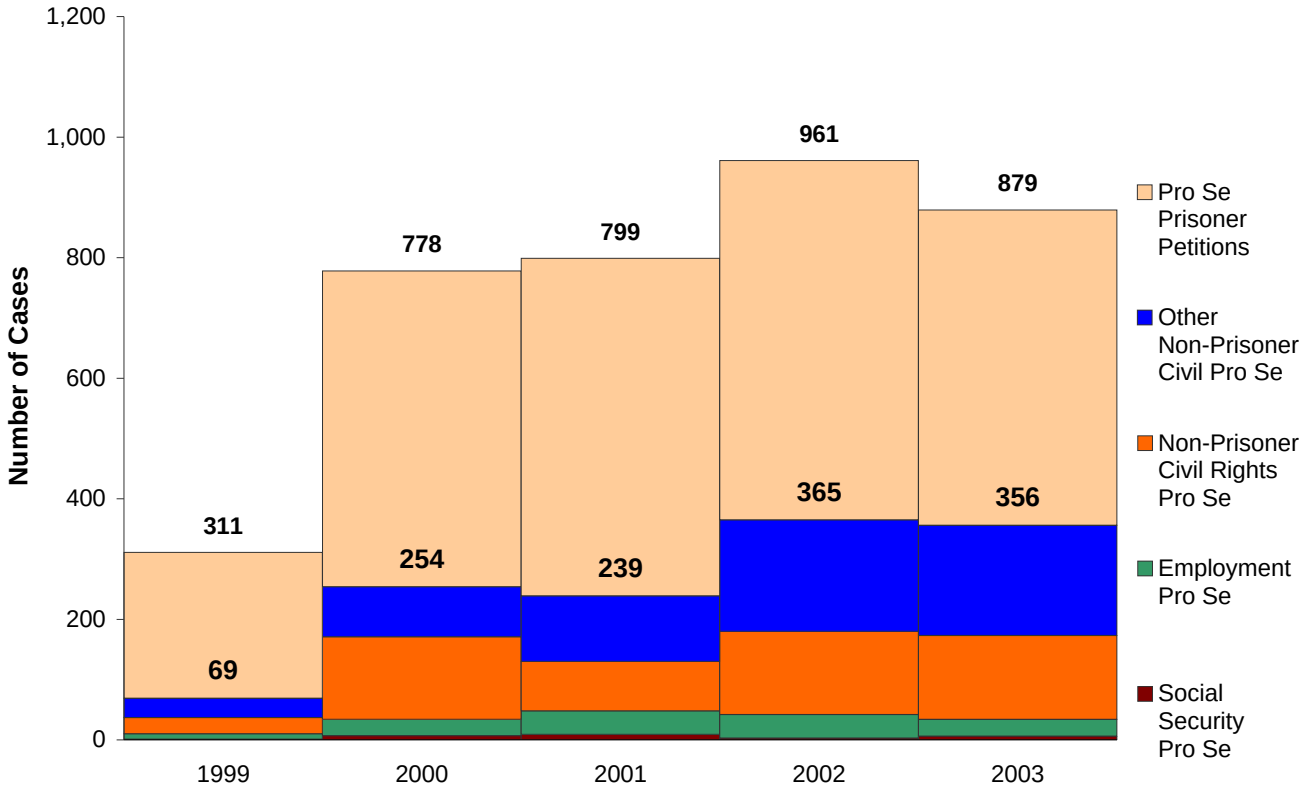
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Montana



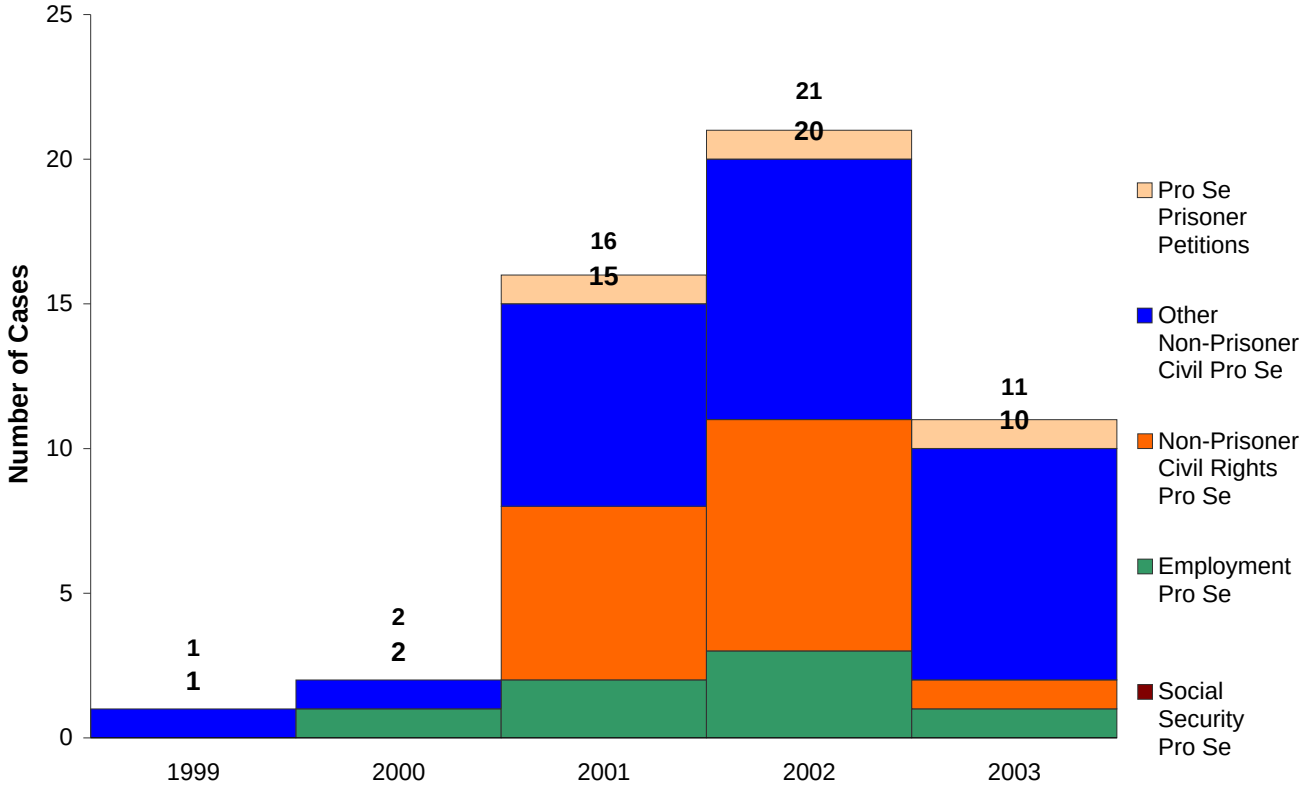
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Nevada



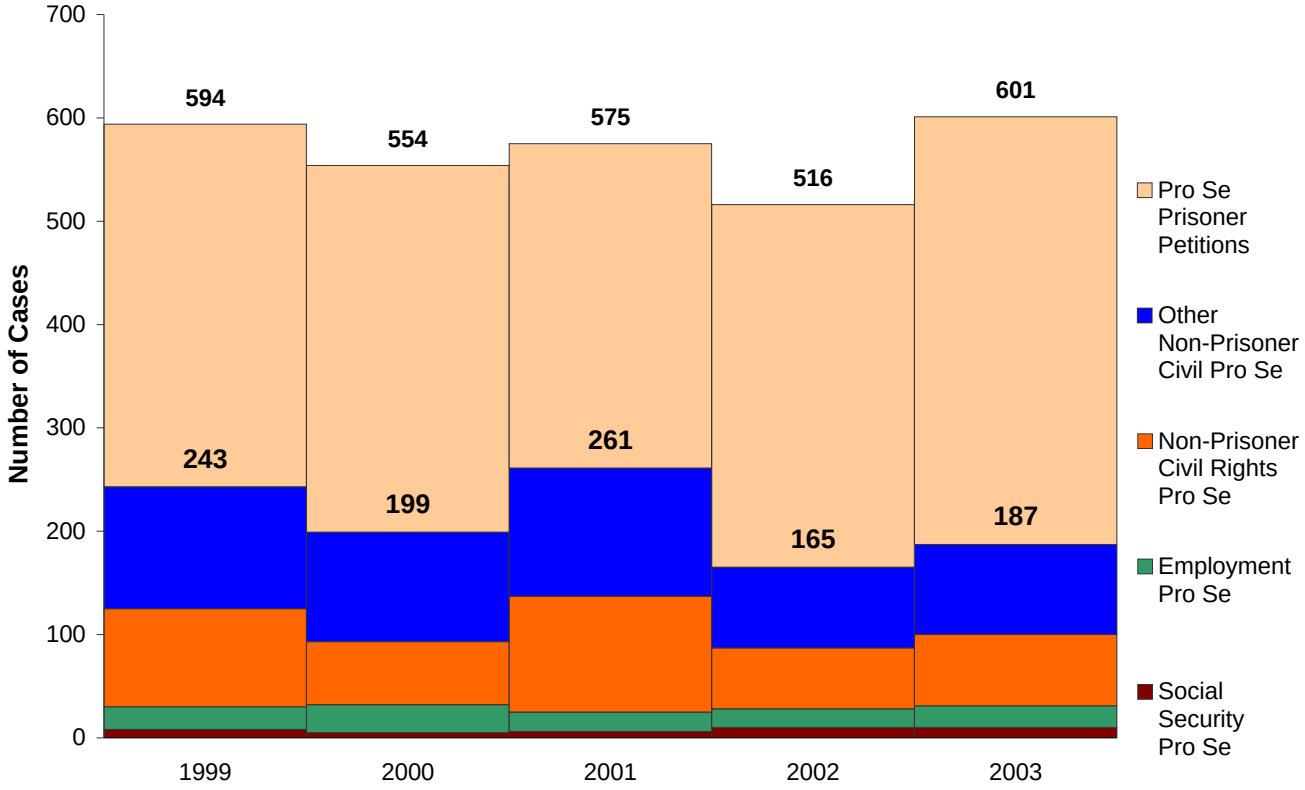
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of the Northern Mariana Islands



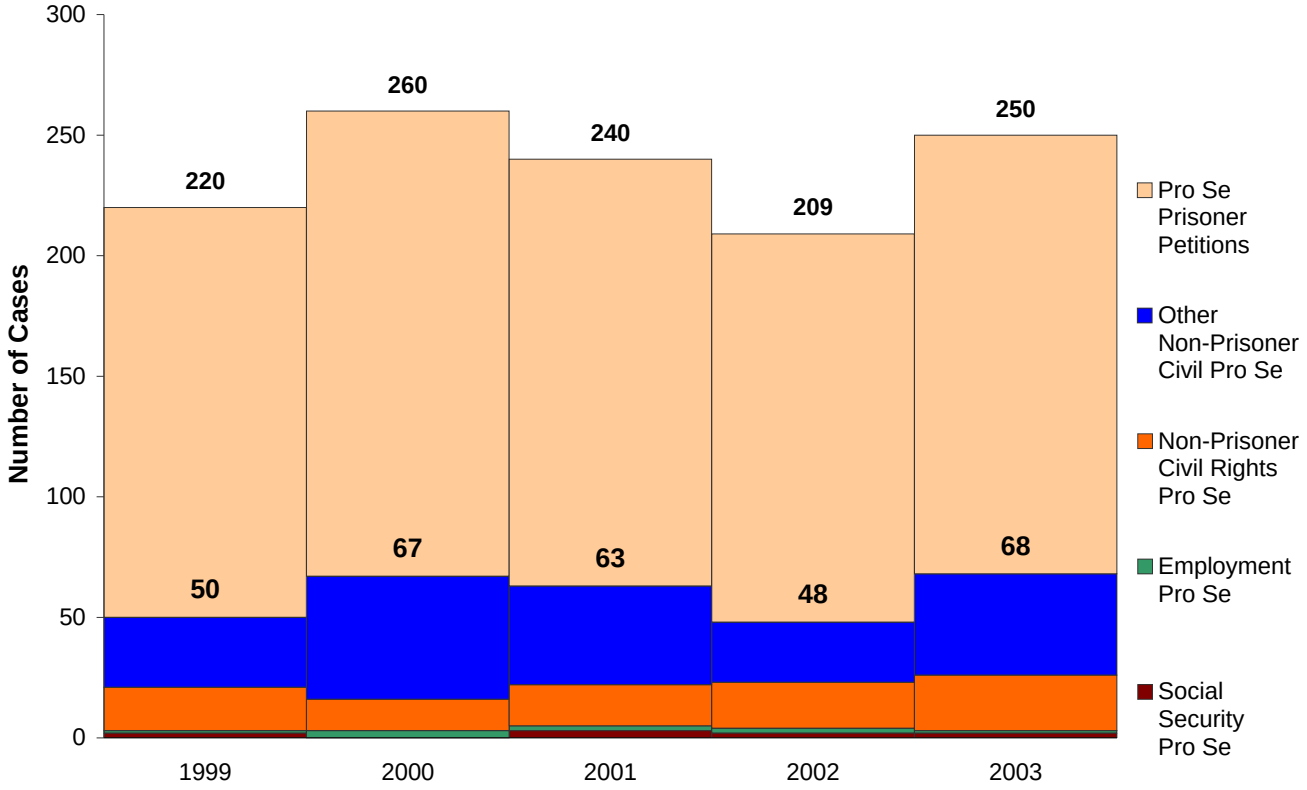
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
District of Oregon



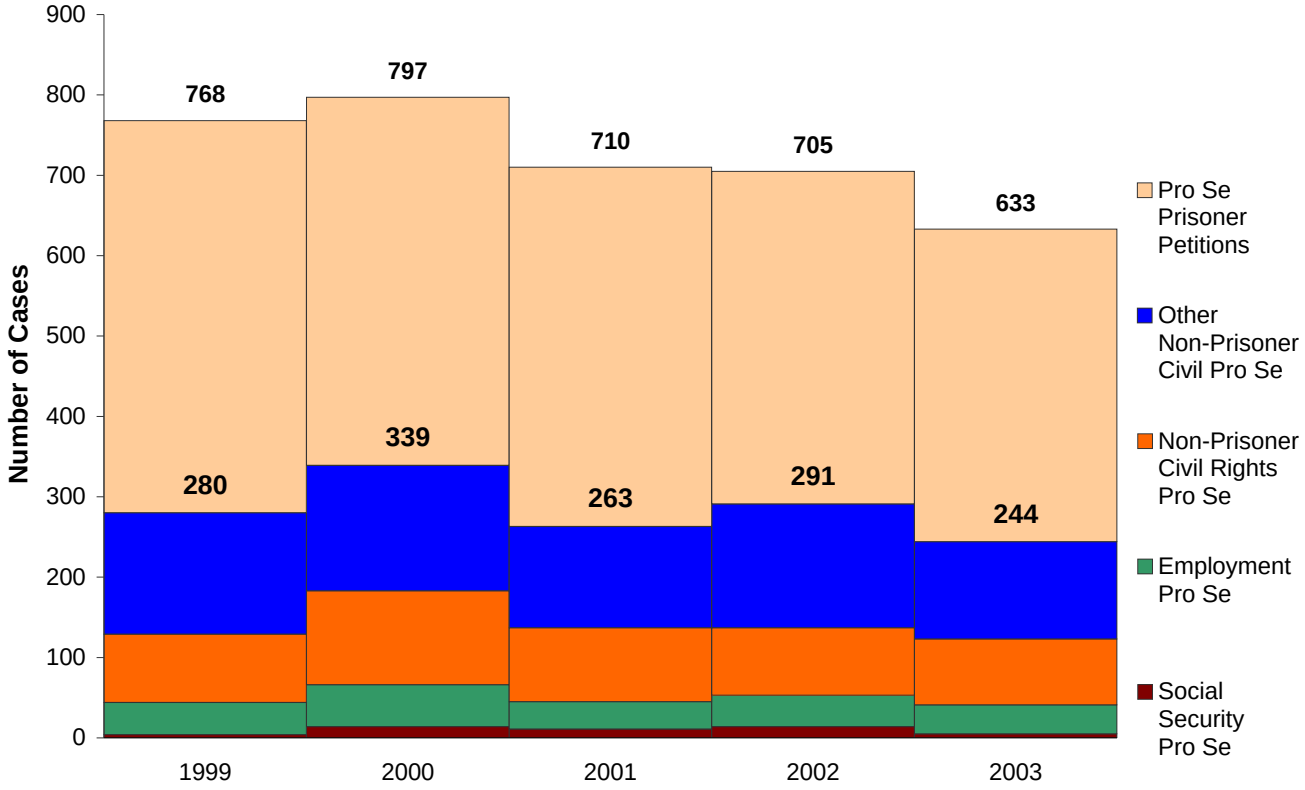
Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Eastern District of Washington

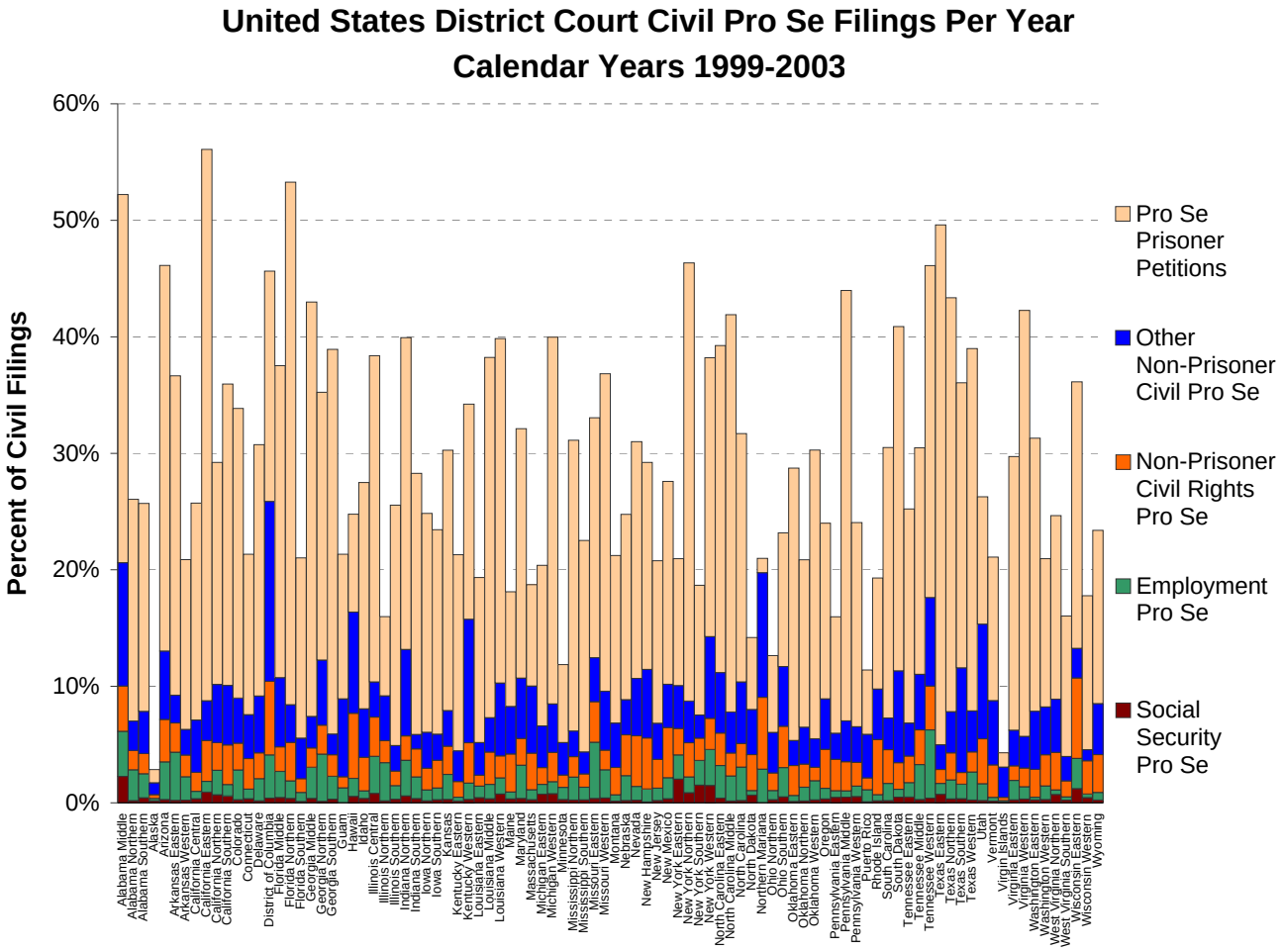


Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.

United States District Court Civil Pro Se Filings Per Year
Western District of Washington

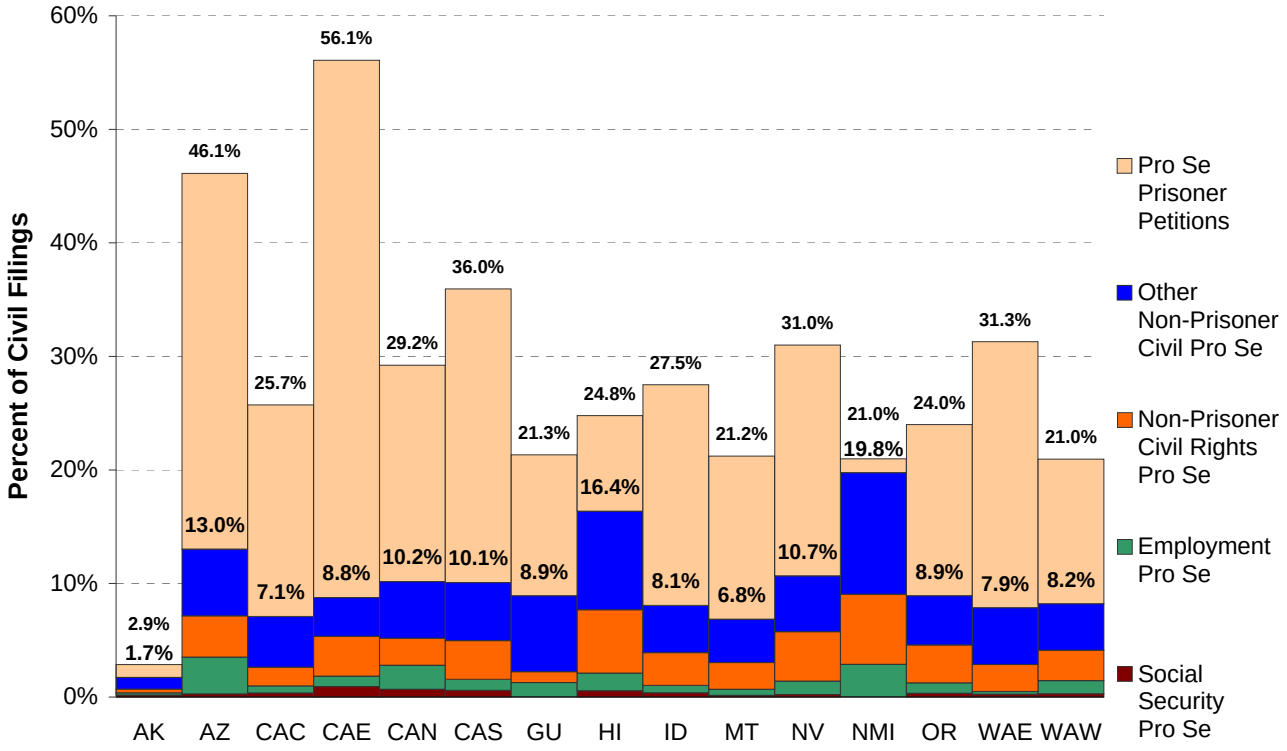


Note: Upper totals are civil pro se filings; lower totals are non-prisoner civil pro se filings.


United States District Court Civil Pro Se Filings Per Year
Calendar Years 1999-2003
Percent of Civil Filings
60%
50%
40%
30%
20%
10%
0%
Pro Se Prisoner Petitions
Other Non-Prisoner Civil Pro Se
Non-Prisoner Civil Rights Pro Se
Employment Pro Se
Social Security Pro Se
Alabama Middle
Alabama Northern
Alabama Southern
Alaska
Arizona
Arkansas Eastern
Arkansas Western
California Central
California Eastern
California Northern
California Southern
Colorado
Connecticut
Delaware
District of Columbia
Florida Middle
Florida Northern
Florida Southern
Georgia Middle
Georgia Northern
Georgia Southern
Guam
Hawaii
Idaho
Illinois Central
Illinois Northern
Illinois Southern
Indiana Northern
Indiana Southern
Iowa Northern
Iowa Southern
Kansas
Kentucky Eastern
Kentucky Western
Louisiana Eastern
Louisiana Middle
Louisiana Western
Maine
Maryland
Massachusetts
Michigan Eastern
Michigan Western
Minnesota
Mississippi Northern
Mississippi Southern
Missouri Eastern
Missouri Western
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York Eastern
New York Northern
New York Southern
New York Western
North Carolina Eastern
North Carolina Middle
North Carolina Western
North Dakota
Northern Mariana
Ohio Northern
Ohio Southern
Oklahoma Eastern
Oklahoma Northern
Oklahoma Western
Oregon
Pennsylvania Eastern
Pennsylvania Middle
Pennsylvania Western
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee Eastern
Tennessee Middle
Tennessee Western
Texas Eastern
Texas Northern
Texas Southern
Texas Western
Utah
Vermont
Virgin Islands
Virginia Eastern
Virginia Western
Washington Eastern
Washington Western
West Virginia Northern
West Virginia Southern
Wisconsin Eastern
Wisconsin Western
Wyoming

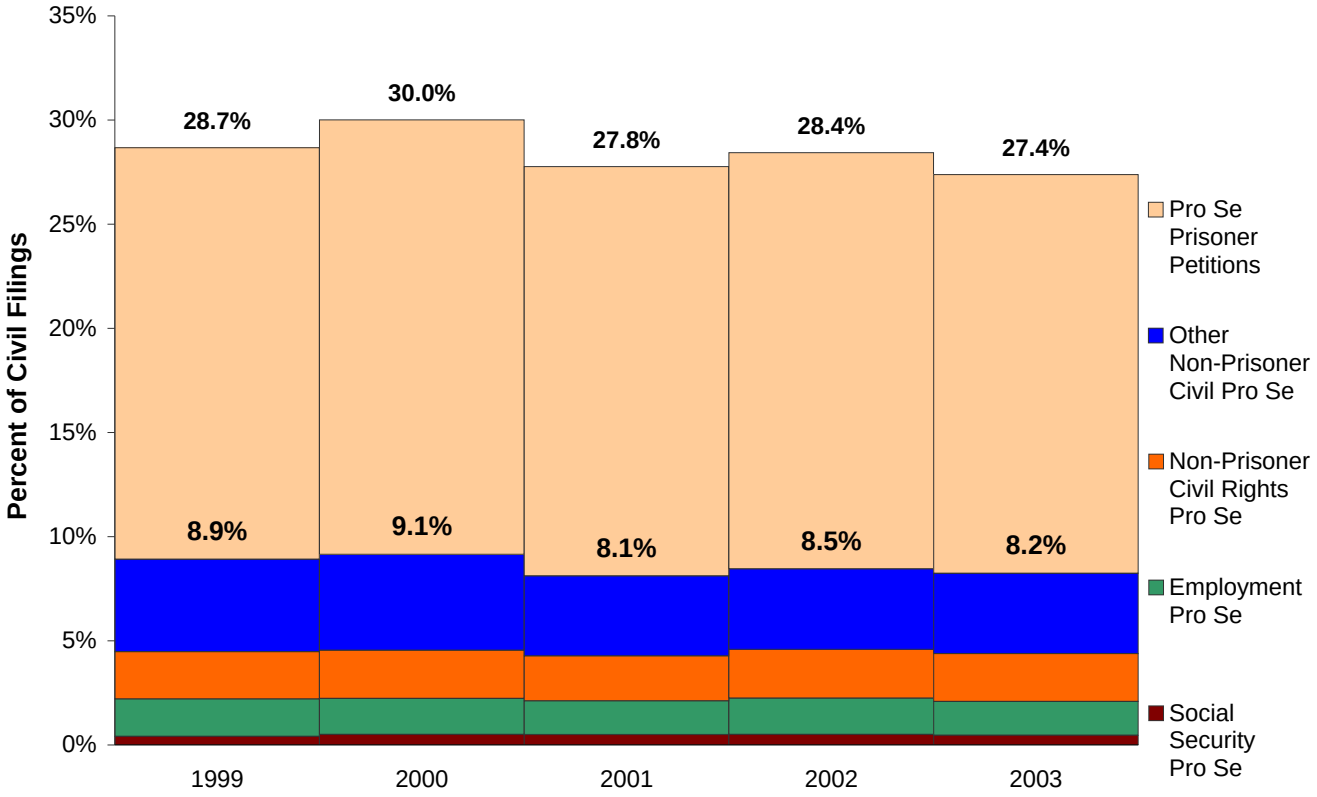
United States District Court Civil Pro Se Filings Per Year
Ninth Circuit

Calendar Years 1999-2003



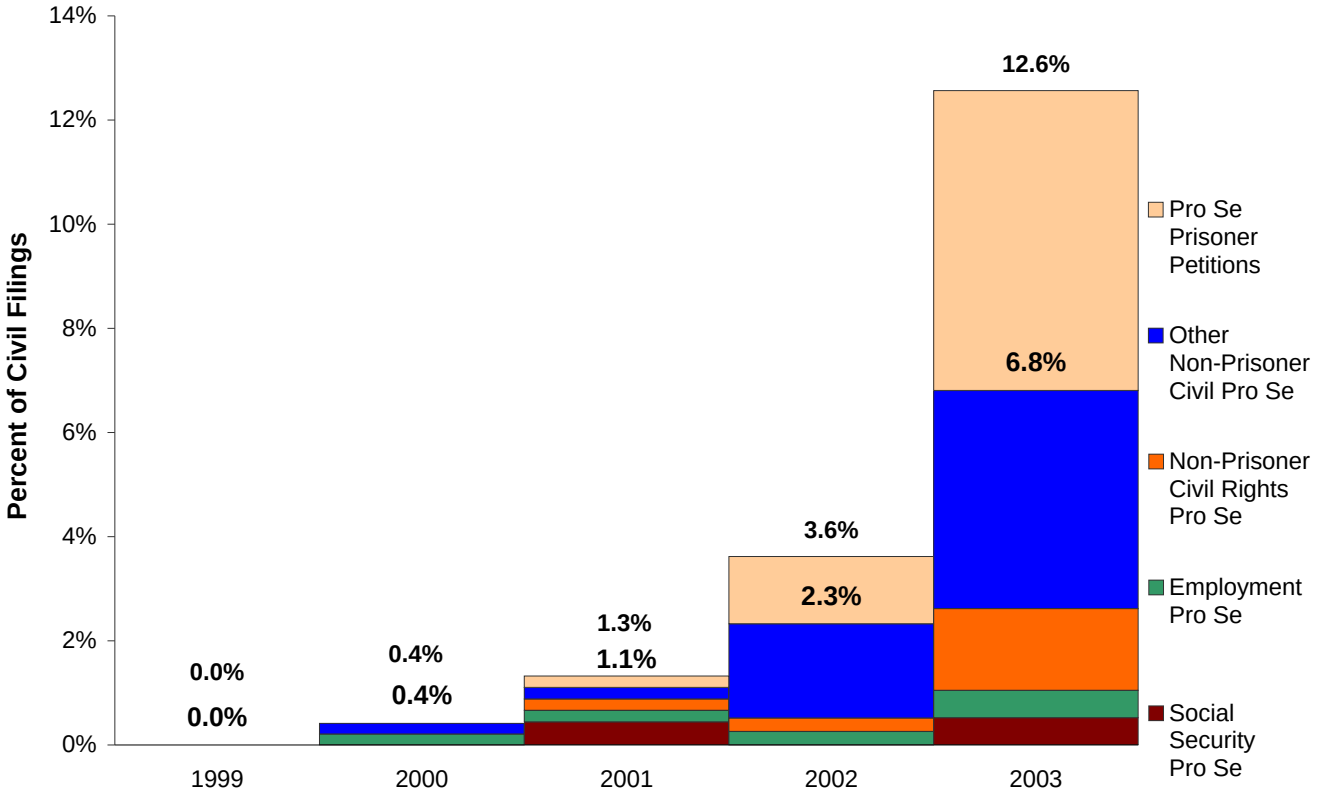
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
All Districts



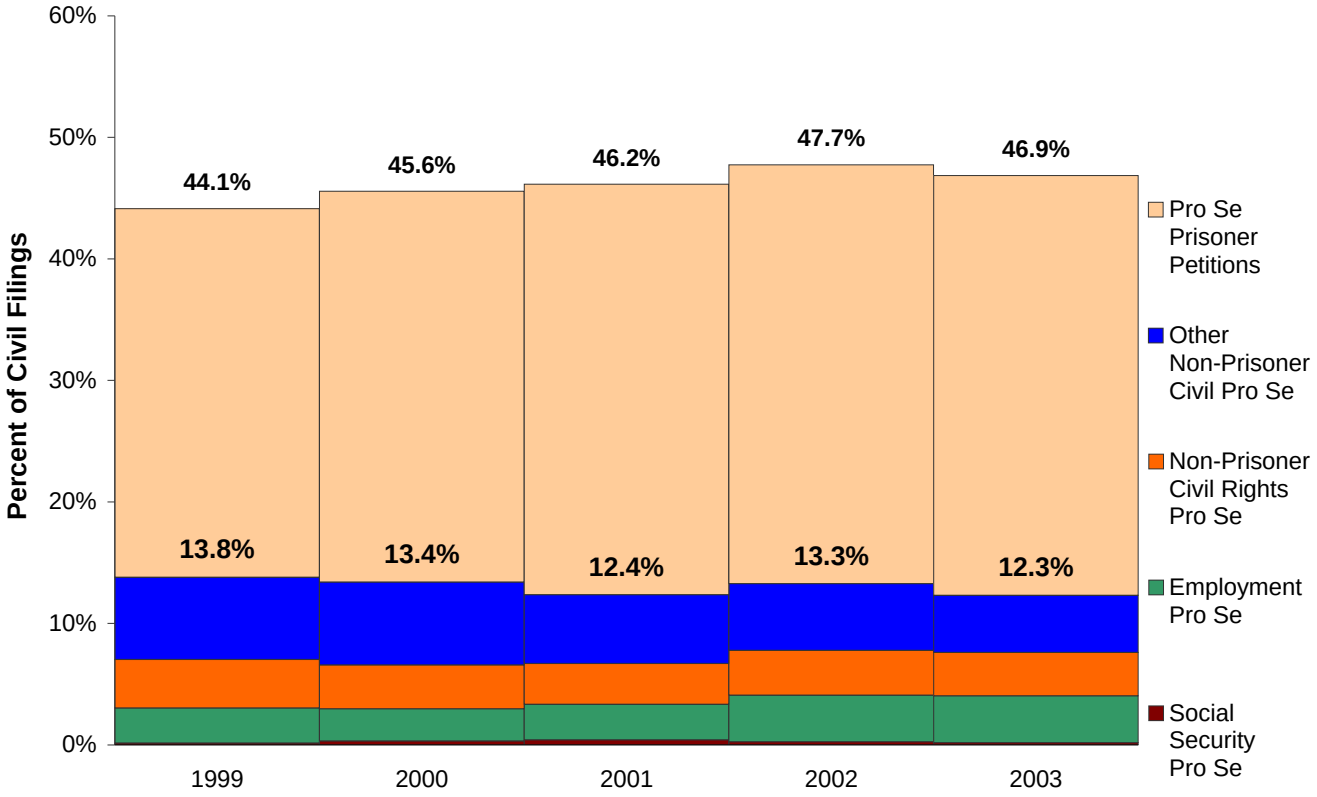
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Alaska



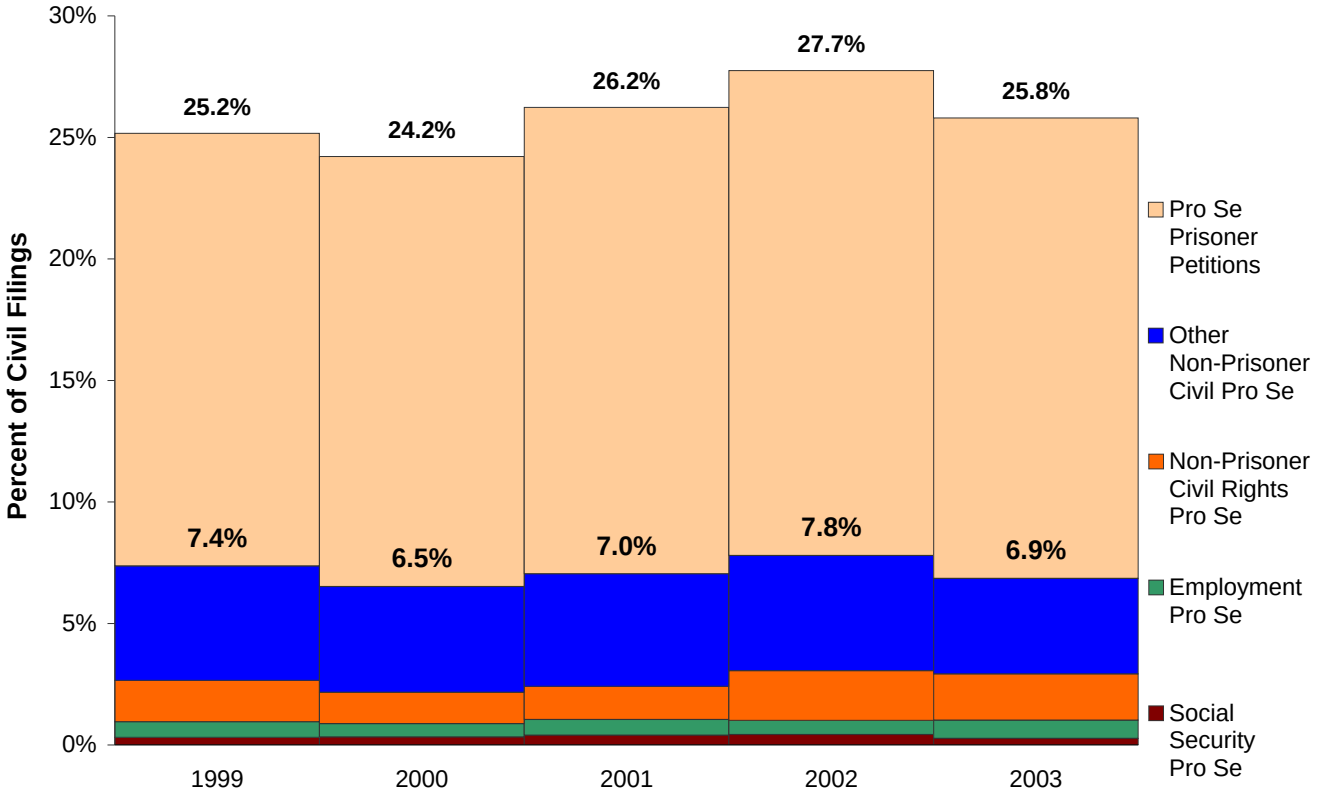
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Arizona



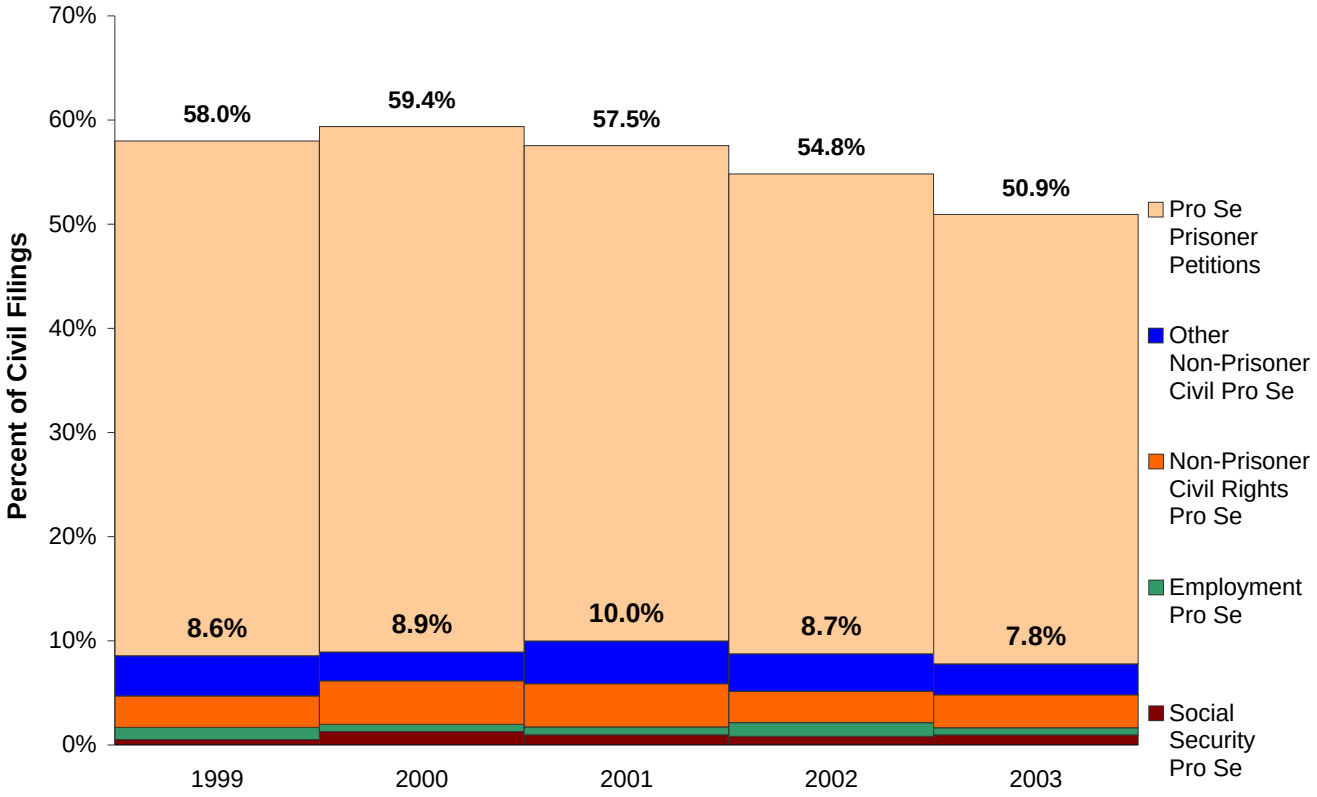
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
Central District of California

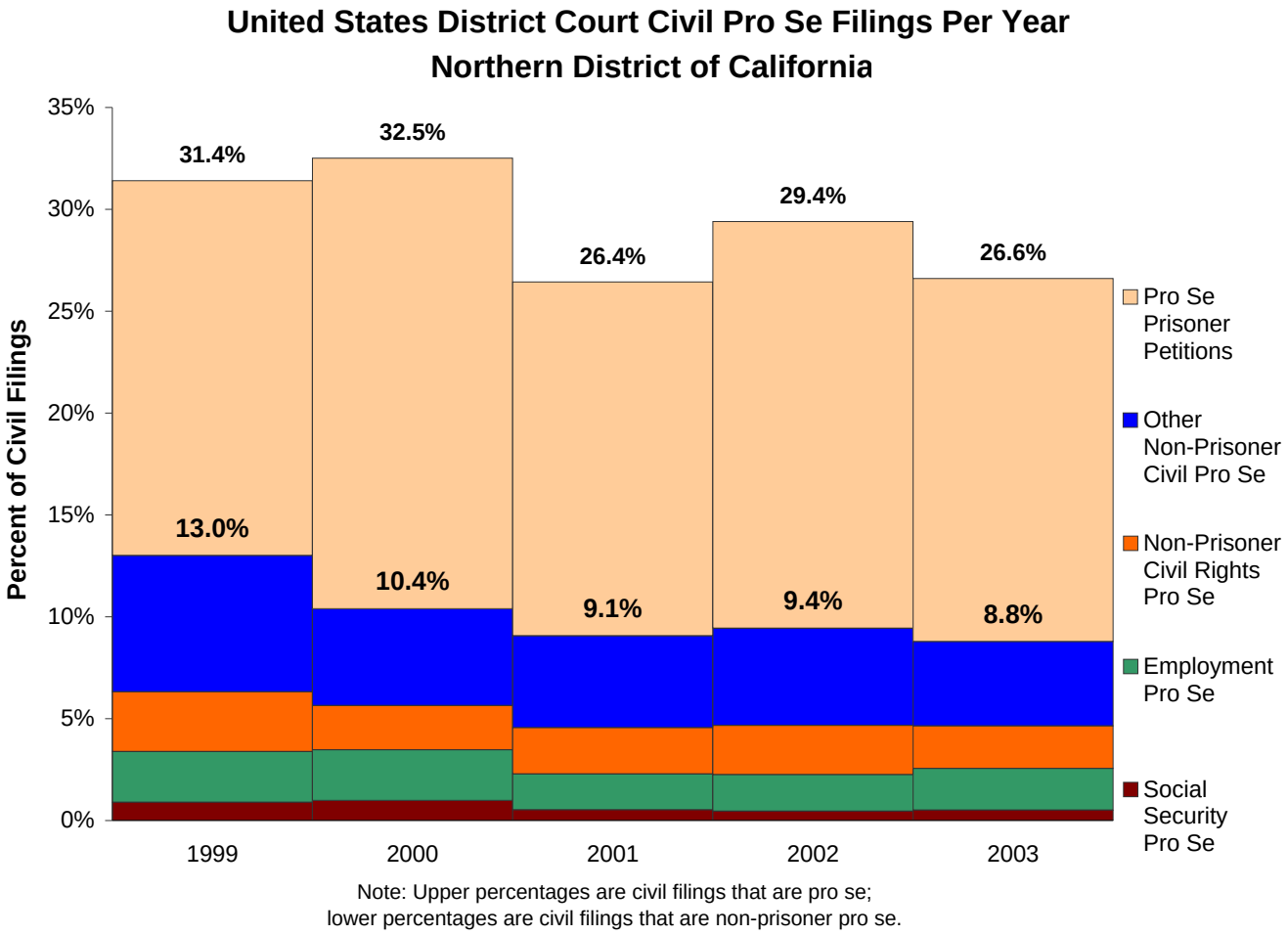


Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
Eastern District of California

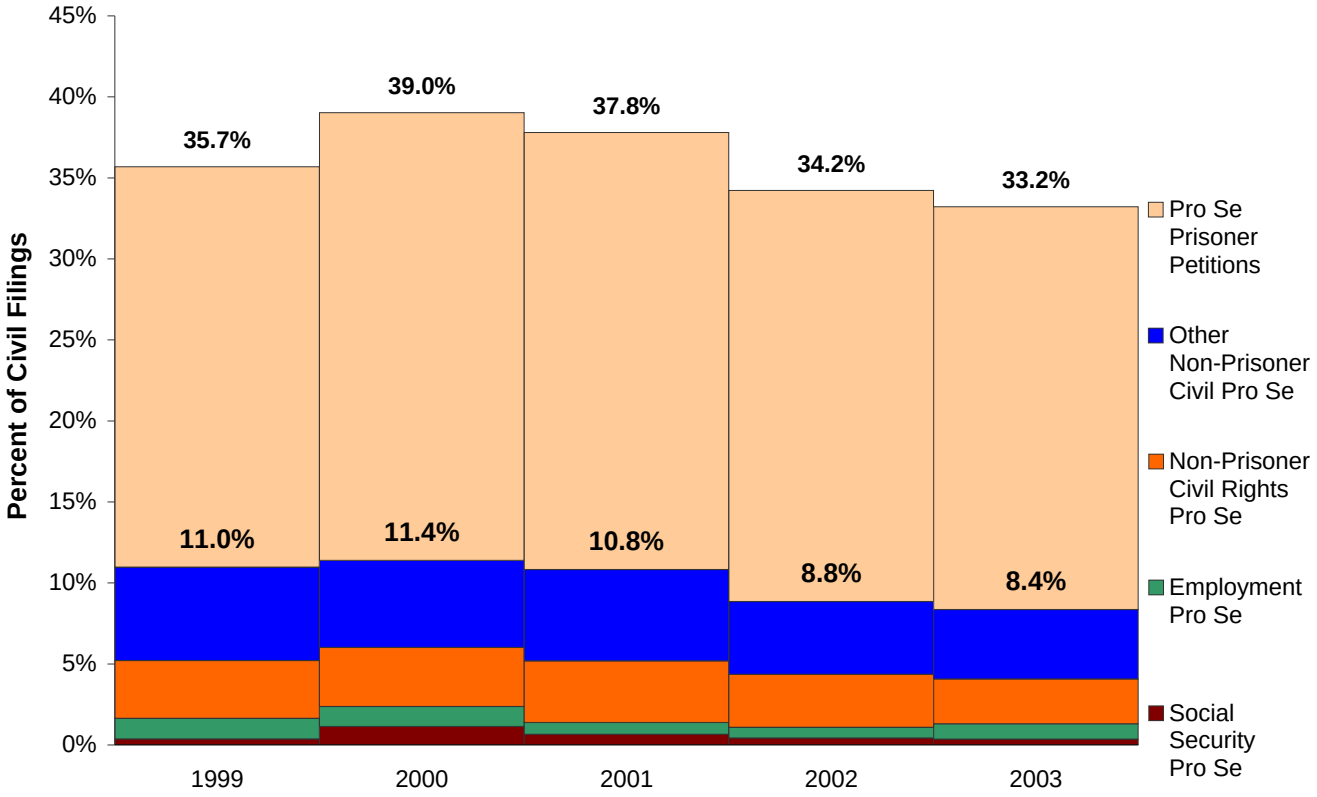


Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.



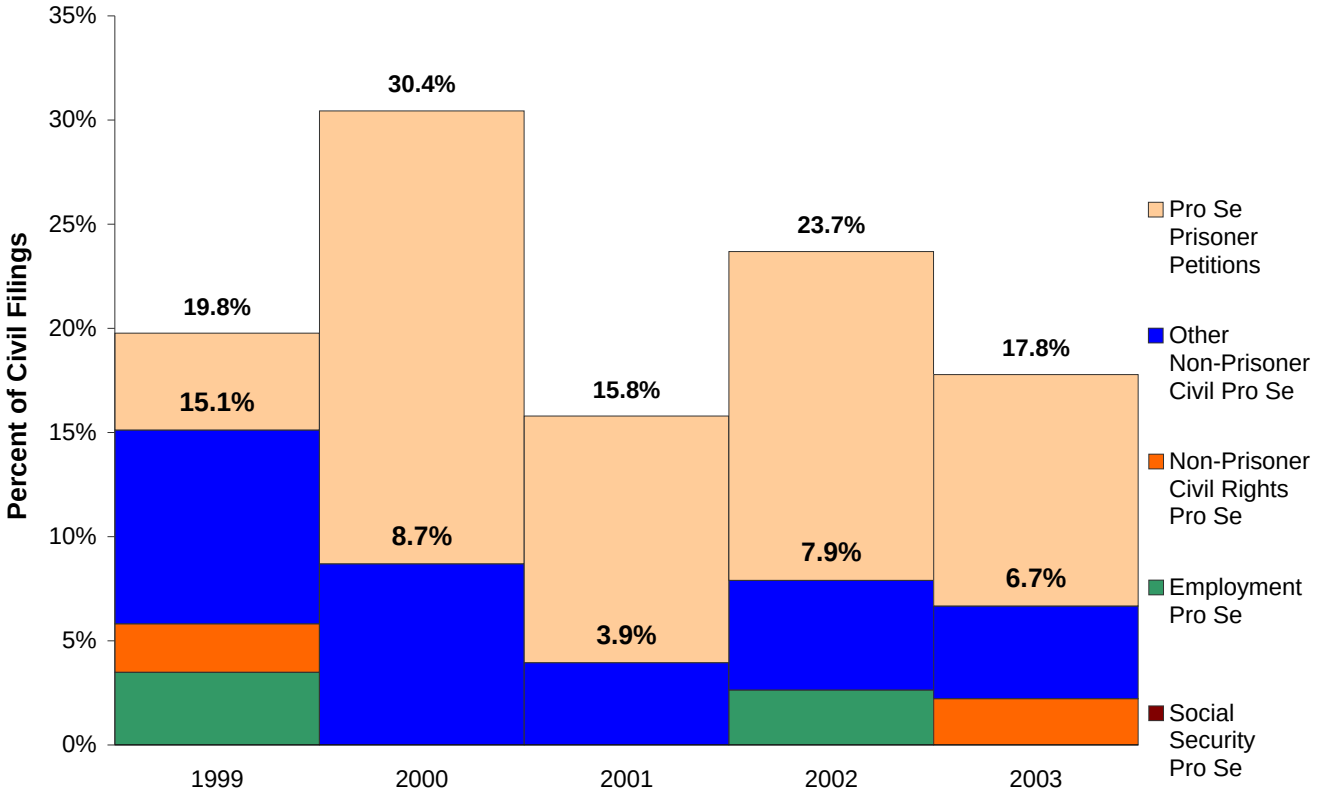
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
Southern District of California



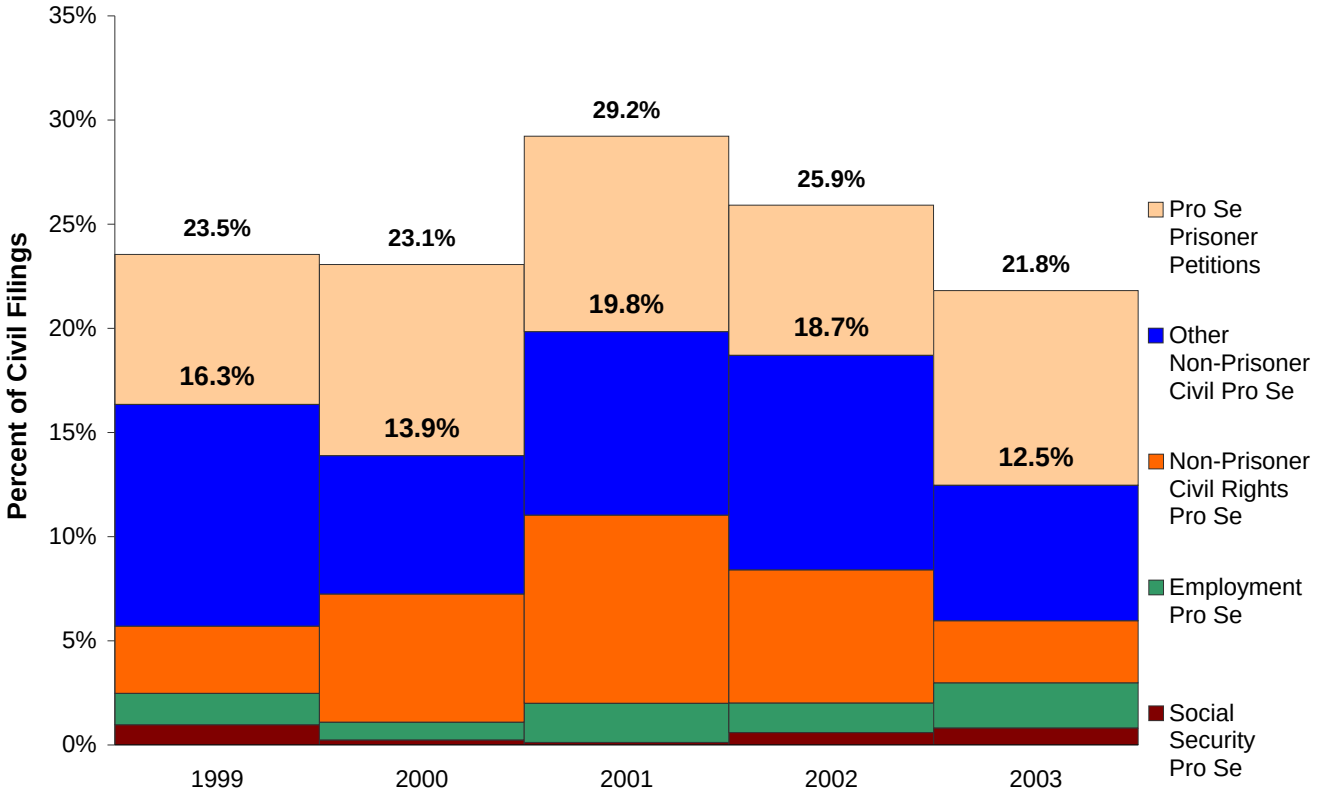
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Guam



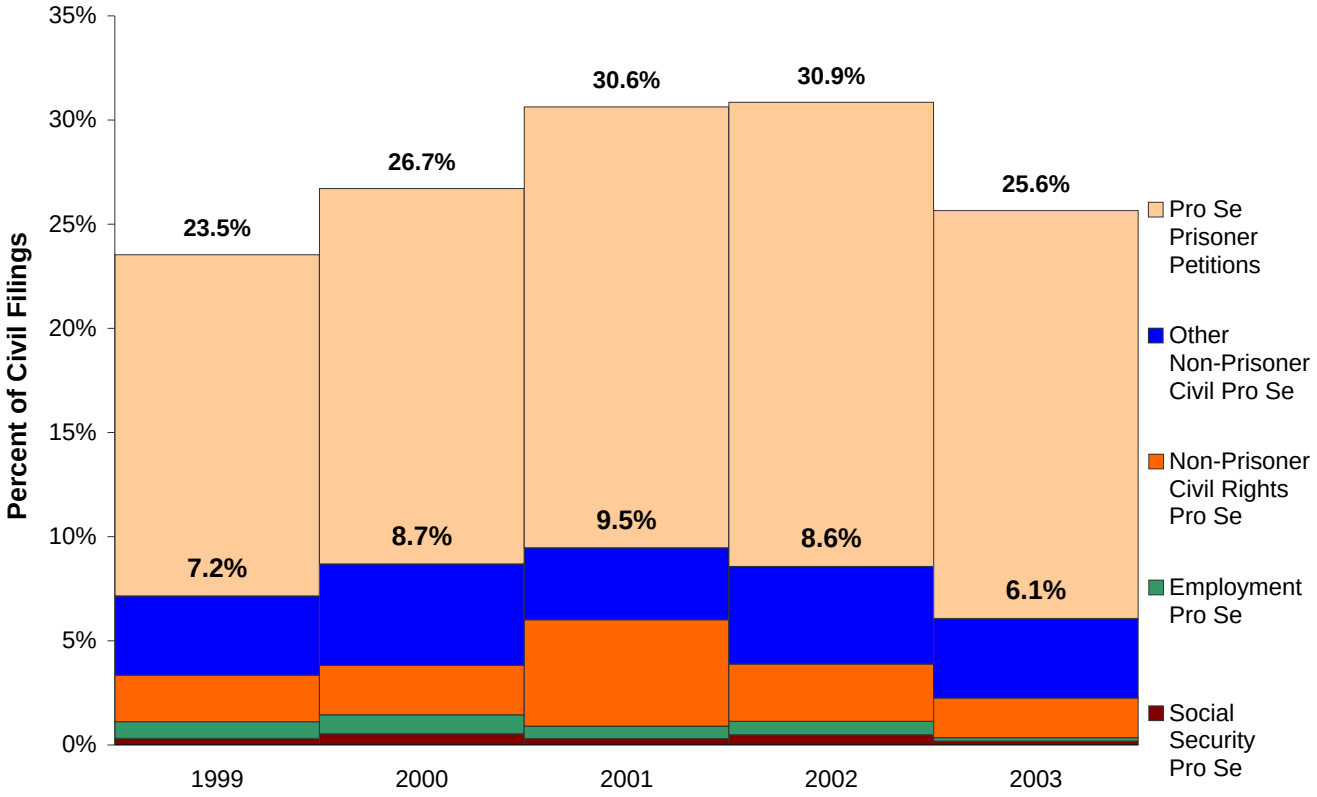
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Hawaii

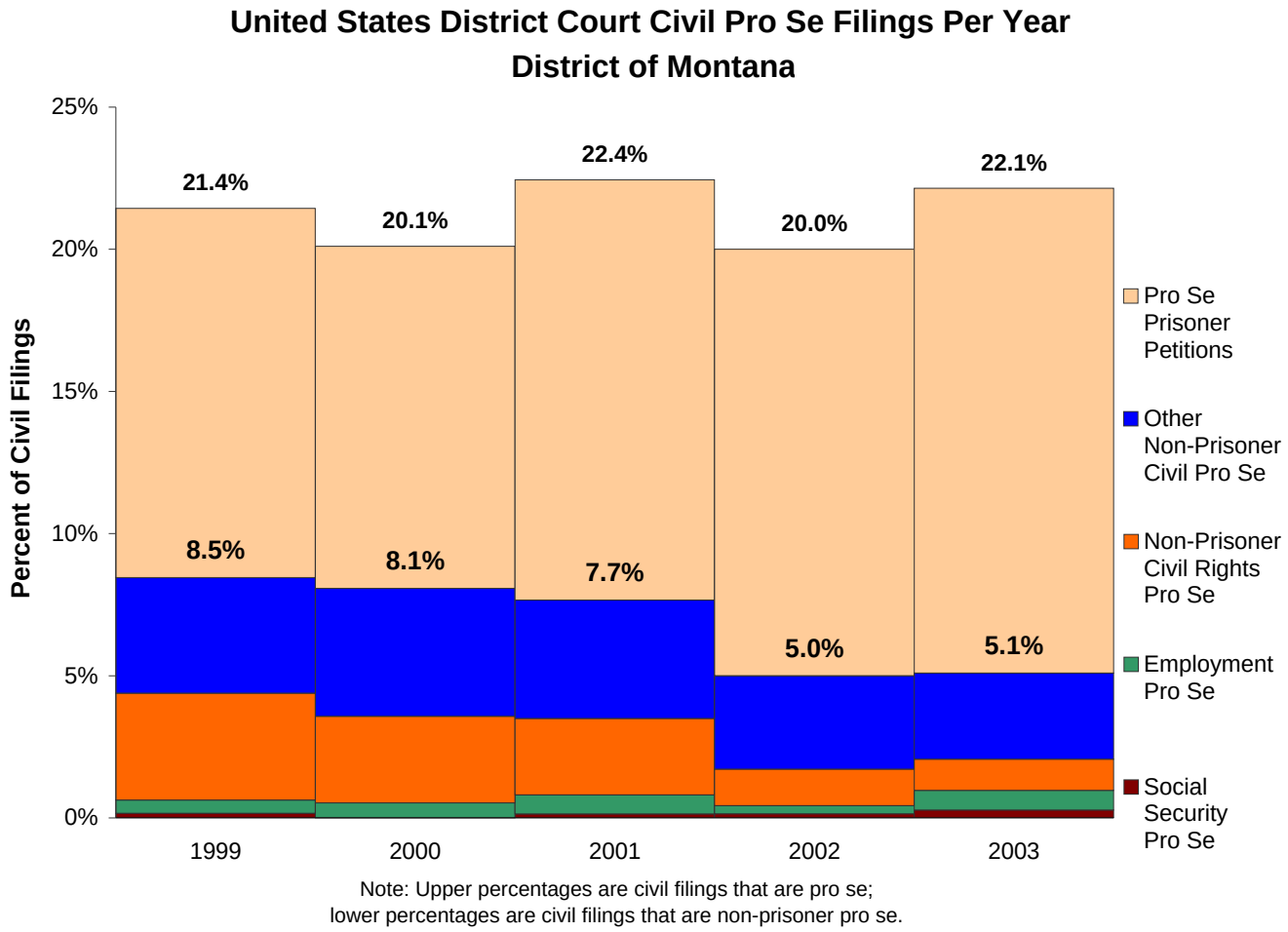


Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

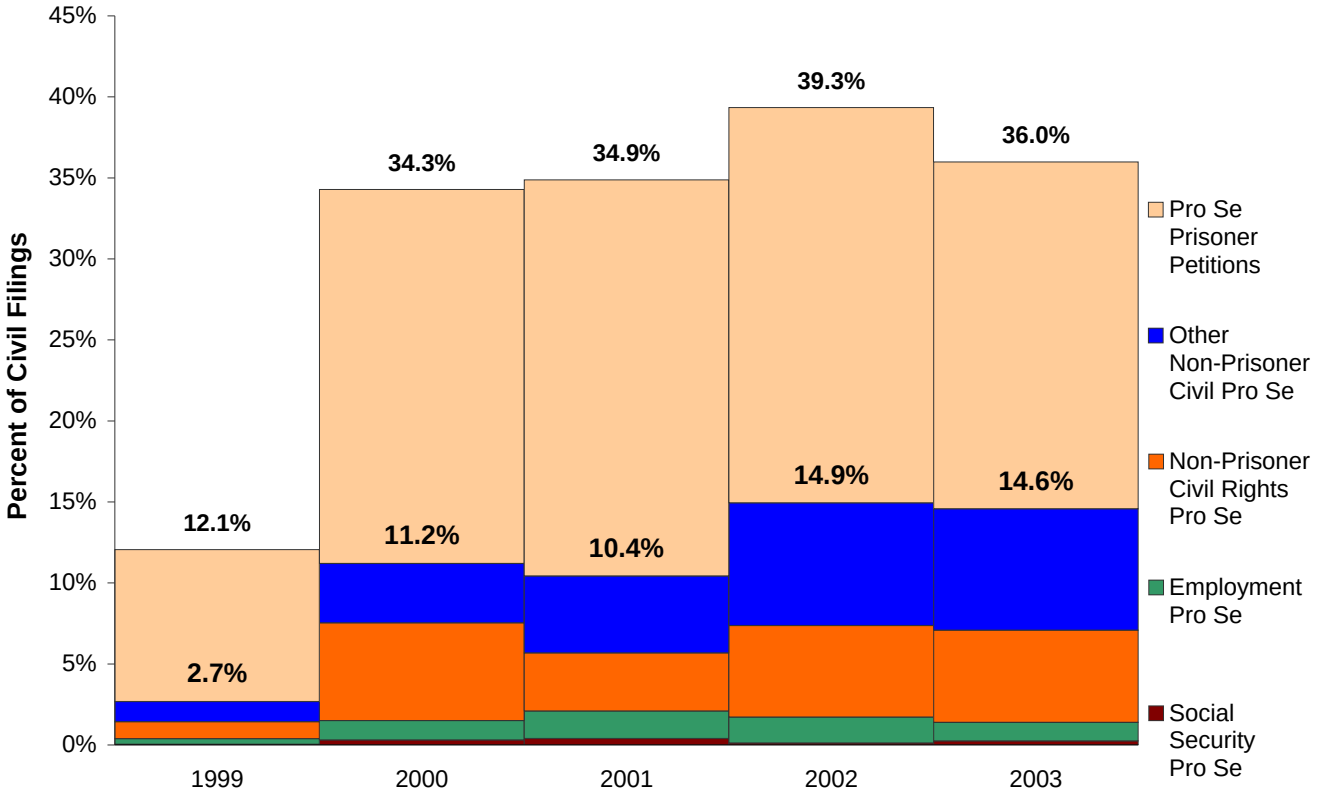
United States District Court Civil Pro Se Filings Per Year
District of Idaho



Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

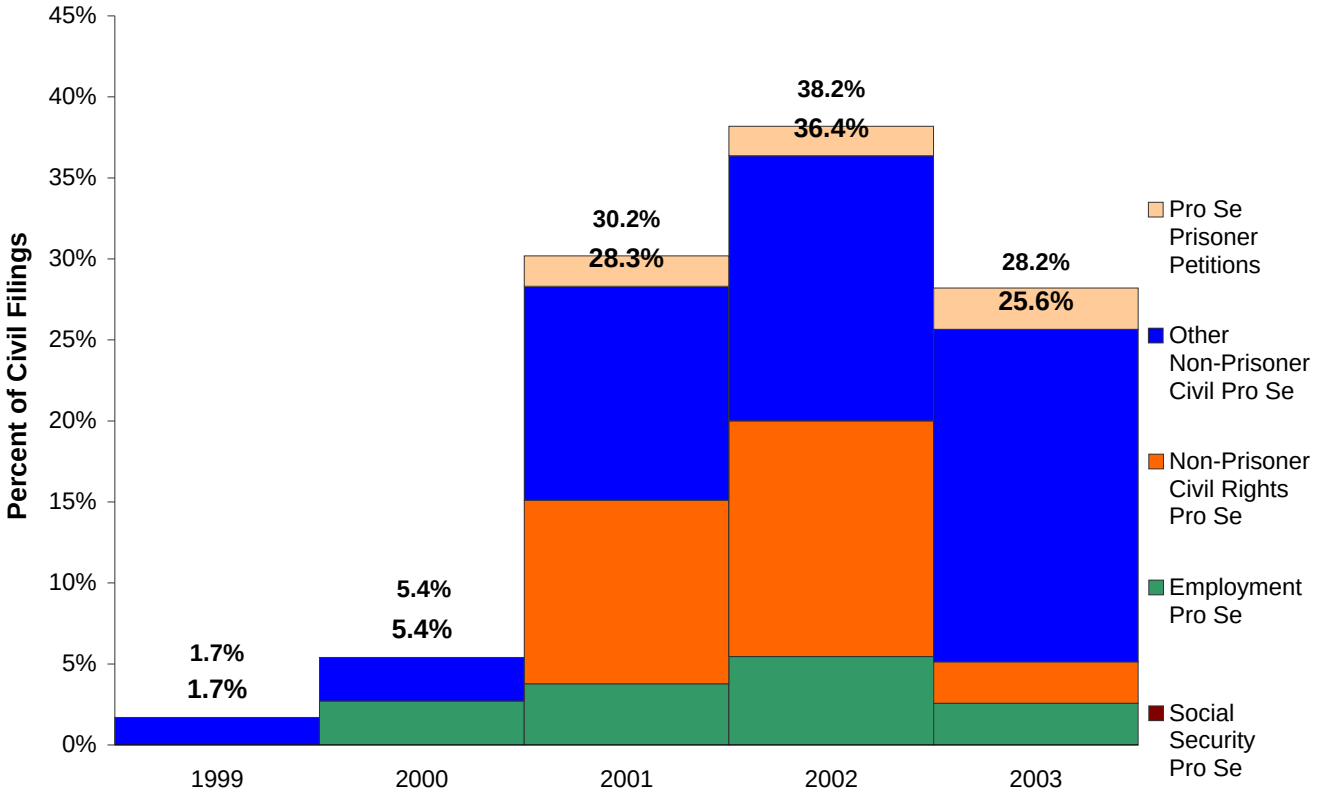

United States District Court Civil Pro Se Filings Per Year
District of Montana
Percent of Civil Filings
25%
20%
15%
10%
5%
0%
21.4%
20.1%
22.4%
20.0%
22.1%
8.5%
8.1%
7.7%
5.0%
5.1%
1999
2000
2001
2002
2003
Pro Se Prisoner Petitions
Other Non-Prisoner Civil Pro Se
Non-Prisoner Civil Rights Pro Se
Employment Pro Se
Social Security Pro Se
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Nevada



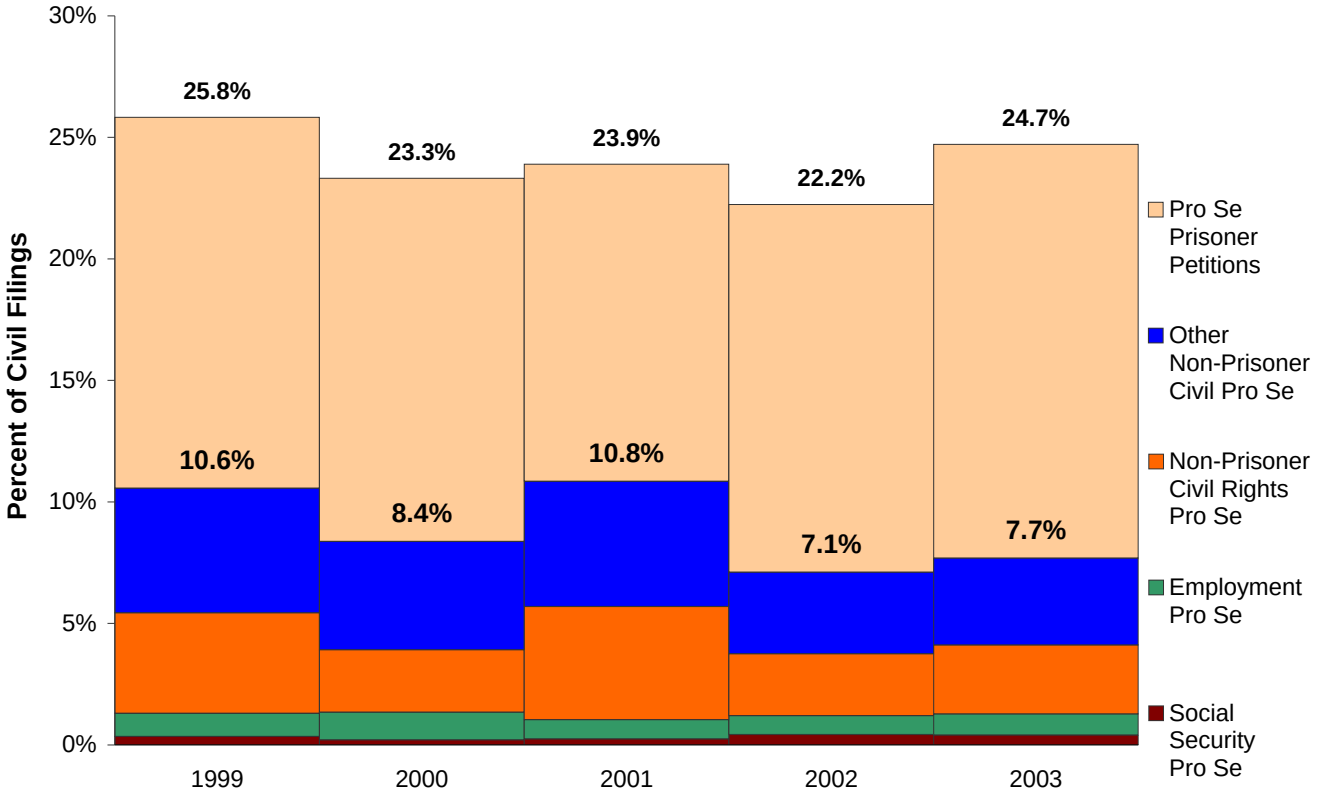
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of the Northern Mariana Islands



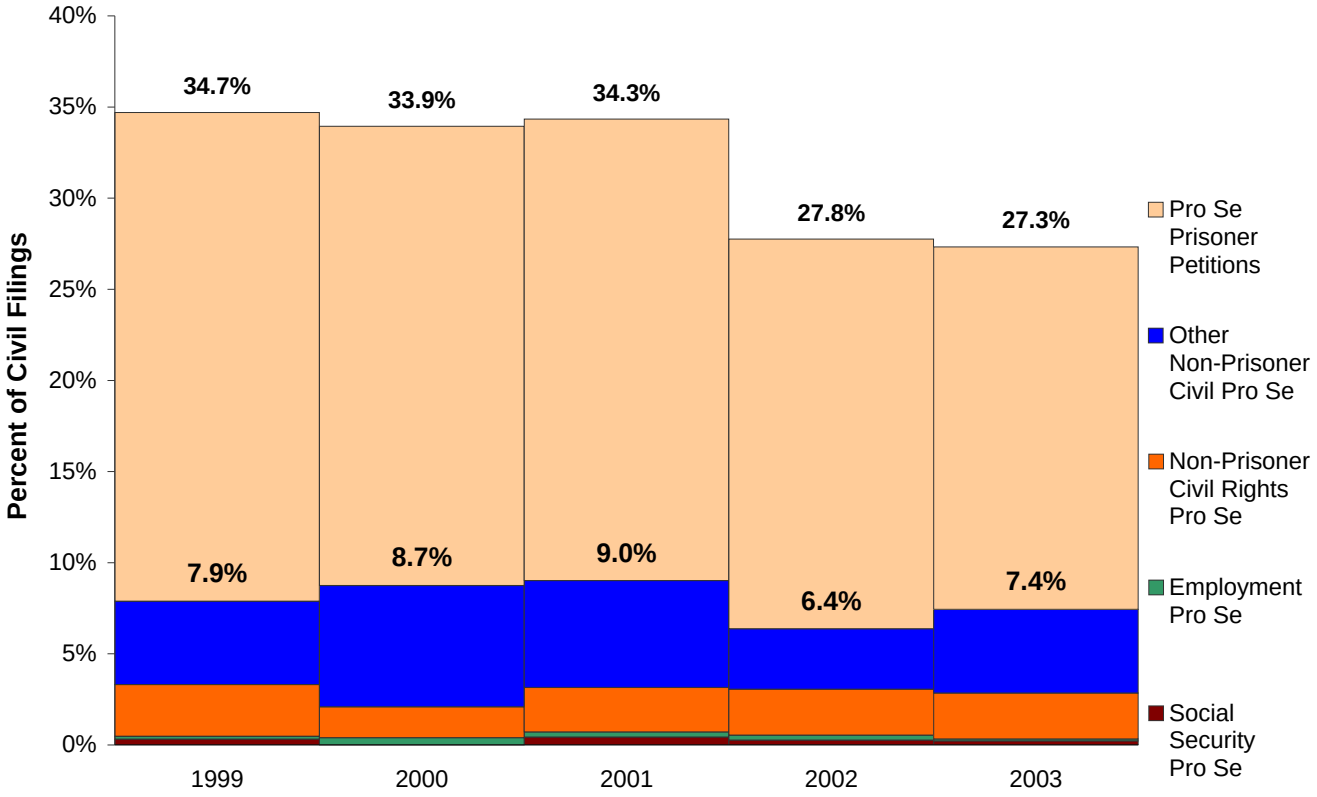
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
District of Oregon



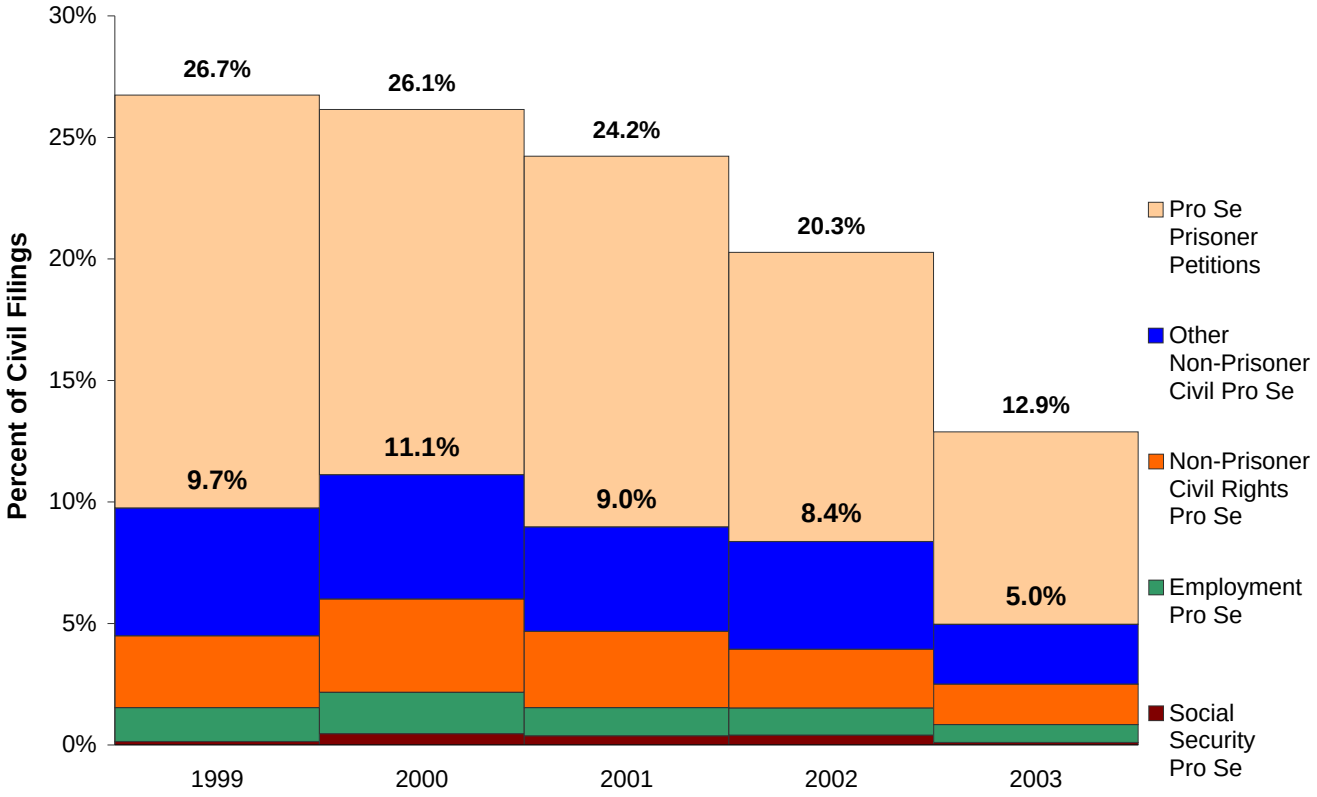
Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
Eastern District of Washington



Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

United States District Court Civil Pro Se Filings Per Year
Western District of Washington



Note: Upper percentages are civil filings that are pro se;
lower percentages are civil filings that are non-prisoner pro se.

FY2002 Pro Se Appeals and Cases in the Ninth Circuit

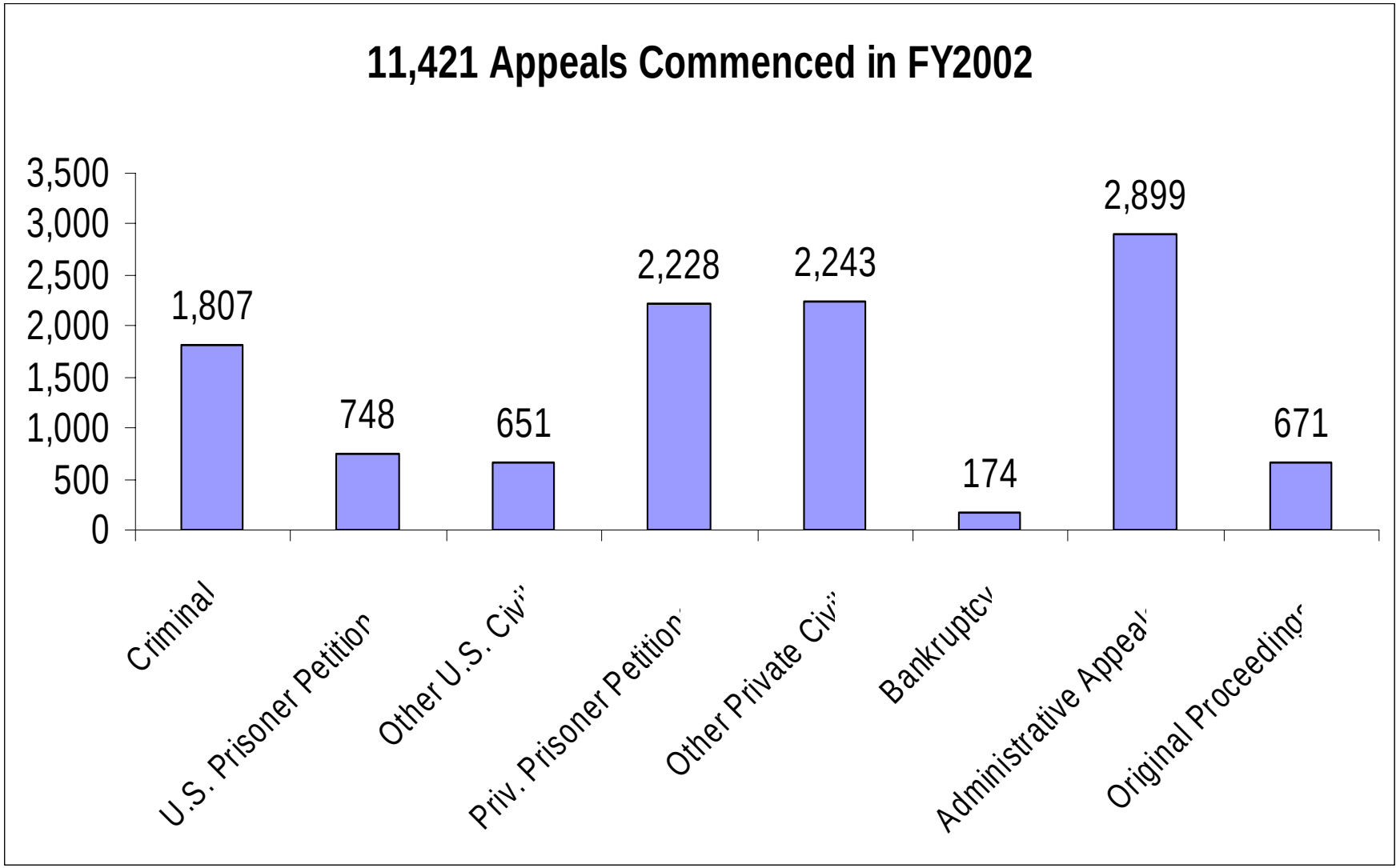
Prepared by the

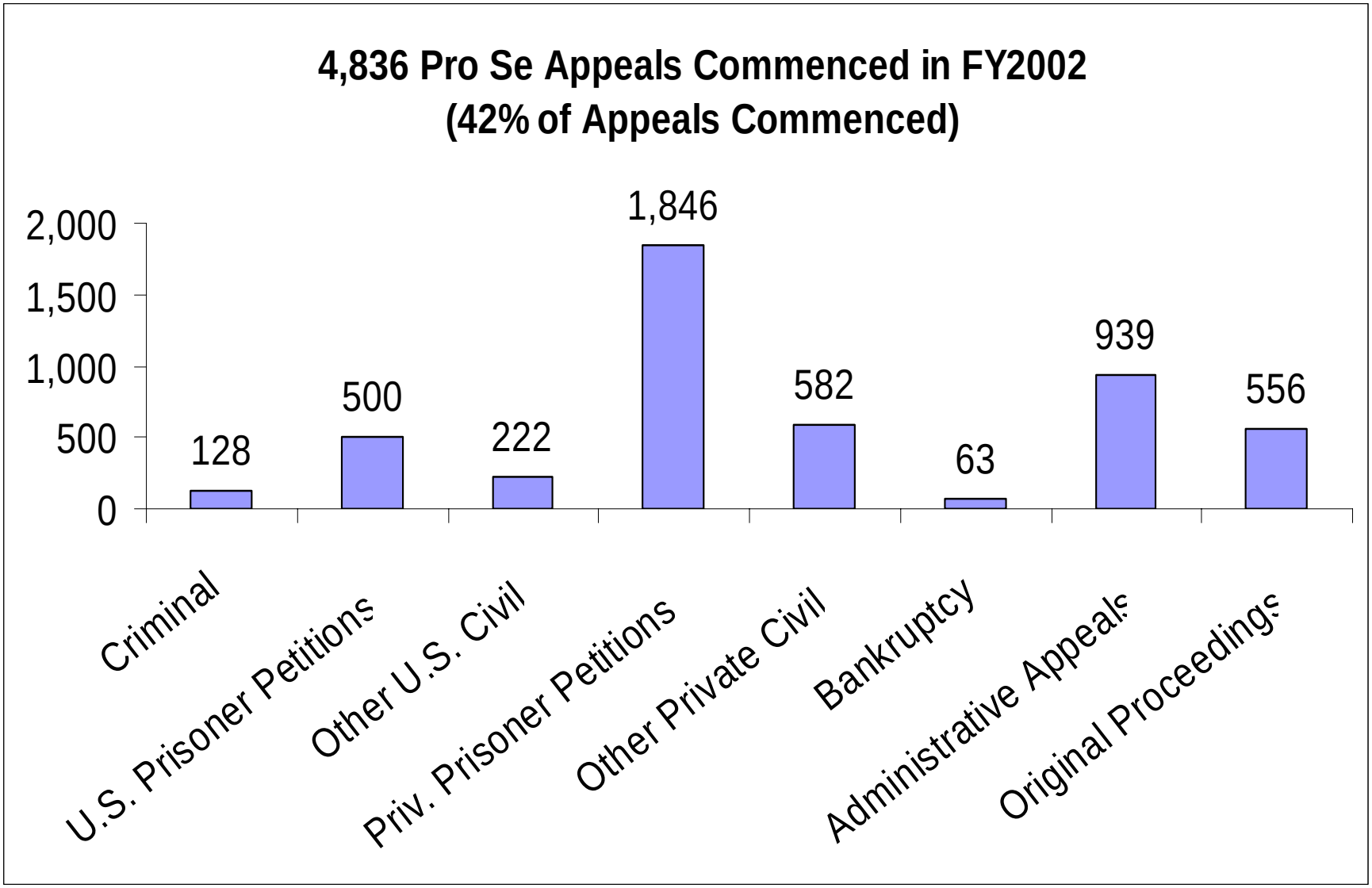
Office of the Circuit Executive

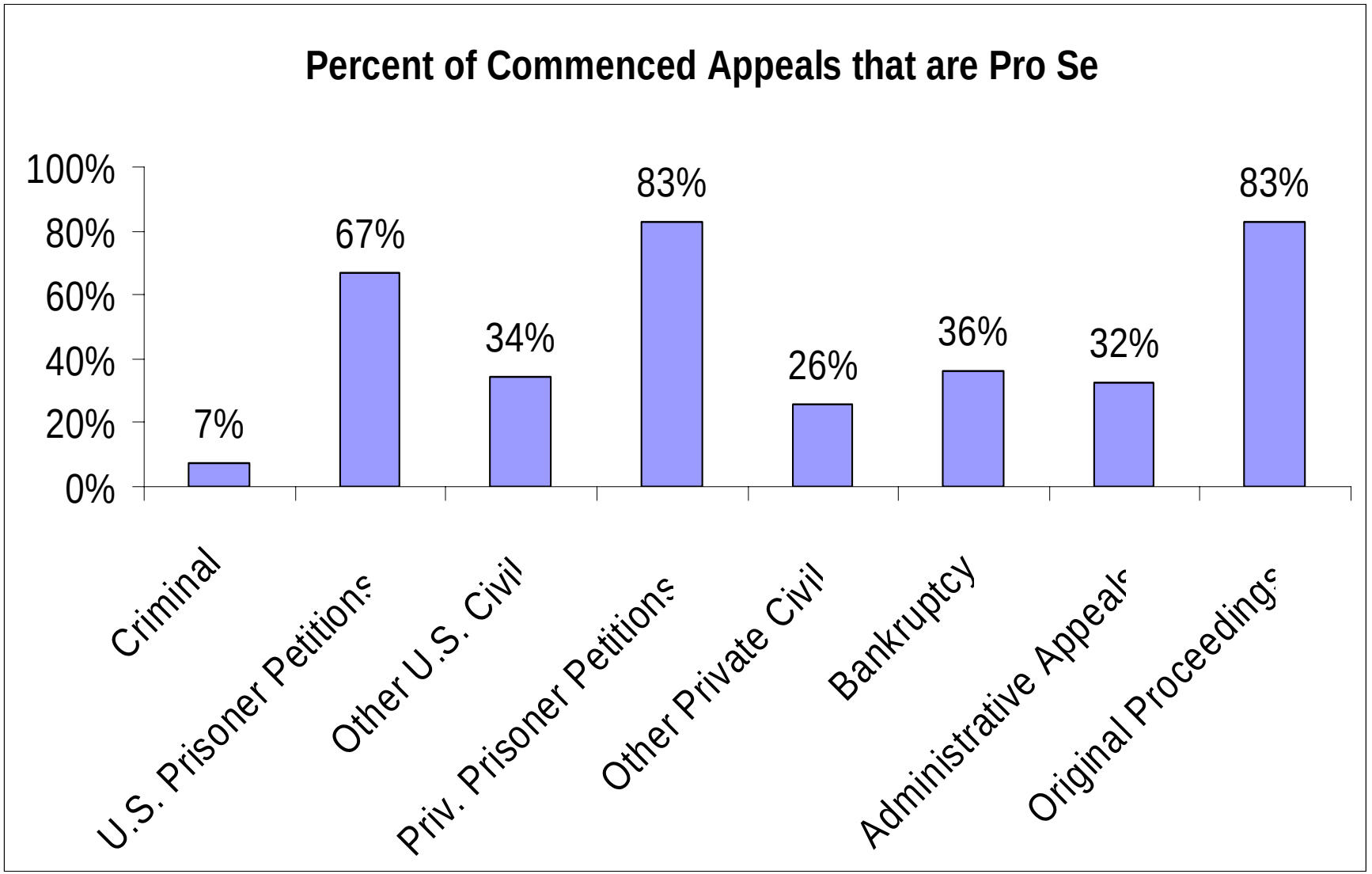
for the

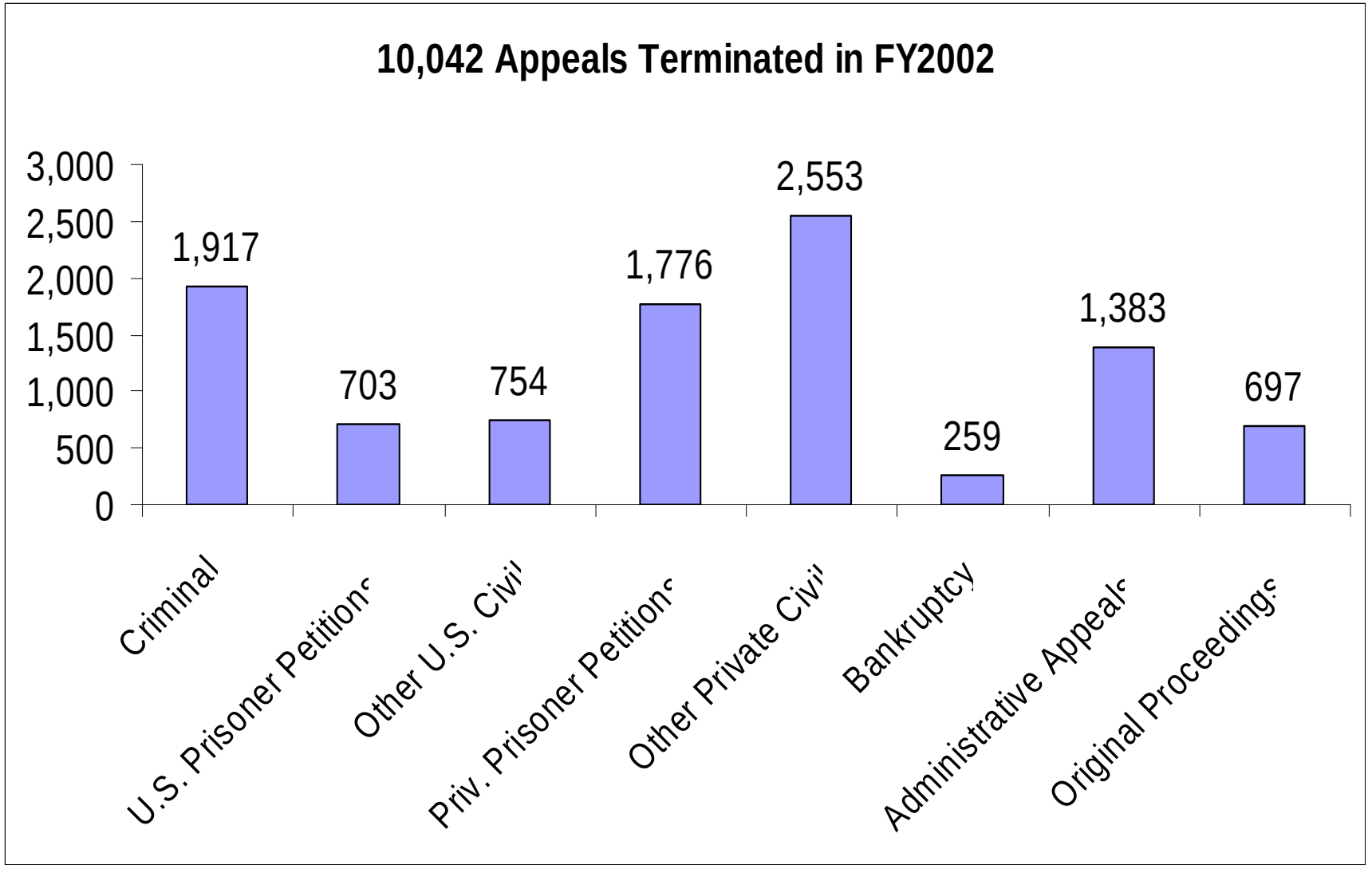
Task Force on Self-Represented Litigants

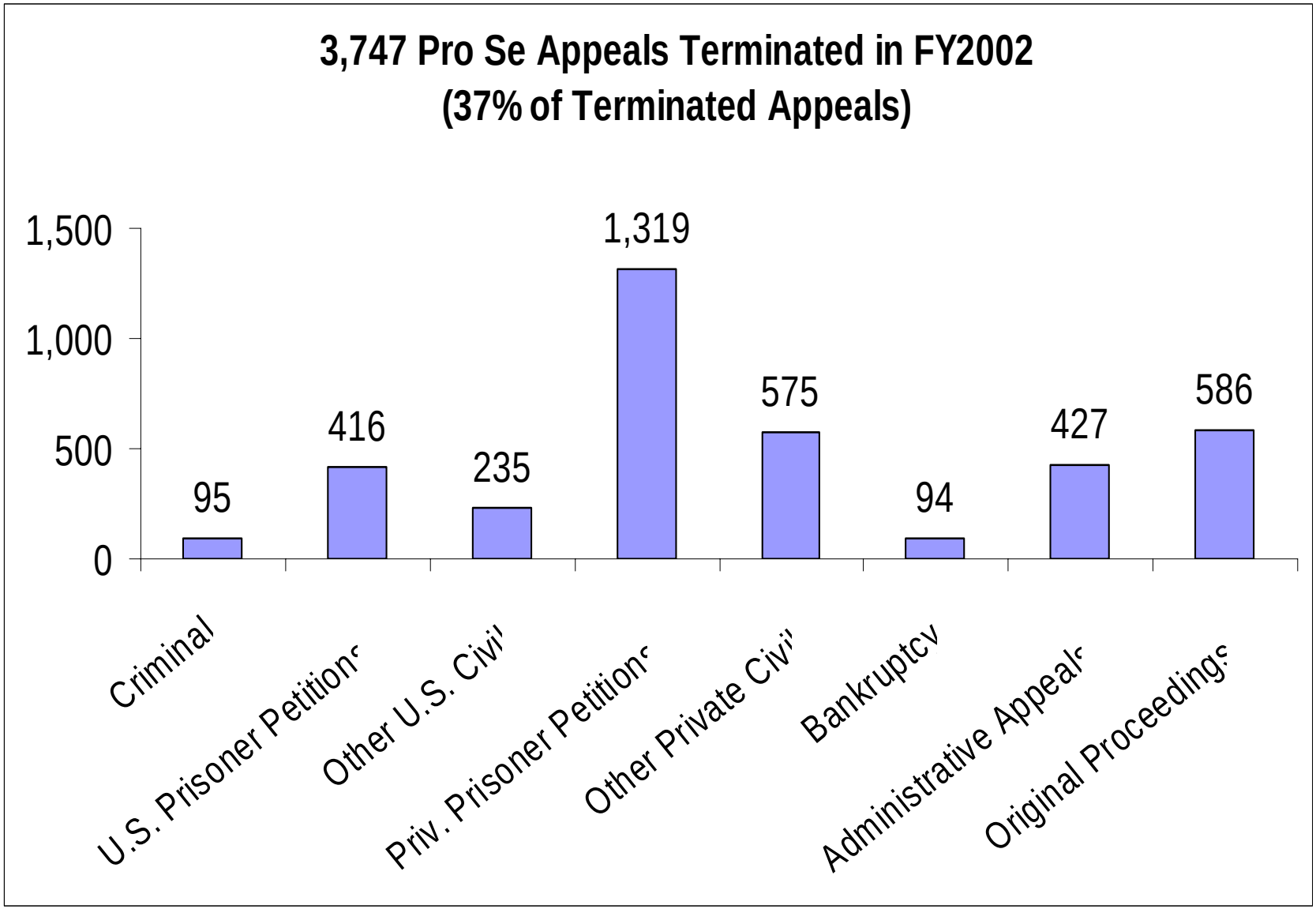
April 11, 2003

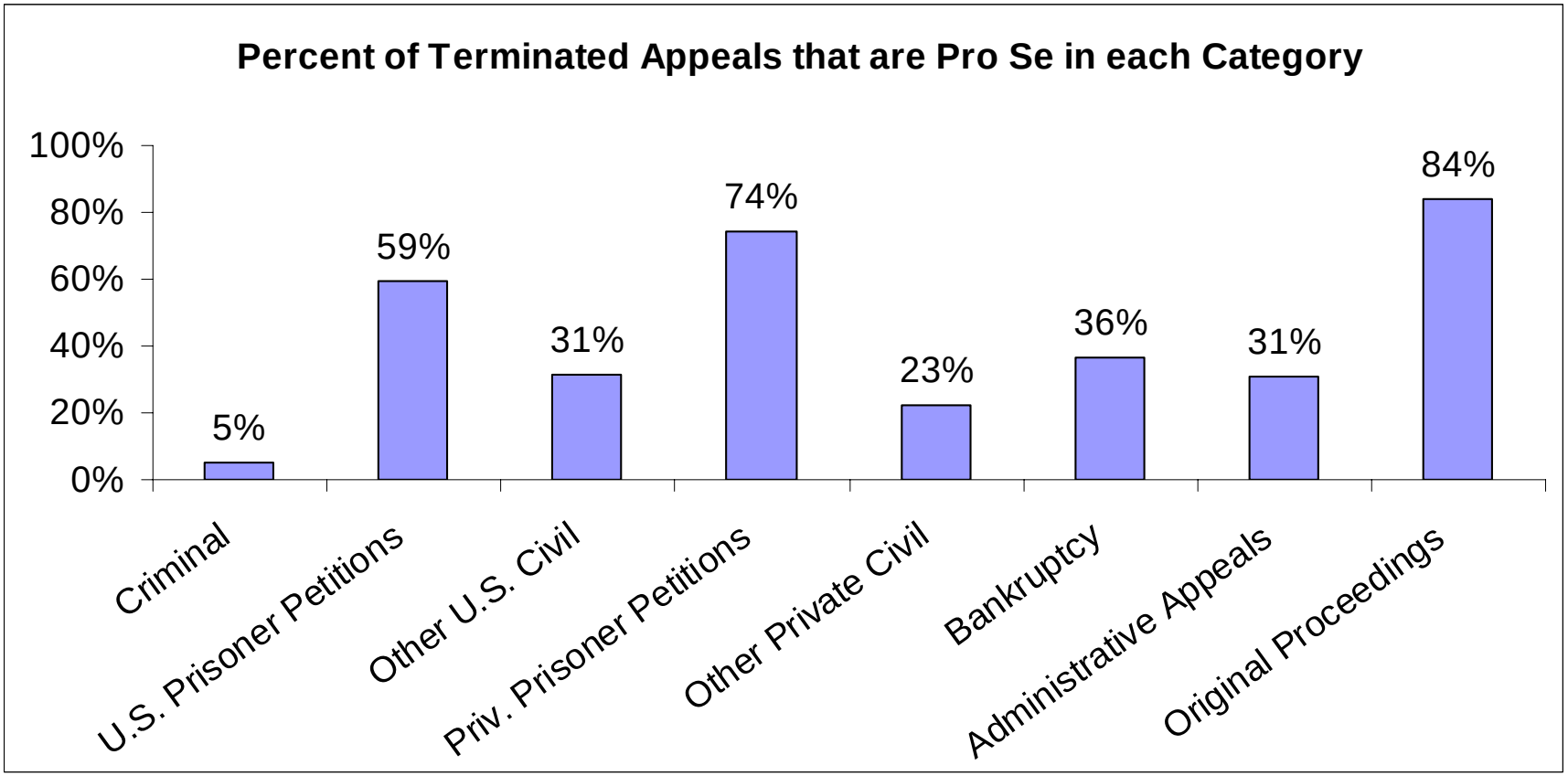

11,421 Appeals Commenced in FY2002
3,500
3,000
2,500
2,000
1,500
1,000
500
0
1,807
748
651
2,228
2,243
174
2,899
671
Criminal
U.S. Prisoner Petition
Other U.S. Civ
Priv. Prisoner Petition
Other Private Civ
Bankruptcy
Administrative Appeal
Original Proceeding

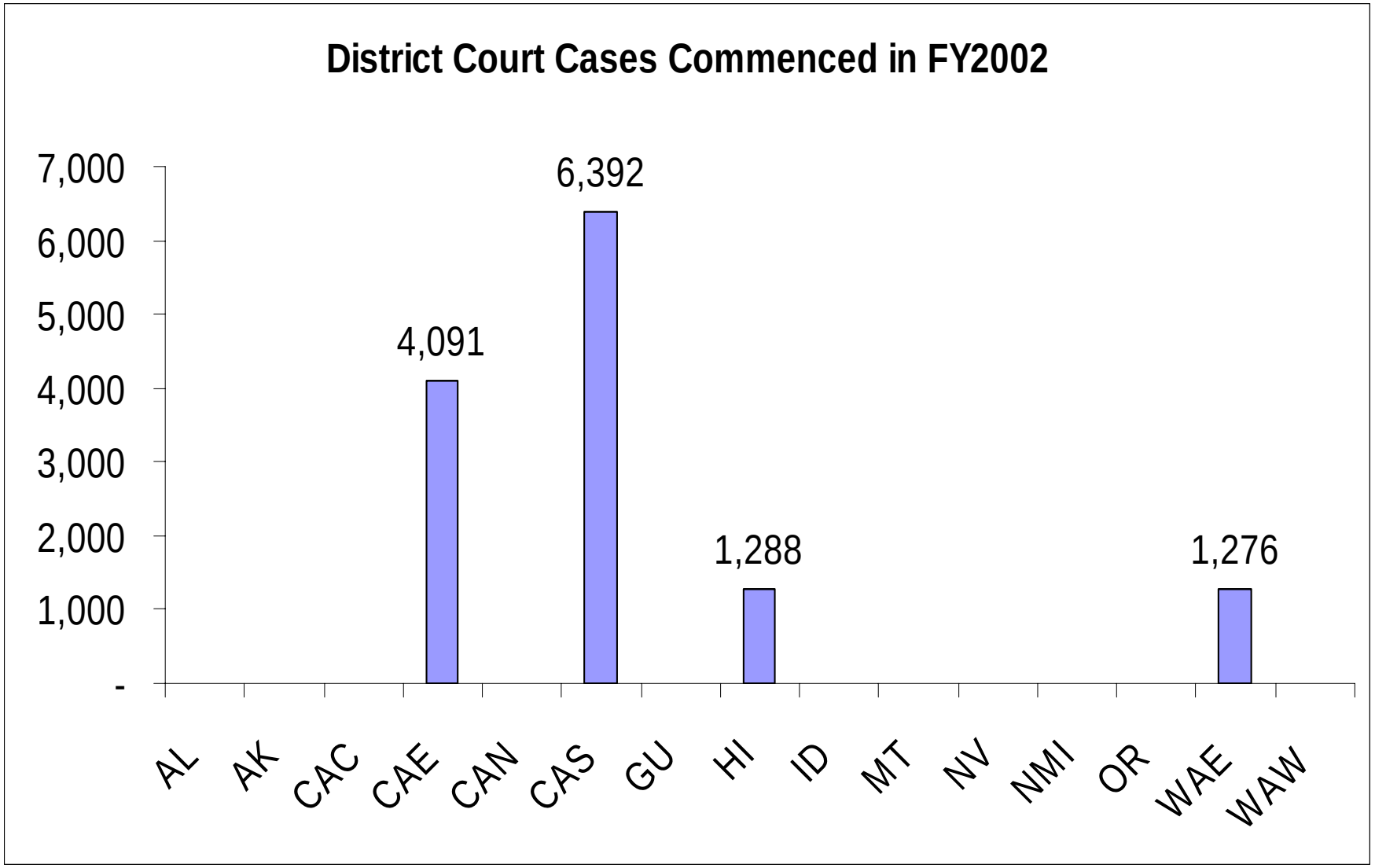

4,836 Pro Se Appeals Commenced in FY2002
(42% of Appeals Commenced)
2,000
1,500
1,000
500
0
128
500
222
1,846
582
63
939
556
Criminal
U.S. Prisoner Petitions
Other U.S. Civil
Priv. Prisoner Petitions
Other Private Civil
Bankruptcy
Administrative Appeals
Original Proceedings

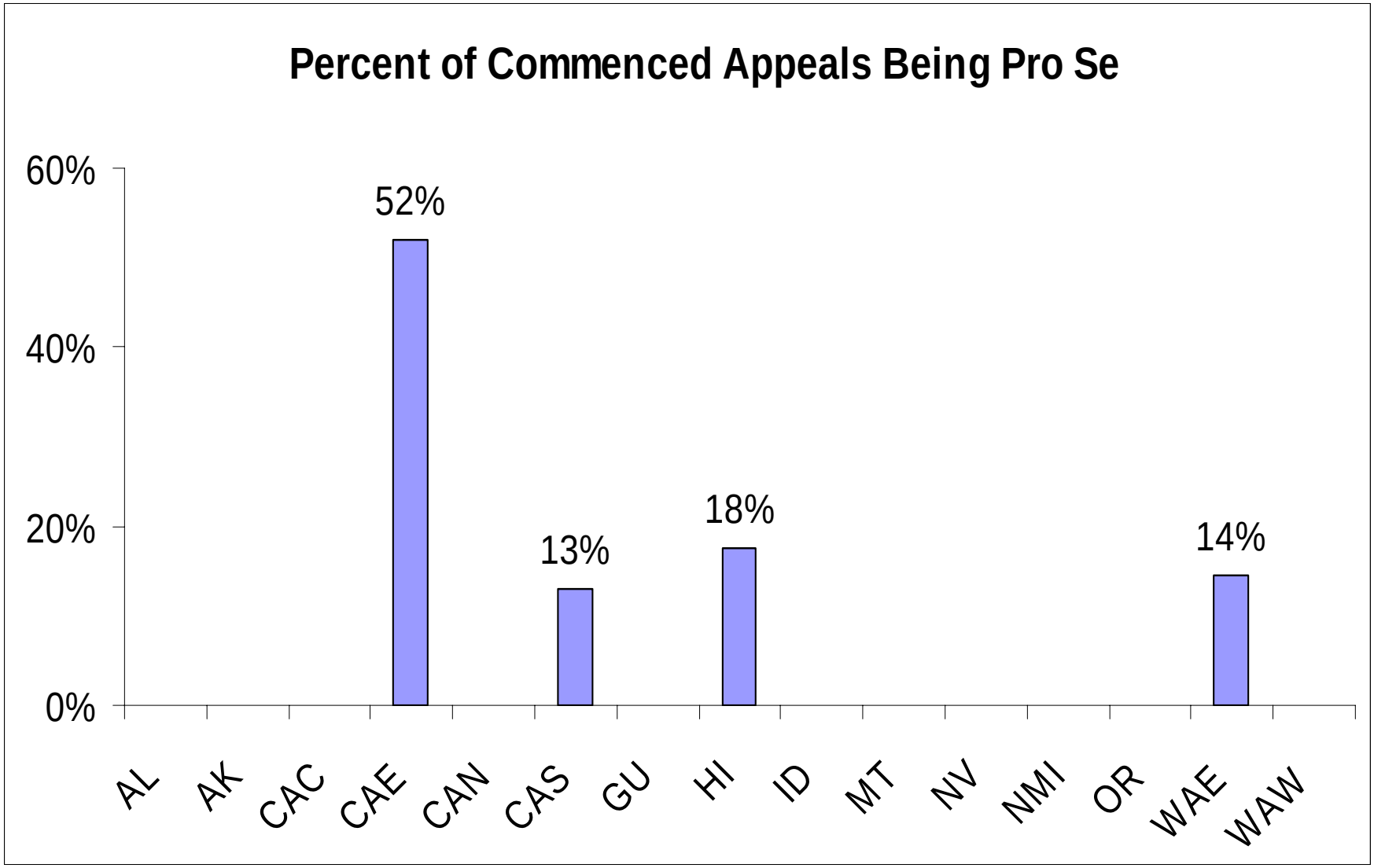

Percent of Commenced Appeals that are Pro Se
100%
80%
60%
40%
20%
0%
7%
67%
34%
83%
26%
36%
32%
83%
Criminal
U.S. Prisoner Petitions
Other U.S. Civil
Priv. Prisoner Petitions
Other Private Civil
Bankruptcy
Administrative Appeals
Original Proceedings

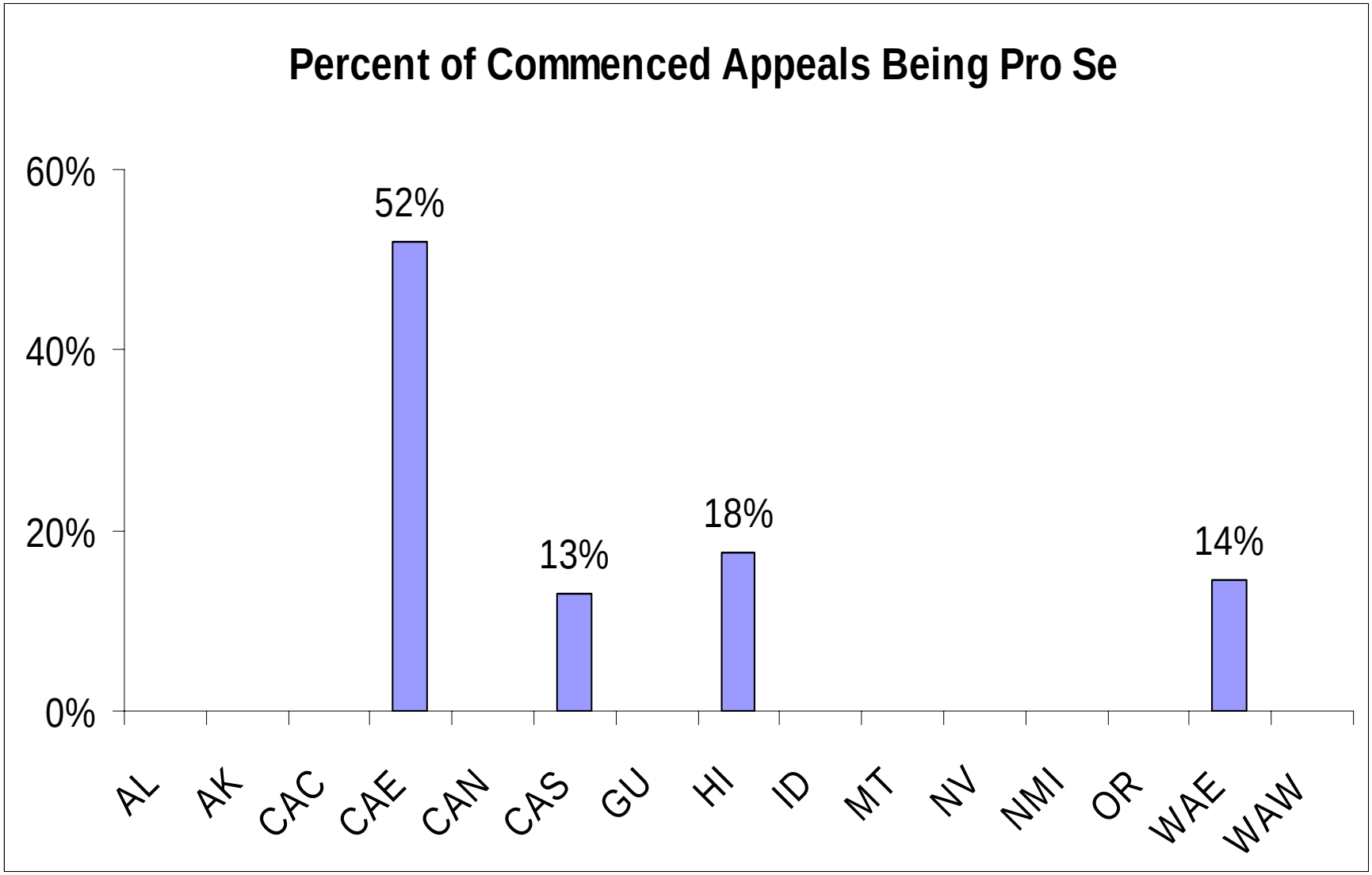

10,042 Appeals Terminated in FY2002
3,000
2,500
2,000
1,500
1,000
500
0
1,917
703
754
1,776
2,553
259
1,383
697
Criminal
U.S. Prisoner Petitions
Other U.S. Civil
Priv. Prisoner Petitions
Other Private Civil
Bankruptcy
Administrative Appeals
Original Proceedings

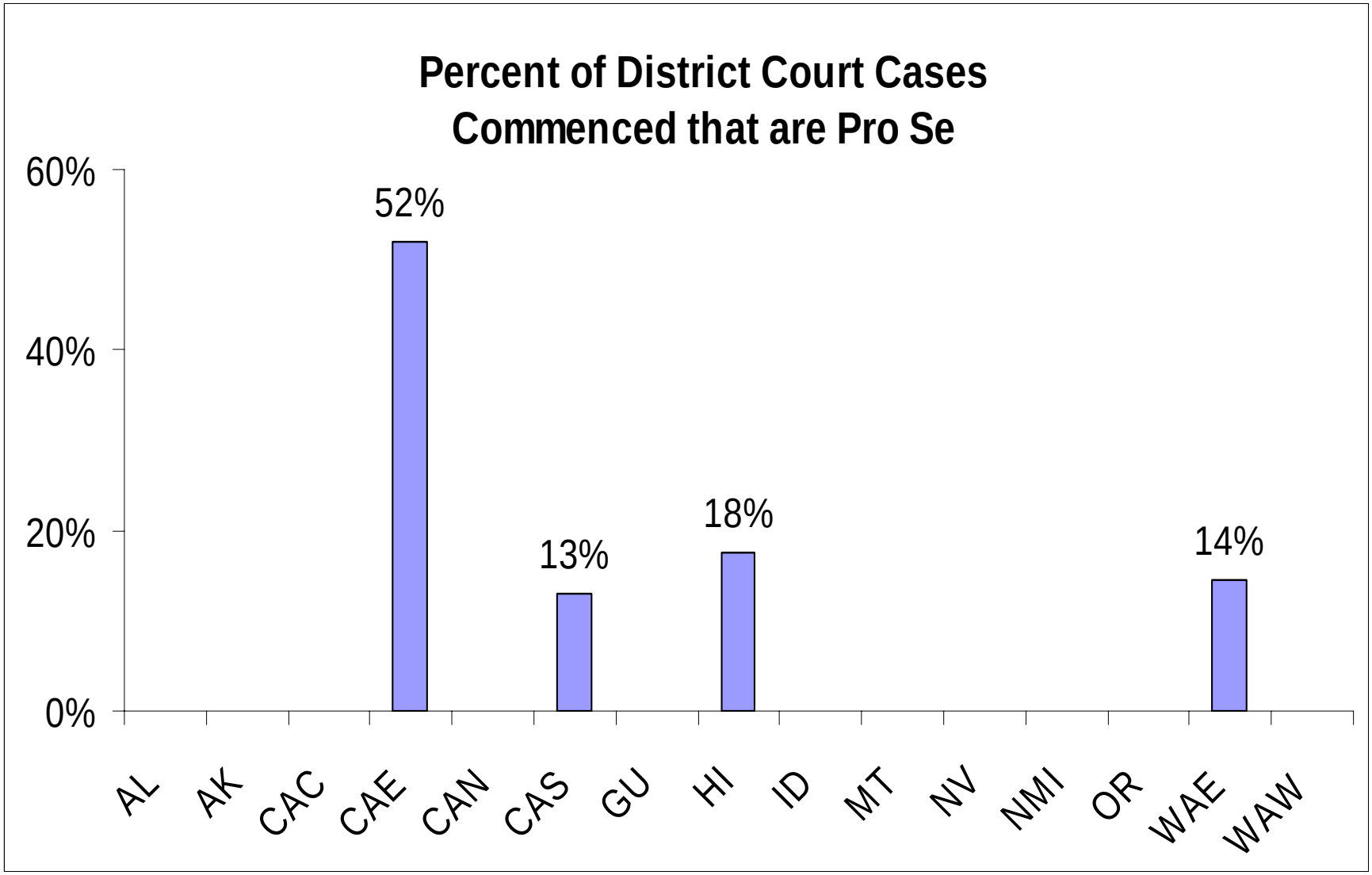

3,747 Pro Se Appeals Terminated in FY2002
(37% of Terminated Appeals)
1,500
1,000
500
0
95
416
235
1,319
575
94
427
586
Criminal
U.S. Prisoner Petitions
Other U.S. Civil
Priv. Prisoner Petitions
Other Private Civil
Bankruptcy
Administrative Appeals
Original Proceedings

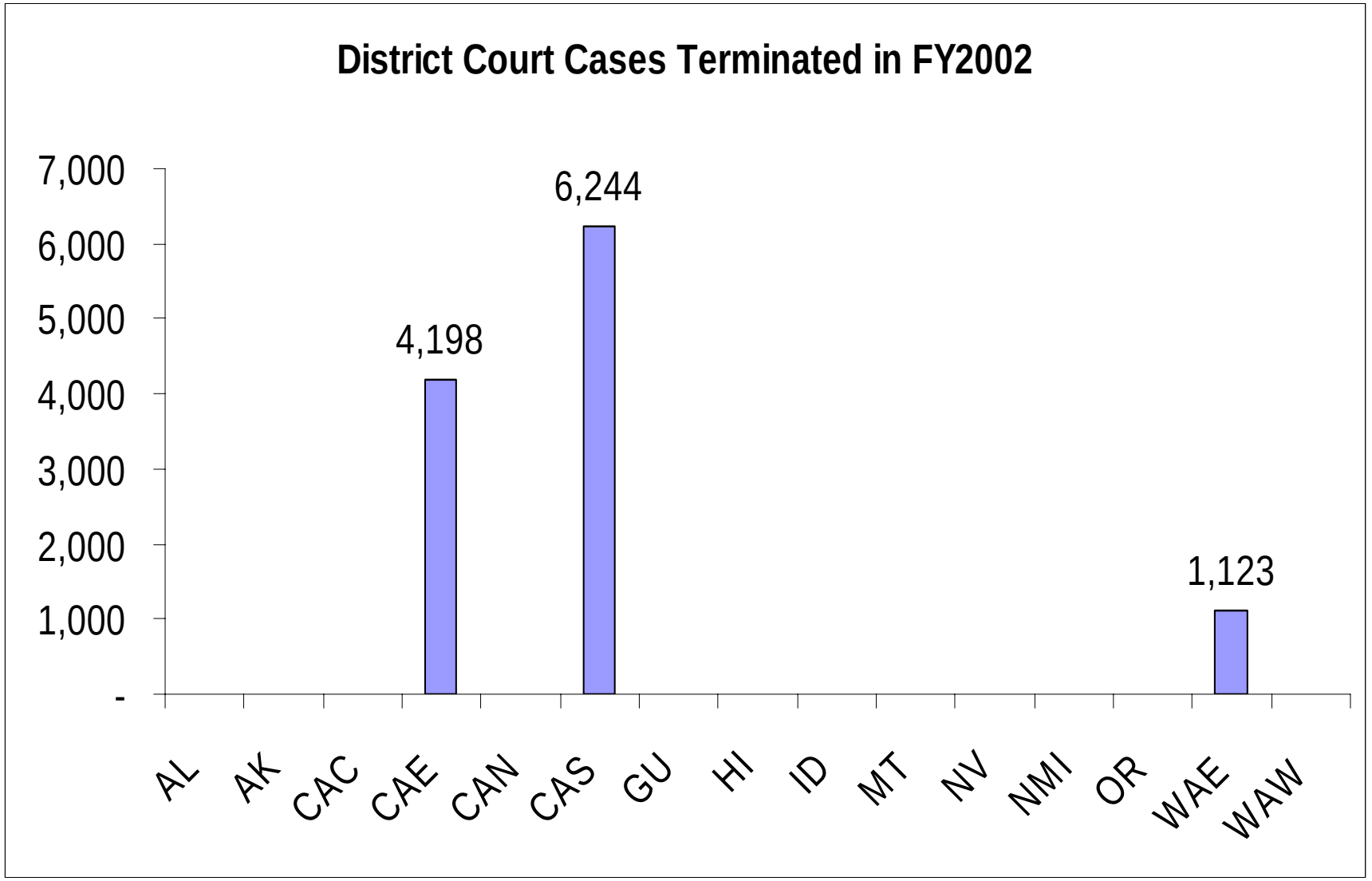

Percent of Terminated Appeals that are Pro Se in each Category
100%
80%
60%
40%
20%
0%
5%
59%
31%
74%
23%
36%
31%
84%
Criminal
U.S. Prisoner Petitions
Other U.S. Civil
Priv. Prisoner Petitions
Other Private Civil
Bankruptcy
Administrative Appeals
Original Proceedings

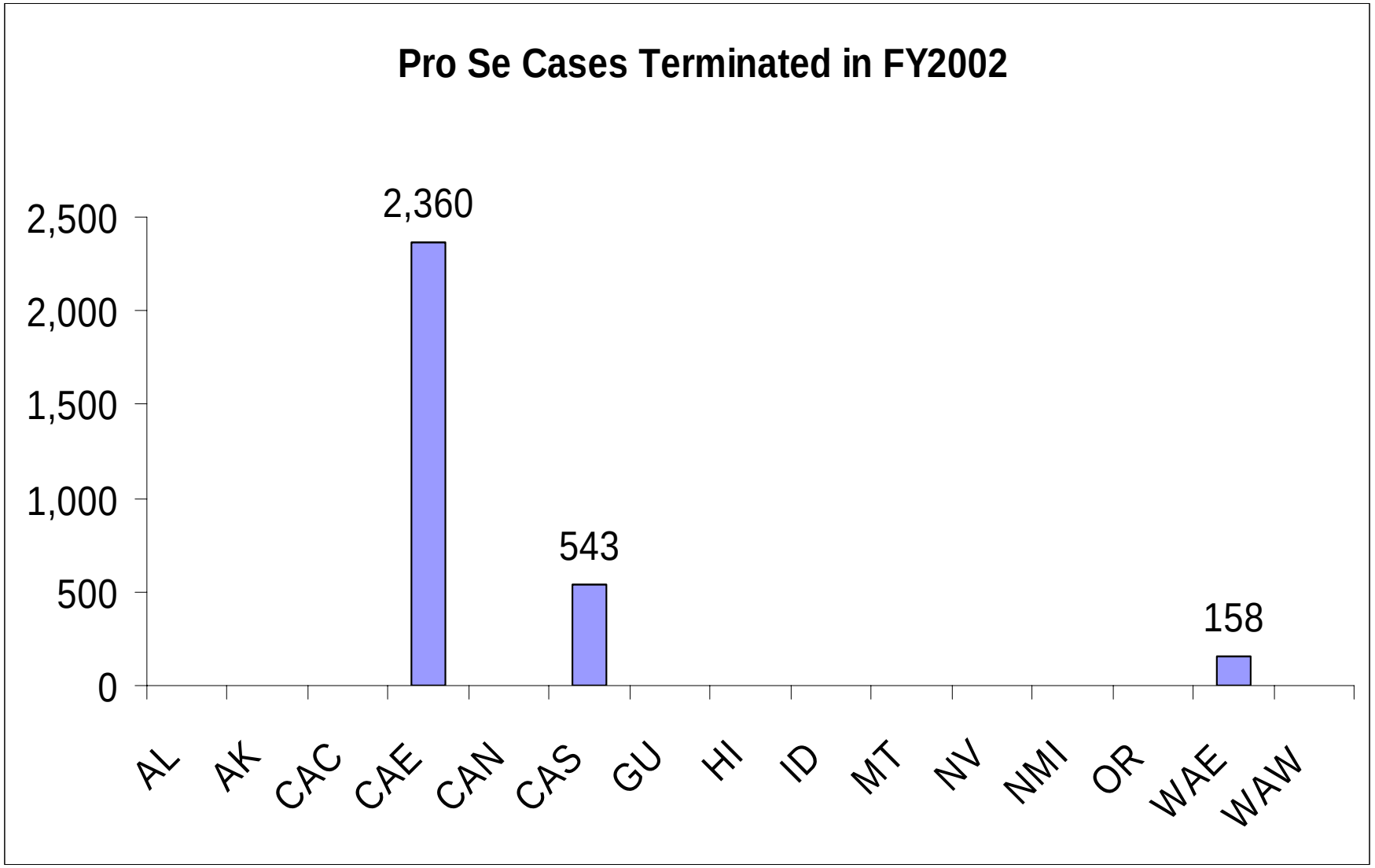

District Court Cases Commenced in FY2002
7,000
6,000
5,000
4,000
3,000
2,000
1,000
-
4,091
6,392
1,288
1,276
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW

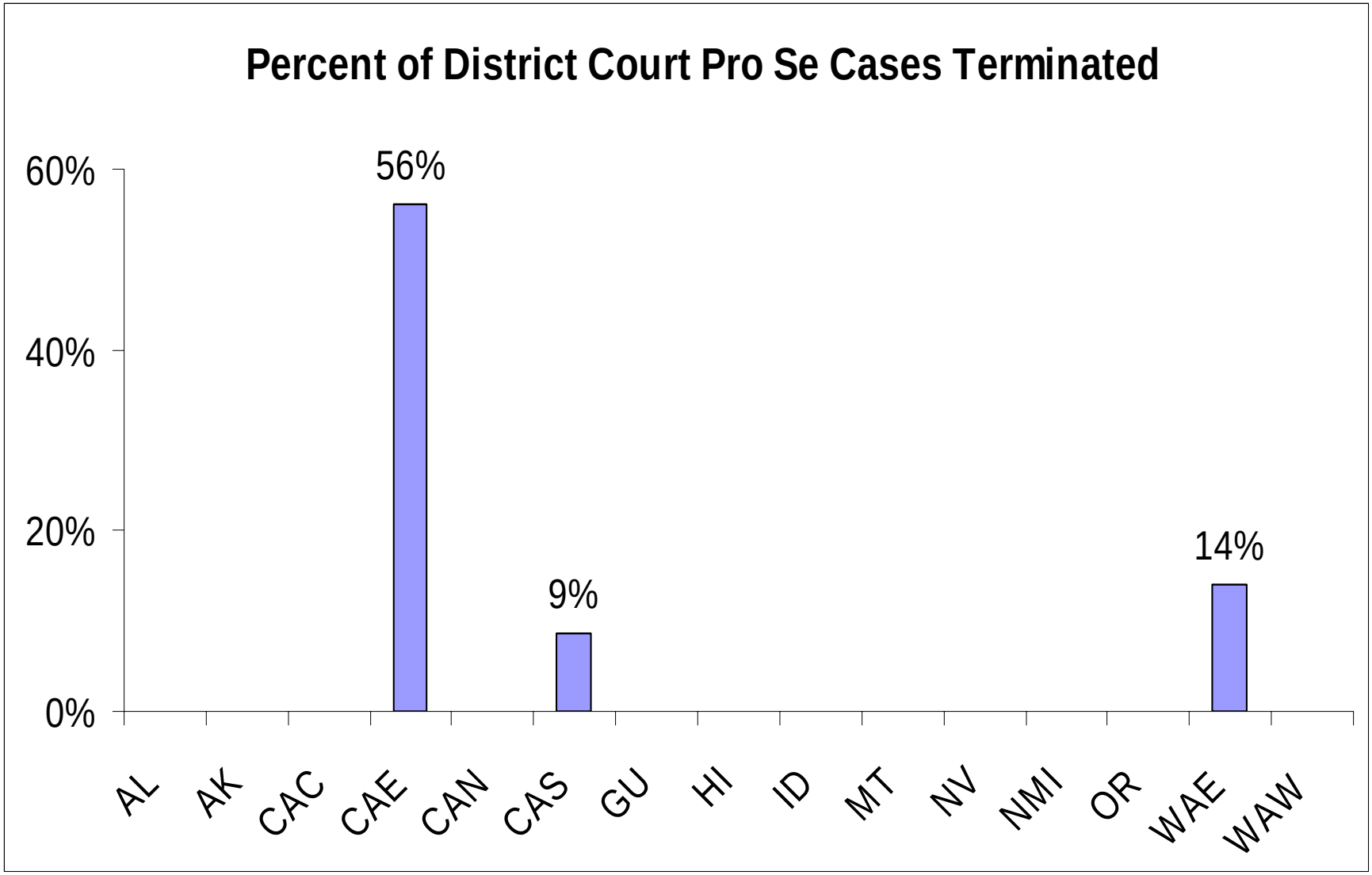

Percent of Commenced Appeals Being Pro Se
60%
40%
20%
0%
52%
13%
18%
14%
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW


Percent of Commenced Appeals Being Pro Se
60%
40%
20%
0%
52%
13%
18%
14%
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW


Percent of District Court Cases Commenced that are Pro Se
60%
40%
20%
0%
52%
13%
18%
14%
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW


District Court Cases Terminated in FY2002
7,000
6,000
5,000
4,000
3,000
2,000
1,000
-
4,198
6,244
1,123
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW


Pro Se Cases Terminated in FY2002
2,500
2,000
1,500
1,000
500
0
2,360
543
158
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW


Percent of District Court Pro Se Cases Terminated
60%
40%
20%
0%
56%
9%
14%
AL
AK
CAC
CAE
CAN
CAS
GU
HI
ID
MT
NV
NMI
OR
WAE
WAW

APPENDIX O

AJS Proposed Best Practices for Cases Involving Self-Represented Litigants

Proposed Best Practices for Cases Involving Self-Represented Litigants[1]

These practices are helpful, and many are required, in all cases, not just those involving self-represented litigants.

General

1. When a litigant appears without an attorney, verify that the litigant understands that he or she is entitled to be represented by an attorney; give information on pro bono or lawyer referral resources. Explain that self-representation is difficult, you as judge cannot act as an advocate for either side, and the other party's attorney will not provide assistance or advice.
   - If an unrepresented litigant appears to be mentally disabled, take additional steps to involve counsel and other support services.
   - The difficulty of self-representation should be emphasized in cases that are particularly complex, cases where the stakes are very high, and jury cases.
   - Once it is clear a litigant does not intend to get an attorney, do not harp on pro se status or make negative comments that suggest prejudgment or disapproval.

2. Direct the litigant to the resources available for self-represented litigants.
   - Inform a self-represented litigant that he or she has the responsibility to become familiar with and attempt to comply with the rules of procedure.

1. The ideas in these best practices are based on the accompanying paper *Reaching Out or Overreaching: Judicial Ethics and the Self-Represented Litigant*; on the "Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants" from the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges; on the November 2004 draft of "Judicial Guidelines for Hearings Involving Self-Represented Litigants" proposed by the Subcommittee on Judicial Guidelines of the Massachusetts Supreme Court Steering Committee on Self-Represented Litigants;" on "Judicial Techniques for Cases Involving Self-Represented Litigants" by Rebecca Albrecht, John Greacen, Bonnie Hough, and Richard Zorza, published in the winter 2003 *Judges' Journal*; and on "Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts" by John Greacen, published in the winter 2005 *Judges' Journal*.

- Repeat information regarding resources at every stage in the process.

3. Be generous in granting extensions of time to self-represented litigants (and others) to prepare for a hearing, obtain counsel, or comply with other requirements as long as the litigant appears to be acting in good faith, making an effort, and giving notice to the other side.

4. Ensure that court interpreters are available for all court proceedings (including settlement discussions) involving self-represented litigants (and others) who have language barriers.

5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing arguments to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).

6. Explain the prohibition on ex parte communications (you cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).

7. Actively manage and schedule cases involving self-represented litigants.

8. Insofar as possible, monitor counsel to ensure that a self-represented litigant is not being misled.

A COURTEOUS COURTROOM

9. Start court on time (required in all cases); if delay is unavoidable, apologize and offer a brief explanation.

10. Explain to self-represented litigants that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real courtroom, either from them or directed to them.

11. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings).
    - Do not make comments or use a tone and manner that are rude, intimidating, harsh, threatening, angry, sarcastic, discouraging, belittling, humiliating, or disdainful.

- Do not interrupt self-represented litigants unless necessary to control proceedings or prevent discourtesy.
- Do not engage in protracted dialogues or make off-hand, negative comments regarding their pro se status.
- Address self-represented litigants with titles comparable to those used for counsel.
- Avoid over-familiar conduct toward attorneys (for example, using first names, sharing in-jokes, referring to other proceedings or bar events, inviting attorneys into chambers, chatting casually before or after court proceedings).

12. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.

13. Pay attention and act like you are paying attention.
    - If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.

PLEADINGS

14. Construe pleadings liberally.
    - Look behind the label of a document filed by a self-represented litigant and give effect to the substance, rather than the form or terminology.
    - Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
    - Consider information in other documents filed by a self-represented litigant.
    - Allow amendment freely.

15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect unless it is absolutely clear that no adequate amendment is possible.

16. Read all relevant materials and announce that you have done so before making a ruling.

17. Give the rationale for a decision either in writing or orally on the record.

18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.

19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.

20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.

21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.

22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide such instructions.
    - Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedure he or she has chosen.

23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.

24. Decide all motions filed by a self-represented litigant without undue delay.

SETTLEMENT

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.
    - Encourage, but do not try to coerce, settlement or mediation.

26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily.
    - Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
    - Determine that any waiver of substantive rights is knowing and voluntary.

PRE-HEARING

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross examined, how to make an objection).

28. Explain the elements and the burden of proof.

29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
    - Explain that you will make your decision based only on the evidence presented.
    - Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.

30. Try to get all parties and counsel to agree to relax technical rules of procedure and evidence so that the hearing can proceed informally with an emphasis on both sides getting a chance to tell their story.

HEARING

31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.

32. Allow non-attorneys to sit at counsel table with either party to provide support but do not permit them to argue on behalf of a party or to question witnesses.

33. Before starting, ask both parties whether they understand the process and the procedures.

34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).

35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.
    - Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.

- Ask the same type of questions of witnesses called by a represented party if warranted.
- Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

36. Follow the rules of evidence that go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.
    - If you relax a rule for a self-represented party, relax it for a represented party as well.
    - Require counsel to explain objections in detail.
    - If counsel objects, ask if he or she is arguing that the evidence is unreliable.
    - Explain rulings on evidence.

37. If necessary to prevent obvious injustice, allow a brief recess or adjourn for the day (or longer) to allow a self-represented litigant (or even a represented litigant) to obtain additional evidence or witnesses.

38. Do not allow counsel to bully or confuse self-represented litigants or their witnesses.

THE DECISION

39. Announce and explain your decision immediately from the bench with both parties present if possible unless the volatility of the proceedings suggests that a written decision would be preferable to prevent outbursts and attempts to re-argue the case.

40. If you decide to take a matter under advisement, inform the parties that you wish to consider their evidence and arguments and will issue a decision shortly.
    - If possible, announce a date by which a decision will be reached.

41. Reach a decision promptly (required in all cases).

42. Issue an order in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law.

43. If asked about reconsideration or appeal, refer the litigant to resources for self-represented litigants on this topic.

44. If asked about enforcement of an order or collection of a judgment, refer the litigant to any resources for self-represented litigants on this topic.