



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

## Limited-Scope Pro Bono Representation in Mediation of Pro Se Cases

### Unrepresented parties and mediation

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Pro se plaintiffs file more than 2,000 cases each year in the Southern District of New York; these cases constitute over 20% of the court's civil docket. While most of these litigants would benefit greatly if they were represented throughout their entire cases by pro bono counsel, there are not enough lawyers willing to volunteer to represent even a substantial fraction of them, so most will continue to represent themselves. But by recruiting pro bono counsel for a discrete task, or limited purpose, rather than for an entire case, courts can make the most of the limited pool of volunteer attorneys and expand the number of unrepresented litigants who benefit from the assistance of counsel.

This court's mediation program for pro se employment discrimination cases is one example of such "unbundled legal services." In pro se employment discrimination cases, judges can issue a standard "Mediation Referral Order for Pro Se Employment Discrimination Cases," which informs the parties that they are being referred to mediation and that the court will locate limited-scope counsel for the plaintiff. The order provides that the plaintiff may object to the mediation or to the court's request for pro bono counsel. Referral orders are generally entered at the earliest stage of a case, often before the defendant has been served. This allows for the maximum amount of time for the court to recruit a volunteer and for the volunteer and client to prepare for the mediation.

Although the court most often requests counsel to assist pro se litigants in the mediation of employment cases, the court does occasionally seek counsel for other types of cases, for example, prisoner cases. In these cases, settlement conferences are usually held by a designated magistrate judge.

Pro bono mediation counsel assist pro se parties in many ways: they explain applicable legal standards and the norms of litigation, advise as to reasonable ranges of settlement and litigation costs and risks, negotiate directly with opposing counsel, prepare mediation statements, and represent the plaintiff at mediation.

If the case does settle, the early mediation conserves substantial resources by making motion practice, discovery, and trial unnecessary. Even if a case does not



settle, the plaintiff has had an early opportunity to get advice about the legal and factual issues in the case.

This program is a collaboration of the court's Mediation Office, the Office of Pro Se Litigation, and the attorneys and participants in law school clinics who are willing to volunteer their services. Referrals to the program have increased substantially in recent years, and the settlement rates in mediation have been between 60-70%. Not only do pro bono attorneys provide an invaluable service to their clients and to the Court, most also report great satisfaction in participating in the program.

## **Volunteering to serve as pro bono counsel**

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- **How do I volunteer?**

Fill out the Application for Pro Bono Opportunities on the court's website, see <http://nysd.uscourts.gov/file/forms/application-for-pro-bono-opportunities>, and mail or deliver it to the Office of Pro Se Litigation, or send an email to [pro\\_bono@nysd.uscourts.gov](mailto:pro_bono@nysd.uscourts.gov) (if possible, attach an electronic business card to your email), or call (212) 805-0181.

The Office of Pro Se Litigation will contact you to discuss your interest and availability and the details of the placement process.

You may also volunteer through the Pro Se Clinic run by the New York Legal Assistance Group (NYLAG). NYLAG recruits volunteers for limited-scope tasks such as representing litigants in mediation. To volunteer with NYLAG, call 212-659-6190.

- **Do I need to be admitted to the Southern District of New York to appear as limited-scope counsel?**

Yes, you must be licensed to practice law either in New York State or another state and you must be admitted to the court to represent a party as pro bono counsel, even in a limited capacity. To access the court's electronic case filing (ECF) system, you must also register for a PACER (Public Access to Court Electronic Records) account. For more information on registration and fees, visit the SDNY or PACER website.

- **Do I need malpractice insurance?**

If you volunteer through the court's program, you do need malpractice insurance. If you volunteer through NYLAG, however, their insurance will cover you.



- **Do I need mediation experience?**

While mediation experience is not required, it is important to familiarize yourself with the mediation process, its benefits, and its impact on your client's case. If you are new to mediation you can consult the ADR resources on the court's website and speak with the assigned mediator or with Mediation Office staff.

- **Do I need to have expertise in the subject matter of the case?**

According to the New York Rules of Professional Conduct Rule 1.1:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Experienced attorneys may be available for mentoring. If you are interested please contact the Mediation Office.

## **Representing a client in mediation**

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- **A case has been referred to me. What should I do next?**

1. **Review the case and meet the client**

Your case review will include the following steps:

- o Use the PACER system to view the full case docket and to get the litigant's contact information, which you can find on the docket or at the end of the complaint, IFP (*in forma pauperis*) application, or other submission.
- o Contact the litigant to set up a meeting (you may meet in person or by phone) to discuss the case. Let the litigant know that you have been asked by the court to serve as pro bono counsel.



- o If you and the litigant wish to work together, draft an engagement agreement that clearly defines the scope of representation.
- o Respond to the Office of Pro Se Litigation within one week to report whether, based on your initial review, you are interested in handling the case. It's fine if further review will be necessary before you make a final commitment.

If at any point in your review you decide that you won't be able to take on the matter, or the litigant declines your offer of representation, please contact the Office of Pro Se Litigation immediately.

## **2. File a notice of limited appearance**

Once you and your client have entered into an engagement agreement, you will then file a notice of limited appearance as pro bono counsel (the relevant ECF event is "Notice of Appearance of Pro Bono Counsel - Limited Appearance") and let the Office of Pro Se Litigation know that you have done so.

## **3. Schedule the mediation and review the court's mediation procedures**

Mediation can only take place once all parties have appeared. If defense counsel has already appeared, once you file the notice of limited appearance, a mediator will be assigned. You will receive an email from the Mediation Office with the name and contact information for the mediator, as well as the applicable scheduling deadlines and information about the mediation rules and procedures. You can also review information on the court's website, here: <http://nysd.uscourts.gov/mediation>. If defense counsel has not yet appeared, assignment of a mediator will be suspended until that appearance.

Once all parties have appeared and a mediator has been assigned, the mediator and parties will determine a date, time, and location for the initial mediation session.

## **Other frequently asked questions**

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- **What if the plaintiff's case doesn't seem particularly strong?**

One of the benefits of this program is that it provides the opportunity for the pro se litigant, for perhaps for the first and only time, to talk with a lawyer about the merits of the case. In preparing for mediation, pro bono counsel will advise the plaintiff about the litigation process and the associated risks. A case that is not particularly strong can still be settled, and a plaintiff with such a



case will certainly benefit from counsel's advice, whether the case settles or not.

- **Can I discuss the case with the Mediation Office or the Office of Pro Se Litigation?**

Court employees, whether from the Mediation Office or any other office in the court, cannot provide legal or strategic advice. But you may contact any relevant court office with procedural questions, such as the procedures for mediation or for appearing as pro bono counsel.

The Office of Pro Se Litigation can, however, refer you to experienced attorneys who can offer you advice. NYLAG can do this as well.

**Who is responsible for the service of the complaint?**

The plaintiff is responsible for effectuating service, but most pro se plaintiffs will be entitled to rely on the U.S. Marshals Service to serve the summons and complaint. The service order in the case will state whether the Marshals were directed to serve the complaint. If you are working with a client who needs assistance with service, you may direct him or her to the Court's website → "Representing Yourself" → "Pro Se FAQ's" or click on the following link: [http://nysd.uscourts.gov/courtrules\\_prose.php?prose=faq](http://nysd.uscourts.gov/courtrules_prose.php?prose=faq).

- **Where do I find more information about the case?**

PACER is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts. You can view the full docket on PACER. If you are admitted to the Southern District of New York, you probably already have a PACER account. Once you are logged into PACER, click on the PACER Case Locator and follow the instructions.

- **Where can I find the plaintiff's contact information?**

Once you access the PACER system, you should be able to find Plaintiff's contact information at the top of the docket or on the initial complaint.

- **Where can I find a sample engagement agreement?**

If you need advice about engagement agreements, see the New York State Bar Association's website: <http://www.nysba.org/ManagingYourPractice/>. Other bar associations, such as the American Bar Association, also provide sample engagement agreements, including agreements for pro bono representation.



- **How do I file a Notice of Limited Appearance?**

If you need a sample form, go to the SDNY website; under “Quick Index” click on Pro Bono; then, on the left-hand side, click on Forms. Or click this link: <http://nysd.uscourts.gov/file/forms/limited-notice-of-appearance-of-pro-bono-counsel>. Complete the fillable PDF form or draft your own and file it in the case using the ECF event titled “Notice of Appearance of Pro Bono Counsel - Limited Appearance.” The limited-appearance ECF event will *not* add you as counsel of record, and you will not receive ECF notices in the case. When your representation is complete, you will not need to move to withdraw as counsel. As an alternative, you may use the ECF Event called Notice of Appearance of Pro Bono Counsel, but still title your document as a limited appearance. This event will add you to the docket as counsel of record, and you will receive ECF notices. Once your representation ends, you will have to make sure to get your appearance terminated.

- **Is the case stayed due to the mediation referral?**

No. The mediation process runs parallel with deadlines set by the judge.

- **What is the scheduling process? Are there timeframes I should be aware of?**

Once a case has been assigned to a mediator, the mediator will reach out to the parties in an effort to schedule the initial mediation session. A date for the initial session should be finalized within 30 days and held within 60 days of mediator assignment. Additional mediation sessions may be scheduled if needed, as long as mediation does not delay the Judge’s scheduling.

- **Can I recover attorney fees or contingencies?**

No, it is expected that as pro bono counsel appearing only for settlement purposes you have agreed to take on the case without any expectation of recouping fees.

- **Can I seek reimbursement of costs?**

Yes, you may seek reimbursement of any costs that you may have incurred by taking on the case. In 1997, the Court established the Pro Bono Fund, which permits attorneys to seek reimbursement for certain out-of-pocket expenses. [See Order Establishing the Pro Bono Fund](#) to find out more about reimbursement.



- **If the case doesn't settle in mediation, can I stay on the case as Plaintiff's full counsel?**

Yes, but you will have to enter into a new engagement agreement with your client and file a new notice of appearance.

- **Can I receive CLE credit?**

For information on the Pro Bono CLE Board Regulations and Guidelines, click here: <http://ww2.nycourts.gov/attorneys/cle/probono.shtml>.