Lessons Learned from Pro Bono Service in the Eastern District of Virginia

By Kristan B. Burch

In July 2016, the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia sent an announcement that they were compiling a list of volunteer attorneys willing to represent certain plaintiffs on a pro bono basis. The announcement explained that a district judge assigned to a civil pro se case may determine that appointment of counsel "would help to facilitate the administration of justice," and the majority of such cases would likely involve civil rights claims brought pursuant to 42 U.S.C. § 1983.

I responded to the announcement and agreed to join the list of volunteers to represent plaintiffs in pro bono cases. On October 3, 2016, I was appointed to represent a prisoner who had filed a complaint against several prison employees, alleging use of excessive force in violation of the Eight and Fourteenth Amendments. My client alleged that he had been maliciously beaten and kicked by the defendants when they were conducting a cell extraction, claiming that some of the defendants were involved in the alleged assault and that other defendants were deliberately indifferent during the alleged assault.

Prior to my appointment as counsel, my client had appealed a summary judgment decision by the district court to the Court of Appeals for the Fourth Circuit ("Fourth Circuit"), and the Fourth Circuit had vacated the district court's granting of summary judgment for defendants and remanded the case for review of videotape evidence of the cell extraction, which my client had sought. That decision by the Fourth Circuit led to a disclosure by the defendants that the videotape evidence no longer existed and was not available for review.

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One of my first actions as counsel for my client was to file a motion for sanctions related to the videotape evidence, which the district court granted and which led to a denial of defendants' motion for summary judgment as a sanction for the spoliation. After participating in some limited discovery, the case was set for trial. The district court granted an application for writ of habeas corpus ad testificandum, and my client was transported from South Carolina to Virginia for trial. In January 2018, a bench trial was conducted, and the district court ruled in favor of the defendants. The case currently is on appeal to the Fourth Circuit.

From this experience, I pass along some of the lessons learned in hopes that others will consider taking pro bono cases when they have the opportunity.

1. Handling a pro bono case requires just as much work as a case for a paying client. This may seem like an obvious lesson learned, but it must be considered when you are agreeing to handle a pro bono case. You will be tied to a tight schedule which is just as enforceable as in your other cases, with deadlines which you must meet. You will have to balance your billable work with the demands of your pro bono case, and ultimately, it will take just as much time to prepare for trial in your pro bono case as it would in other case.

2. Ask questions to your client and listen to what he tells you. From my first call with him, I learned that my client was very knowledgeable and experienced in federal court litigation. Over the years, he has filed multiple complaints and been to trial in other federal courts so he knew what it meant to handle a case in federal court. While I was able to explain certain nuances to him about practice in federal court, he was able to educate me on the grievance and appeal procedure within the Virginia Department of Corrections. He knew what notices needed to be sent during a grievance proceeding in order to request that

videotape evidence be maintained, and he kept meticulous records of his efforts to ensure the videotape evidence was available for trial. He provided valuable input for the pleadings filed and for the evidence put on at trial.

3. Sometimes trial lawyers have to accept the unknown.

At trial, my main witness was my client, and it was important for him to tell his story of what happened during the cell extraction. My client had a great memory, and I had taken careful notes when discussing matters with him by telephone. I prepared my direct examination of him and several other prisoners, who we called as witnesses as I normally would do, but the difference in this case was that I was not able to run through my outlines with my client or the other witnesses before trial began. While trial lawyers know they cannot prepare for every scenario, the fact that my client and some of the other witnesses were incarcerated led to some challenges, as I had to react to unexpected responses or new topics which were raised for the first time at trial. Instead of fearing the unknown, I had no choice but to embrace it and rely on my preparation and experience to get through some of the unexpected developments.

4. Not every witness will testify as you expected.

While I had talked to all of my witnesses before trial, I only had brief discussions with many of them before they testified, and it was a fact gathering exercise done over the telephone. It is hard to size up witnesses when you only have spoken to them by phone, and you do not know how they will appear when they are called by video conference at trial. This was a good reminder that sometimes the witnesses who you anticipate will do the best while on the stand, in fact, do not, while others about whom you had concerns will prove they can handle the pressure of cross-examination.

5. Civility always has a place in trial practice.

My opposing counsel in this case works for the Office of the Attorney General, and she tries prisoner cases all over Virginia. I expect that she has tried more civil cases in federal court during the time she has been with the AG's Office than many lawyers in private practice will ever try in federal court. Even though I was injected into the case after the first appeal, she understood that I had to get up to speed on the case, and she worked with me to complete written discovery, schedule depositions, and agree on briefing schedules. While matters could have been combative at every turn, we both were able to zealously represent our clients while still being civil to one another. This reaffirmed the notion that you can disagree with your opposing counsel without creating a hostile relationship.

6. Pro bono service is rewarding.

While handling this case was exhausting at times, I still would describe it as a positive experience. I enjoyed working with my client and appreciated learning his point of view on the civil rights issues in the case. He was appreciative of my time and effort, and he had a chance to tell his story to the district court at trial. Assisting with pro bono cases not only provides excellent experience in federal court, but it also provides you a chance to give back to the legal community in which you work. ❊