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COMPULSORY ACCEPTANCE OF COURT APPOINTMENTS: MALLARD V. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

INTRODUCTION

A judicial forum for the resolution of legal disputes is fundamental to our "concept of ordered liberty." Uninhibited access to the courts is basic to the principle of equitable treatment under the law. The ideal of justice in our democratic society presumes that all parties to a dispute start out on equal footing; that is, that no one is unfairly prejudiced or foreclosed from a just determination of a case prior to court adjudication.

Early Roman jurisprudence recognized and protected equal access to the legal system for rich and poor alike. In the late fifteenth century, England codified the right of a poor person to sue. This concept continues to ring true in American jurisprudence.

1. Quoting the language of Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 324 (1937). See also Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

2. Maguire, Poverty and Civil Litigation, 36 Harv. L. Rev. 361, 361 (1923) [hereinafter Maguire].

3. 2 Statutes of the Realm 578, quoted in Maguire, supra note 2, at 373. Statute II of Henry VII, ch. 12, enacted in 1495, accorded paupers the following rights:

   Be it ordeyned and enacted ... that every poouer persone ... which ... shall have cause of accion ... ayenst any persone ... shall have ... writtes originall and writtes of Sub pena according to the nature of their causes, therfor nothing paing to youre Highnes for the seales of the same ... And that the seid Chaunceller ... shall assigne suche of the Clerks whiche shall doo and use the making and writing of the same writtes ... and also lerned Counsell and attorneyes for the same, without any reward taking therfor; ... The Justices ther shall assign to the same poouer persone ... Counsell lerned by their discreccion which shall geve their Councelles nothing taking for the same, and in like wise ... appoynte attorney and attorneyes for the same poouer persone ... and all other officers requisite and necessarie to be hadde for the spede of the seid duties without any rewards for their Councelles help ... and the same lawe and ordre shalbe observed and kepte of all such suytes ....

Id.

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if for no other reason than that the contrary view—that justice must be bought—is antithetical to our collective sensibilities of fair play.\footnote{4}

In \textit{Mallard v. United States District Court for the Southern District of Iowa},\footnote{5} the Supreme Court of the United States held that a federal statute authorizing an indigent to proceed in forma pauperis does not empower the federal courts to require an attorney to provide representation upon the court’s appointment.\footnote{6} This decision could make the cost of bringing suit so prohibitive as to foreclose a litigant from access to the federal courts. While the in forma pauperis statute eases the burden on the indigent litigant by providing for a waiver of filing fees and court costs, the Court’s decision limits the ameliorative effect of the statute by placing the cost of hiring counsel solely upon the indigent litigant himself. Given the fees of most attorneys, an indigent will be left with one of two options: to present a claim \textit{pro se} or to refrain from court action. This Comment will show that the Court, rather than engaging in a dry parsing of statutory language, should have interpreted the statute in light of Congress’ overall interest in assuring indigents meaningful access to the federal courts. The \textit{Mallard} majority failed to consider the duty of the bench and bar to work in concert to best promote the equitable administration of justice that gives effect to the principle of “Equal Justice Under Law.”\footnote{7}

\section{I. Meaningful Access to the Courts}

While not specifically enumerated in the Bill of Rights, the right of access to the courts in the United States has been viewed

\footnote{4} “[D]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.” \textit{Roberts v. LaValle}, 389 U.S. 40 (1967).

\footnote{5} 109 S. Ct. 1814 (1989).

\footnote{6} \textit{Mallard v. United States Dist. Court for the S. Dist. of Iowa}, 109 S. Ct. at 1823.

The statute at issue in \textit{Mallard} states in part:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that he is entitled to redress.

\ldots

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

\footnote{28 U.S.C. § 1915 (1982).}

expansively as a fundamental right. Constitutional protection of this right has been found in the first amendment, the privileges and immunities clause of article IV, and the due process and equal protection clauses of the fourteenth amendment. Justice Black asserted that the right of uninhibited access to civil courts depends upon the presence of two elements: a judicial forum that constitutes the exclusive means of dispute resolution and the "fundamental" nature of the interest involved in the subject matter of the dispute. These elements, he argued, are present in nearly every legal dispute.

8. However, judicial access as a fundamental right has not been uniformly determined. See generally, Brickman, Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services, 46 N.Y.U. L. Rev. 595 (1971) (hereinafter Brickman).

9. Cal Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The Supreme Court stated that the first amendment right to petition extended "to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." Id. at 510. See also Brickman, supra note 8.

10. Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907). The United States Supreme Court found the right of effective judicial access implicit in the privileges and immunities clause of art. IV of the Constitution and in the fourteenth amendment. Id. at 147—48.

11. Powell v. Alabama, 287 U.S. 45, 68 (1932) (citing Galpin v. Page, 85 U.S. 350 (1873)). Procedural due process presumes that some process is due the individual prior to court adjudication. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Galpin, 85 U.S. at 369. A criminal defendant has the right to counsel, and an attorney will be appointed by the court if the defendant is financially unable to retain one. U.S. Const. amend. VI. See infra notes 26—38 and accompanying text. See also Snidach v. Family Fin. Corp., 395 U.S. 337 (1969) (opportunity to defend); Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) (notice must be "reasonably calculated ... to apprise interested parties of the pendency of the action"); Grannis v. Ordean, 234 U.S. 388 (1914) (the opportunity to be heard).

12. Boddie v. Connecticut, 401 U.S. 371 (1971). Justice Brennan concurred with the majority holding that the state could not deny an indigent access to divorce court, but argued that the right to judicial access was grounded in equal protection as well as due process:

   Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether.... A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee.

   Id. at 388—89.


15. Id. at 955—56 (Black, J., dissenting).
In *Boddie v. Connecticut*, the Court used Justice Black's test to determine whether the plaintiff had a right to court access. The Court held that to deny an indigent access to a divorce court was to deny him due process because the state had a monopoly over the courts and the courts were the exclusive means by which a marriage could be legally dissolved. Justice Harlan's majority opinion left unanswered the question of whether access to the courts was a fundamental right for all purposes. Under *Boddie*, however, at least when courts are the exclusive means of resolving a dispute which involves fundamental interests, it appears that indigent litigants have an uninhibited right of access to the court.

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*The civil courts of the United States and each of the States belong to the people of this country and... no person can be denied access to these courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.... I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for the resolution of their disputes.*

*Id.* Justice Douglas also dissented, and argued that "[c]ourts ought not to be a private preserve of the affluent." *Id.* at 961 (Douglas, J., dissenting).

18. *Id.* at 382—83.
19. *Id.* at 381. While uninhibited, the right has not been held to be completely unlimited. The expansive interpretation of the right to judicial access in *Boddie* was substantially narrowed in a subsequent case which held that a discharge in bankruptcy may be denied an indigent solely by virtue of his financial inability to pay the required filing fee. United States v. Kras, 409 U.S. 434 (1972). In *Kras*, the Court reasoned that because a discharge in bankruptcy was a "legislatively created benefit," it did not rank among fundamental interests peripheral to the Constitution. *Id.* at 447. Furthermore, since a settlement with creditors was theoretically possible, an alternate means of resolving the problem was available to the voluntary bankrupt. *Id.* at 444—47. Hence, the two requirements for uninhibited access to the courts as a fundamental right posited by Justice Black—the court as the sole means of resolving the dispute and a fundamental interest at stake—were not present in *Kras*. *Id.* at 445.

To complicate matters further, the test for determining whether a right is fundamental has been only partially articulated by the Court. Justice Powell's majority opinion in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973), held that education was neither explicitly nor implicitly protected by the Constitution. The key factor in the analysis which the Court majority failed to mention, however, was *what* test to use in determining whether a right was implicitly guaranteed by the Constitution. Justice Marshall's dissent provided the necessary addendum with a "nexus" test of fundamentality:

> As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

But getting through the courthouse door is just the first step in securing judicial resolution of a dispute. The right of access to the court is meaningless without either personal legal expertise or the counsel of one who possesses such technical knowledge and who can advocate the litigant's position. Indeed, the Supreme Court has recognized that the right of access to the courts must be "adequate, effective, and meaningful." A layperson who attempts to advance a case without the assistance of counsel is clearly at a disadvantage in approaching the bench and at an even greater disadvantage when attempting to defend himself against a trained adversary. While the courts have considered this disadvantage to be greatest when a defendant's personal liberty is threatened in a criminal action, the details of pursuing a civil claim are no less complex and the interests at stake are not necessarily any less compelling.

A. Criminal Defendants

The sixth amendment to the United States Constitution guarantees criminal defendants the right to adequate representation. Initially construed to mean only that an accused

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22. Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964). The Court underscored the pro se disadvantage when they stated that "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." Id. at 7.
23. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). A criminal defendant, without "the guiding hand of counsel at every step in the proceedings against him ... faces the danger of conviction because he does not know how to establish his innocence." Id. at 69.
25. Lee v. Habib, 424 F.2d 691, 901 (D.C. Cir. 1970). "Often a poor litigant will have more at stake in a civil case than in a criminal case." Id. See also Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967):

The actual concerns of the poor do not reflect the law's sharp distinction between civil and criminal litigants. Poverty only magnifies the importance of protecting one's property from seizure by legal process. The poor man may be evicted, his furniture may be repossessed, his welfare payments cut off, his children taken from him.

Id.

26. U.S. Const. amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.
could not be prevented from retaining an advocate for his defense. This constitutional right did not place an affirmative duty on the federal courts to provide counsel, nor did it bind state courts to appoint counsel for an indigent criminal defendant. Most jurisdictions felt no compulsion to assign counsel except in crimes that were punishable by death.

In *Powell v. Alabama*, the Supreme Court held that the sixth amendment right to counsel was operative on the states through the fourteenth amendment. The Court further held that the failure of a court to appoint counsel for a capital defendant, "whether requested or not, was a denial of due process." Legal counsel was determined to be critical in the preparation of an adequate defense.

After *Powell*, the Supreme Court extended the right to appointed counsel to a noncapital defendant in *Johnson v. Zerbst*. The Court later extended this right to any indigent felony defendant, based on the rationale that a fair trial could not be assured without legal assistance. The Court subsequently

27. See generally W. Beany, *The Right to Counsel in American Courts* 14 (1955), for a lengthy discussion of the historical antecedents of the right to counsel and early Supreme Court interpretations of that right.
28. *Id.* at 15—16.
29. *Id.* at 16.
30. 287 U.S. 45 (1932).
32. *Id.* at 71. The Court also held that to deny a capital defendant reasonable time to obtain counsel was a denial of due process. *Id.*
33. *Id.* at 69.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

*Id.*

34. 304 U.S. 458 (1939) (federal prosecution for counterfeiting).

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure
broadened the right to counsel to cover access to legal services during the accusatory stage of prosecution, and eventually concluded that due process requires that a defendant be assisted by counsel in all criminal trials, even petty-offense prosecutions, in which the defendant may be punished by incarceration.

In sum, the adversarial nature of a criminal proceeding demands that the prosecutorial machinery be offset by a competent and zealous defense. The Supreme Court has made it clear that an inequitably obtained conviction is such a compelling affront to justice and fundamental fairness that access to counsel must be assured at all stages of a criminal proceeding, even, and especially if, the defendant is too poor to hire his own attorney.

B. Civil Litigants

Although the constitution does not explicitly establish a right to counsel in civil cases, certain noncriminal proceedings threaten a loss of liberty so great that courts have held that a right to appointed counsel exists for the one so endangered. These cases

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fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Id.* *Gideon* concerned an indigent defendant charged with a noncapital felony. *Id.* at 336. Unable to hire a lawyer, Gideon asked that counsel be appointed for him, but was denied the request on the ground that Florida law provided appointed counsel for indigent defendants only in capital cases. *Id.* at 337. Gideon proceeded to defend himself *pro se*, and a jury found him guilty. *Id.* He then filed a petition for habeas corpus on the ground that the court's refusal to appoint counsel was a denial of his constitutional rights. *Id.* The Florida Supreme Court denied relief. *Id.* The United States Supreme Court granted certiorari, and reviewed the case as a civil appeal. The argument on appeal was that denial of counsel violated the due process clause of the fourteenth amendment. The Supreme Court appointed Abe Fortas to represent the petitioner, under the same rationale that necessitates appointed counsel for criminal defendants. *See supra* Section A. The Court held that the right to the assistance of counsel was as essential in noncapital cases as in capital felonies, and that a conviction obtained without the assistance of counsel violated due process. *Id.* at 349.


39. *See, e.g.*, *Cleaver v. Wilcox*, 489 F.2d 940 (9th Cir. 1974). "[D]ue process requires the state to appoint counsel whenever an indigent parent . . . faces a substantial possibility of the loss of custody or of prolonged separation from a child." *Id.* at 945 (footnote omitted).
have primarily been in the area of family law, involving either conflicts between spouses or between the parent, child, and the state.  

One case in particular that held that a right to court-appointed counsel exists for an indigent civil litigant for the same reasons that indigent criminal defendants have that right, was United States v. Dillon.  

Dillon involved a prisoner's petition to vacate a judgment of conviction for a bank robbery to which the petitioner Dillon had pled guilty under the promise of a lenient sentence.  

Dillon requested that the district court appoint counsel to represent him at the hearing, but his request was denied.  

The Ninth Circuit Court of Appeals reversed and remanded the case to the district court, which appointed "an attorney with some considerable experience and with some means."  

The district court awarded "just compensation," holding that compulsory representation by a court-appointed attorney constituted a "taking" under the fifth amendment.  

The Ninth Circuit reversed the award, and noted that, while the appointment of counsel was not based on the sixth amendment right to counsel as in a criminal proceeding, the due process clause of the fifth amendment nevertheless mandated appointment of counsel in a civil context.  

After examining historical antecedents of uncompensated, court-
ordered representation of indigents in both civil and criminal cases, the court concluded that the right to counsel was not tied so much to the interests at stake as it was to the lawyer's duty as an officer of the court to assist in the efficient administration of justice. According to the court's reasoning, attorneys assume certain obligations as part of their professional calling, and one obligation is the duty to "represent indigents upon court order, without compensation." The significance of the Dillon opinion rests in the court's clear disinclination to base the right to appointed counsel on the distinction between civil and criminal cases and the respective interests at stake. Every litigant risks some loss if his or her claim is not defended or adequately advocated. While courts have been willing to appoint counsel in criminal or quasi-penal proceedings, judicial power is not necessarily confined to those kinds of actions, nor does the court lack the inherent power to appoint counsel in civil cases.

II. CIVIL APPOINTMENT UNDER SECTION 1915(d)

Federal circuit courts have struggled to balance the needs of meritorious indigent litigants with the burden uncompensated service imposes upon the bar. The courts have also been cognizant of their own crowded dockets and their responsibility to adjudicate cases in the most just and efficient manner practicable.

In Peterson v. Nadler, the Eighth Circuit held that courts are empowered under 28 U.S.C. section 1915 to appoint counsel in

48. Id. at 635.
49. Id. In addition, the court found that "representation of indigents under court order without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute." Id.
50. See infra notes 55—58 and accompanying text.
51. See, e.g., Maclin v. Freake, 650 F.2d 885 (1981). "The decision must rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel." Id. at 887.
52. See CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972) ("A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law."). "A judge should dispose promptly of the business of the court." Id. at 3(A)(5). "If mere bald assertions by an indigent ... required appointment of an attorney under § 1915(d), the demand for such representation could be overwhelming." Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986).
53. 452 F.2d 754 (8th Cir. 1971) (conversion claim brought by an indigent inmate against his former attorney who sold the plaintiff's automobile subsequent to plaintiff's incarceration).
civil litigation. The court emphasized its own inherent discretionary power to appoint counsel, in spite of the lack of any express right on the part of the indigent litigant. The Peterson court determined that a court can meet its duty to ensure that only cases truly worthy of adjudication are heard by screening out misrepresented, "frivolous or malicious" claims. The court also found that an attorney assigned to represent an indigent has a professional duty to accept a court appointment. Most significantly, however, the court found that the power to appoint arose from the court's inherent discretionary power, rather than from the attorney's willingness to accept.

The screening process a court must undertake to determine whether the appointment of counsel is warranted entails more than the trial judge's seeking to promote the goals of justice. For example, in Maclin v. Freake, the Seventh Circuit held that a court should consider a variety of factors before ruling on a motion to appoint counsel. These factors include: the merits of the claim, the credibility of the indigent litigant, the indigent litigant's ability to present the case pro se, the nature of the factual issues, and the complexity of the legal issues involved. Similarly, the Ninth Circuit appoints counsel only upon a showing of "exceptional circumstances," and the First Circuit combines the "exceptional circumstances" test with factors similar to those used by the Seventh Circuit.

In Nelson v. Redfield Lithograph Printing, the Eighth Circuit's criteria for determining which in forma pauperis cases merit the

55. Id. at 757.
56. Id. at 758 (citing 28 U.S.C. § 1915(d) (1982)).
57. Id. at 758.
58. Id.
59. 650 F.2d 885 (7th Cir. 1981).
60. Maclin v. Freake, 650 F.2d at 885.
61. Id. at 887—88.
62. United States v. 30.64 Acres of Land, 795 F.2d 796, 799 (9th Cir. 1986).
64. 728 F.2d 1003 (8th Cir. 1984). The plaintiff in this case brought a racial discrimination suit against his employer. He failed to make out a prima facie case, and the district court denied his motion for appointment of counsel. Nelson v. Redfield Lithograph Printing, 728 F.2d at 1005—06.
appointment of counsel focused on whether the advocacy of an attorney would change the disposition of the case. The court stressed the importance of maintaining a reserve pool of attorneys willing to aid the court in its judicial management, however, and suggested a plan to assure this help.

Under the Eighth Circuit standard, the fact that the court can appoint counsel does not mean that every indigent who requests counsel will receive it. When the facts of a case are straightforward or when the assistance of counsel would not alter the court's judgment, an attorney will not be asked to represent the indigent litigant. Judicial discretion guides the court in its duty to manage the administration of claims brought by indigent litigants.

The Fourth Circuit's standard for appointing counsel to represent indigent civil litigants is set out in Whisenant v. Yuan. In Whisenant, a prison inmate requested that counsel be appointed to assist him in bringing a civil rights claim under 42 U.S.C. section 1983. The district court denied Whisenant's request because available federal funds were insufficient to compensate the appointed attorney. The Fourth Circuit reversed the district court and wholly rejected lack of compensation as a basis for

65. Id. at 1006.
66. Id. at 1005.

We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar association and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

Id. (emphasis added).

67. "[O]nce the court is satisfied that plaintiff has alleged a valid prima facie claim, then further inquiry should be made as to need.... The court should also determine whether the nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel." Id. The court will not appoint an attorney when discovery would "be nothing more than a fishing expedition." Id. at 1006.

68. An interesting twist on court discretion is found in Irby v. Winans, 604 F. Supp. 484 (E.D. Wis. 1985). There, the district court concluded that eight unsuccessful attempts to appoint counsel reflected negatively on the merits of the case, and accordingly dismissed the claim. Id. at 486. In another case, after finding the action frivolous, the court held that appointment of counsel was unnecessary since the inmate had access to the jail law library. Smith v. Lamm, 629 F. Supp. 1184 (D.C. Colo. 1986).

69. 739 F.2d 160 (4th Cir. 1984).
70. Whisenant v. Yuan, 739 F.2d at 162. Whisenant, generally ill-educated and completely ignorant of legal matters, was recovering from a serious injury while confined in prison. "He was found to be bleeding internally from a condition known as esophageal varices, and had a seriously reduced hemoglobin level." Id.

71. Id. at 163. The court apparently failed to note that 42 U.S.C. § 1988 provides for recovery of fees upon a favorable judgment. Id. at n.2
denying the plaintiff counsel, refusing to find funding a necessary
prerequisite to justice.\textsuperscript{72} Instead, the court looked to the totality
of the circumstances of each particular claim, focusing on the
individual litigant's ability to present his case adequately.\textsuperscript{73} The
Fourth Circuit found that Whisenant's confinement and lack of
education constituted "exceptional circumstances" which
warranted the appointment of counsel.\textsuperscript{74}

In \textit{Poole v. Lambert},\textsuperscript{75} the Eleventh Circuit Court of Appeals
solicited the help of its district courts to develop and implement
"imaginative and innovative" methods of addressing indigent
prisoner complaints.\textsuperscript{76} The possible alternatives considered by the
court included appointing counsel, transferring the inmate to the
place of trial, providing a bench trial if the plaintiff inmate waived
a jury trial, presenting proof by depositions, and allowing a
continuance if release was imminent.\textsuperscript{77} The court found that only
after reviewing these alternative methods may a court conclude
that dismissal of the case is justified.\textsuperscript{78} The court also held that
a district court has a duty to "fully inform the plaintiff as to the
exact manner in which the trial will be conducted and \textit{to carefully
instruct him} as to how he may present his evidence and testimony
to the court."\textsuperscript{79} It is interesting to note that the Eleventh Circuit
emphasizes the duty of the court itself to advise the indigent, as
well as to consider the need for appointed counsel.\textsuperscript{80} The higher

\textsuperscript{72} "The availability of federal funds is, of course, unrelated to the question of
fundamental fairness." \textit{Id.} at 163—64.
\textsuperscript{73} \textit{Id.} at 163.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} 819 F.2d 1025 (11th Cir. 1987).
\textsuperscript{76} Poole v. Lambert, 819 F.2d at 1028. Typically, these prisoner complaints are
brought under 42 U.S.C. § 1983, and requests for counsel are made pursuant to 28 U.S.C.
§ 1915(d). \textit{Id.}
\textsuperscript{77} \textit{Id.} at 1028—29.
\textsuperscript{78} \textit{Id.} at 1029. "[A] dismissal for failure to prosecute is justified only as a last resort,
after other possible methods of disposing of the action on the merits have been fully
explored and where the prisoner does not cooperate with the diligent efforts of the
district court." \textit{Id.}
\textsuperscript{79} \textit{Id.} (emphasis added).
\textsuperscript{80} \textit{Id.}

After determining that such a case has some merit, the district court initially
should consider the plaintiff's request for counsel, if one is made, in light of
the complexity or novelty of the issues presented. We do not intimate that
Poole should have been afforded counsel in this case; we merely state that
his motion should have been carefully reviewed and responded to by the
court.

\textit{Id.}
degree of solicitude required of the district courts perhaps underscores the court’s recognition of the obstacles that poverty visits upon a litigant who seeks to avail himself of judicial proceedings.

Appointment of counsel for inmates in actions against prison officials under section 1983 is troublesome to district courts because these particular civil rights claims are notoriously frivolous, and the courts may justifiably scrutinize them for merit. Notwithstanding the problematic nature of section 1983 claims, incarceration does not mean that an individual is without recourse to the judicial system to remedy civil wrongs.

In addition to the foregoing considerations of the character of the litigant and his case, the courts are sensitive to the potential financial burden that such representation could entail. Courts are reluctant to impose extraordinary expenses on an appointed attorney. For example, in *State ex rel. Wolff v. Ruddy*, the Supreme Court of Missouri held that, because of the volume of pending and threatened cases concerning representation of the

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81. *See, e.g.*, Gale v. Moore, 763 F.2d 341 (8th Cir. 1985) (complaint was frivolous because denial of parole does not violate equal protection); Philips v. Mashburn, 746 F.2d 782 (11th Cir. 1984) (“naked assertion of conspiracy” between state court judge and attorneys properly within district court’s discretion to dismiss as frivolous); Cornez v. Munoz, 724 F.2d 61 (7th Cir. 1983) (allegation of attorney malpractice for public defender’s failure to pursue “various issues that defendant wanted argued” frivolous); Johnson v. Baskerville, 568 F. Supp. 853 (E.D. Va. 1983) (complaint dismissed as frivolous because no colorable claim of inadequate medical treatment upon which relief could be granted); Wagstaff v. Maryland, 567 F. Supp. 1477 (D. Md. 1983) (complaint dismissed for insufficient evidence of indigency and frivolous grounds for action); Franklin v. Oregon, 563 F. Supp. 1310 (D. Ore. 1983) (inmate penalized with restrictions on filing of in forma pauperis lawsuits because of prior frivolous complaints); Partee v. Lane, 528 F. Supp. 1254 (N.D. Ill. 1981) (allegations of miscalculated good-time credits, denial of psychological care for depression, and denial of parole request without merit and frivolous).

82. *Bradshaw v. United States Dist. Court for the S. Dist. of Cal.*, 742 F.2d 515 (9th Cir. 1984) (Reinhardt, J., concurring).

[The court] must bear in mind that unpopular and even obstreperous litigants are entitled to the full measure of their legal rights. We must be particularly careful that civil rights litigants are afforded their full rights and that neither the unpopularity of their cause nor any perceived belligerency on their part, or other unwillingness or inability to conform to a normal mode, underlies or plays any part in a failure to appoint counsel.

*Id.* at 519.

83. *Peterson v. Nadler*, 452 F.2d 754, 756 (8th Cir. 1971) (citations omitted). Civil complaints of indigent prisoners are especially problematic because, in addition to their poverty, inmates lack meaningful access to legal services by virtue of their incarcerated status. *Id.*

84. *See infra* notes 98—101 and accompanying text.

85. 617 S.W.2d 64 (Mo. 1981) (en banc).
indigent,” an attorney’s duty to accept a court appointment did not extend so far as to “advance personal funds in substantial amounts” for the preparation of an adequate defense.

Taking depositions, preparing witnesses, arranging for expert testimony and consultation, and traveling extensively may all be necessary to defend or prosecute a case. Each involves incurring expense with no guarantee of reimbursement. The risk that these expenses will not be reimbursed when representing an indigent litigant may be more than many attorneys are willing to pay for the sake of professional obligation. Faced with extraordinary out-of-pocket expenses, a lawyer may decide to forego the standard practices and research techniques that are typically followed when a paying client provides the resources which allow exploration of all necessary avenues to zealously present a case. Imposing these untenable choices on attorneys may render the litigant in no better position than if the claim had been presented.

86. State ex rel. Wolff v. Ruddy, 617 S.W.2d at 66.
87. Id. at 67.
88. See infra notes 98—101 and accompanying text.
89. See, e.g., Family Div. of Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984).

Alarmed at the self-fulfilling prophecy of viewing appointed pro bono cases as less complex than compensated cases, the circuit court chided the trial court for failing to adequately inquire into the facts of a parental neglect case and for failing to motivate the appointed attorneys to uncover any possible complexities. Id. at 709 n.19 (the trial court found that parental “neglect cases do not usually require substantial research and investigation efforts”).

In addition to the burden of expending personal funds toward litigation, attorneys are limited by disciplinary rules which prohibit them from gaining a financial interest in the litigation:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980). While attorneys are prohibited from providing financial assistance to their clients in general, “a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(2) (1983) (emphasis added).

Contingent fee arrangements are a possible solution to uncompensated court appointments, provided that damages are the relief sought and provided that expenses are not greater than recovery. See State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (en banc). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-7 (1980) (contingent fee arrangement permissible because “it may be the only means by which a layman can obtain the services of a lawyer of his choice”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-8 (1980) (monetary advances permissible when it is “the only way a client can enforce his cause of action”).
pro se, and may also erode the high standards the profession demands of its members. It also creates a potential conflict between an attorney's financial interest and that of his client, which may further cloud good legal judgment. Indeed, the financial burden that compulsory court appointment imposes upon lawyers has evoked several challenges to its legitimacy.\footnote{90}{For a good illustration of opposing viewpoints, compare Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. Rev. 735, 762—77 (1980) (arguing that "a lawyer who is especially heavily burdened by such a system has a valid constitutional objection, and that a broader constitutional challenge to a system of compulsory service without adequate compensation might fail, but only by a whisker") [hereinafter Shapiro] with Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 Cardozo L. Rev. 255, 275—96 (1981) (reporting that the constitutional challenges of a "taking" without just compensation, involuntary servitude, and equal protection have been "rejected by the vast majority of the courts that have addressed these issues") [hereinafter Rosenfeld].}

The most common constitutional challenge is that mandatory acceptance of court appointment is a "taking" without just compensation.\footnote{91}{Rosenfeld, supra note 90, at 287.} The main contention is that an attorney's services are a property right entitled to constitutional protection.\footnote{92}{Id.} The first rebuttal to this contention is that professional service is not property within the purview of the just compensation clause.\footnote{93}{Shapiro, supra note 90, at 771.}

Second, it is argued that a lawyer, as an officer of the court, has a pre-existing obligation to serve the public; consequently, the government need not reimburse the attorney for performing a pre-existing duty.\footnote{94}{Rosenfeld, supra note 90, at 288 (citing Hurtado v. United States, 410 U.S. 578, 589 (1973)).} The Supreme Court of Missouri, however, in \textit{State ex rel. Scott v. Roper}\footnote{95}{688 S.W.2d 757 (Mo. 1985) (en banc).} found that a number of courts have recognized that the growing burden of uncompensated service could potentially "constitute a taking of property."\footnote{96}{State ex rel. Scott v. Roper, 688 S.W.2d at 763 (citations omitted).} One case cited by the court held that the increasing demand on attorneys to volunteer their legal services prompted the question of whether it is fair to ask the legal profession alone to bear the financial burden of providing indigents with legal services.\footnote{97}{Id. (citing Warner v. Commonwealth, 400 S.W.2d 209, 211 (Ky. 1966)).}

These fears exaggerate the burden the court asks an attorney to bear. Rule 6.2 of the Model Rules of Professional Conduct exempts a lawyer from mandatory service when "representing the client is likely to result in an unreasonable financial burden...."\footnote{98}{Model Rules of Professional Conduct Rule 6.2(b) (1963).}
exemption. For example, the Eleventh Circuit expects an attorney to accept an appointment, but makes exceptions when the "financial loss is likely to be so great that [an attorney’s] representation of the indigent would be ‘materiably limited.’"\textsuperscript{99} Like the Eighth Circuit, the Eleventh Circuit has emphasized the courts’ authority to appoint counsel.\textsuperscript{100} The Eleventh Circuit has implied that courts will not wield that power capriciously, and that attorneys should trust the courts’ judgment.\textsuperscript{101}

A second constitutional challenge that has received judicial consideration charges that the involuntary appointment of attorneys to represent indigents constitutes a denial of equal protection under the fourteenth amendment. In Cunningham v. Superior Court,\textsuperscript{102} the California Court of Appeals held that the need for just adjudication of indigent cases was not rationally related to the means of singling out lawyers as the particular group to meet that need.\textsuperscript{103} The court dismissed the argument that attorneys are ethically bound not to reject "‘the cause of the defenseless or the oppressed’ ” as dicta.\textsuperscript{104} However, the equal protection argument lacks merit when viewed in conjunction with laws imposing certain prerequisites to licensure; such laws have withstood equal protection challenges so long as the statutory duty imposed by the state is rationally related to a legitimate state objective.\textsuperscript{105}

\textsuperscript{99} Waters v. Kemp, 845 F.2d 260 (11th Cir. 1988).
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} The Waters court acknowledged that an uncompensated appointment could be so burdensome that the court would not appoint counsel. Id. Nonetheless, the decision is the court’s, not the attorney’s. See supra note 58 and accompanying text.
\textsuperscript{103} Cunningham v. Superior Court, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (2d Dist. 1986).
\textsuperscript{104} Id. at 341, 222 Cal. Rptr. at 857 (citation omitted). “[W]e do not believe the Payne majority intended to make a ruling with such profound constitutional implications, based on dicta in a footnote.” Id.
\textsuperscript{105} Rosenfeld, supra note 90, at 295 nn.183–84. (citing the approval of the federal circuit court in Hackin v. Lockwood, 361 F.2d 499, 502–04 (9th Cir. 1966), of a rule requiring that an applicant have a legal education before being admitted to the bar).
The final constitutional challenge, that uncompensated compulsory representation amounts to a violation of the thirteenth amendment prohibition against involuntary servitude,\textsuperscript{106} has been rejected by courts as unconvincing and almost wholly without merit.\textsuperscript{107}

III. THE POWER OF THE FEDERAL COURTS TO COMPEL ACCEPTANCE OF APPOINTMENT OF COUNSEL

A. Statutory Authority

The judicial power of the federal courts derives from Article III of the United States Constitution and extends to cases involving a bona fide controversy.\textsuperscript{108} The scope of a federal court’s power is limited only by its jurisdiction.\textsuperscript{109} In order to adjudicate a case or controversy, a court has the authority to manage its own judicial processes.

This authority is manifested most explicitly in a court’s institution of local rules and regulations. The Rules Enabling Act, 28 U.S.C. section 2072, the authority under which the Federal Rules of Civil Procedure (FRCP) were promulgated, states in part that “[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions....”\textsuperscript{110} Rule 1 of the FRCP sets the tone for the entirety of the Rules, mandating the “just, speedy, and inexpensive determination of every action.”\textsuperscript{111} Since the Rules do not necessarily address every exigency of judicial administration, section 2071 of Title 28 provides that “[t]he Supreme Court and all courts established by

\textsuperscript{106} Shapiro, supra note 90, at 768–70; Rosenfeld, supra note 90, at 290–94.
\textsuperscript{107} Shapiro, supra note 90, at 768. The only opinion that has seriously defended the involuntary servitude argument is found in \textit{In re Nine Applications}, 475 F. Supp. 87 (N.D. Ala. 1979). In that case, the district court emphasized that the Supreme Court of the United States has construed the thirteenth amendment as not just a prohibition against slavery, but as a “charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag... to make labor free, by prohibiting that control by which the personal servitude of one man is disposed of or coerced for another’s benefit, which is the essence of involuntary servitude.” \textit{Id.} at 89 (quoting \textit{Bailey v. Alabama}, 219 U.S. 219, 241 (1911)).
\textsuperscript{108} U.S. Const. art. III, §§ 1–2.
\textsuperscript{109} \textit{Id.}
\textsuperscript{111} \textit{Fed. R. Civ. P.} 1.
Act of Congress may from time to time prescribe rules for the conduct of their business.”112 Similarly, Rule 83 of the FRCP states in part that “[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.”113 The FRCP Advisory Committee comment regarding Rule 83 notes that any problems not specifically provided for by the Rules should be disposed of under the general decision-making power of Rule 83 “in accordance with general principles of justice and common sense.”114

In essence, these statutes and rules authorize the federal courts to manage their own judicial proceedings in areas in which the FRCP does not provide guidance, by promulgating local rules of procedure. These rules may be formulated at the discretion of the court so long as they are not inconsistent with the Federal Rules or any other statutes. Consequently, because the Federal Rules of Civil Procedure do not specifically address court appointment of attorneys, federal courts should have the power to appoint counsel under the authority of their local rules, if such representation facilitates the efficient management of judicial business by promoting the steady progress of cases through the court system, and if the bench assigns attorneys according to a reasonable, nonarbitrary exercise of discretion.

One case of particular interest which discussed the extent of a federal court's local rulemaking authority over its practicing bar was Frazier v. Heebe.115 The specific issue in Frazier was whether a federal district court could, under its local rulemaking authority,116 require that an applicant for admission to its state bar either reside in-state or maintain a local office.117 The majority opinion, written by Justice Brennan, held that the Supreme Court's supervisory authority over the lower federal courts extended to scrutiny of the district court's local rules.118 The Court accordingly invalidated the rule at issue,119 concluding that

118. Id. at 645—46.
119. Id. at 645.
both the residency and in-state office requirements unnecessarily and arbitrarily discriminated against out-of-state attorneys. The majority upheld the discretion of a court to fashion and adopt local rules “that are necessary to carry out the conduct of its business,” but emphasized that a lower federal court’s discretion is subject to the Supreme Court’s inherent supervisory authority to ensure that local rules of court are consistent with “the principles of right and justice.”

Chief Justice Rehnquist issued a sharp dissent, in which he criticized the majority for usurping the authority of a district court to promulgate its own rules. The Chief Justice noted that the Rules Enabling Act, as historically interpreted by the Supreme Court, does not grant the Supreme Court the power to review a lower federal court’s local rules unless such rules violate the Constitution or an Act of Congress. Rather, the Supreme Court’s supervisory authority is limited to appellate review of lower court decisions, and does not extend so far as to invalidate a local rule itself. In addition, the Chief Justice noted that a district court has the authority to regulate the membership of its bar, a power with which the Supreme Court has been loathe to interfere in recognition of the district court’s “nearly exclusive authority over such matters.”

Frazer is significant for two reasons: first, it clarifies the powers of the federal court in both its local rulemaking authority and its circumspection under federal rules; and second, it shows that the power to require an attorney to represent an indigent upon court appointment may be inferred from the court’s local rulemaking authority. While Frazer concerns discriminatory bar admission practices rather than court appointment of counsel, the two situations are analogous because both concern the inherent power of a court to conduct its business.

120. Id. at 659.
121. Id. at 645.
122. Id.
123. Id. at 651 (Rehnquist, C.J., dissenting).
125. Frazer, 482 U.S. at 653 (Rehnquist, C.J., dissenting) (citations omitted).
126. Id. at 654 n.5 (Rehnquist, C.J., dissenting).
128. Id. at 655 (Rehnquist, C.J., dissenting) (citing Ex parte Burr, 22 U.S. 529 (1824); Ex parte Secombe, 69 U.S. 9 (1867); Ex parte Garland, 71 U.S. 333 (1866); In re Snyder, 472 U.S. 634 (1985)).
The power of a court over the legal profession extends even beyond the immediate interests of its own courtroom. A court may prohibit a corporation from practicing law, even when members of the corporation are not brought into court, and may call upon the bar to provide amici curiae briefs to elaborate on public policy in order to facilitate a court's decision. Indeed, the power granted to district courts to fashion local rules of practice often goes to the very heart of the relationship between bench and bar. In the event of a conflict between the client's interest and a rule of court, an attorney must follow the court rule. Whether a court regulates bar admission or appoints attorneys to represent indigents, it exercises its inherent judicial authority to regulate the conduct of the bar.

B. The Power of the Court Over its Officers

The court's power to regulate the bar derives in part from the attorney's status as an officer of the court, "subject to its control." In an early case in which the Supreme Court recognized that matters involving bar membership are almost exclusively within the jurisdiction of the federal district court, the Court emphasized the status of an attorney as a court officer, rather than a political officer, and stated that a court's admitting or excluding a lawyer from bar membership "is not the exercise of mere ministerial power ... it rests exclusively with the court to determine who may become one of its officers...."

130. Id.
131. FED. R. APP. P. 29.
132. Dowling, supra note 129, at 635. "There were courts centuries before there were lawyers; but today, the bench and bar are so intimately related that the problems of one are the problems of the other; and the courts, aided by the bar, hold the key to the solution of their problems." Id.
133. Dowling, supra note 129 at 641.
The attorney owes his first duty to the court. He assumed his obligations toward it before he ever had or could have a client. His oath compels him to be absolutely honest with the tribunal before which he practices, even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one he has undertaken to serve primarily, is the court.

136. Id. at 378-79.

Attorneys and counselors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature.
An attorney's subordination to the court stems from his or her responsibility as an officer of the court to aid in its administration of legal services. This is a role the attorney has filled since the inception of Western jurisprudence. The court can assert its judicial power over the bar because, unlike other occupations that are regulated legislatively, the privilege to practice law is the result of an adjudicative function of the court. No absolute right to practice law exists, and the legislature's influence over the bar is not coextensive with that of the court. The court can mandate that the prospective attorney be of "good moral character and professional skill," qualifications that the legislature cannot prescribe. This judicial imposition of exacting obligations upon the bar has been evident throughout the history of legal practice in the United States. In *Theard v. United States*, the Supreme Court echoed Justice Cardozo when he stated that "membership in the bar is a privilege burdened with conditions." An attorney is admitted into the "ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

Along with the obligations an attorney assumes by virtue of his or her admission to the bar, being duly licensed to practice law bestows certain reciprocal privileges upon the practitioner. Only an attorney can give legal advice for remuneration. A lawyer is entrusted to speak on behalf of others in court proceedings and call witnesses into court. Along with the training, experience, and privilege to capitalize upon the legal process, however, comes

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And hence their appointments may, with propriety, be intrusted to the courts, and the latter may very justly be considered as engaged in the exercise of their appropriate judicial functions.

*Id.* (quoting *In re Cooper*, 22 N.Y. 81 (1860)).
137. *See, e.g.,* Shapiro, *supra* note 90.
139. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. 354 U.S. 278, 281 (1957).
146. *Id.*
a corresponding duty to return to the court the favor of its effective utilization.\footnote{147}

As noted above, attorneys have a historical obligation to represent those unable to employ private counsel,\footnote{148} and a court may require a lawyer to render legal services without compensation.\footnote{149} Indeed, the Supreme Court has stated that, simply by virtue of an attorney's status as an officer of the court, the attorney is "bound to render service when required by ... appointment."\footnote{150} Contrary to some scholarly opinion that characterizes the "officer of the court" status as anachronistic, and misapplied at that,\footnote{151} the attendant responsibilities that accompany this status are as relevant today as they were in the past.

C. Ethical Mandates

The ethical rules governing the legal profession recognize that one aspect of the equitable administration of justice is that "legal services should be available to all,"\footnote{152} notwithstanding limited financial resources. Justice\footnote{153} is reduced to a mere marketable commodity if the only way to protect legal rights is to buy one's way into the system. In an attempt to solve the dilemma between the need for legal services and the inability to pay legal fees, the American Bar Association (ABA) has developed certain ethical directives.

An attorney is obligated as a matter of professional responsibility to render \textit{pro bono publico} service and to accept

\begin{footnotes}
\footnote{147. Recently the Third Circuit stated:}
\footnote{There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibilities for the administration of justice would be frustrated were it unable to enlist or require the services of those who have by virtue of their license, a monopoly on the provision of such services. United States v. Accetturo, 842 F.2d 1408, 1413 (3d Cir. 1988).}
\footnote{148. See supra notes 144—46 and accompanying text.}
\footnote{149. United States v. Dillon, 946 F.2d 633, 635 (9th Cir. 1995). See also Hurtado v. United States, 410 U.S. 578, 588—89 (1973).}
\footnote{150. Powell v. Alabama, 287 U.S. 45, 72—73 (1932) (emphasis added). Accord Waters v. Kemp, 845 F.2d 260, 265 (11th Cir. 1988). An attorney appointed to represent an indigent litigant "accepts the call because it is his bounden duty to do so, as an officer of the court." \textit{Id}.}
\footnote{151. See Shapiro, supra note 90.}
\footnote{152. \textit{Model Code of Professional Responsibility} EC 2-33 (1986).}
\footnote{153. \textit{Black's Law Dictionary} 447 (abridged 5th ed. 1983) defines "justice" as the "[p]roper administration of laws. In Jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his due." \textit{Id}.}
court appointments to represent those unable to retain private counsel. Rule 6.1 of the Model Rules of Professional Conduct provides that "[a] lawyer should render public interest legal service."\textsuperscript{154} The history of this rule characterizes \textit{pro bono} service as a "basic responsibility of each lawyer."\textsuperscript{155} The attorney has an obligation to represent cases in areas of the law that typically do not promise high fees, such as civil rights law, poverty law, and public interest law.\textsuperscript{156} The commentary to Rule 6.1 recognizes the increasingly complex nature of individuals' legal rights, and charges each lawyer with promoting equitable access to the courts by aiding in the administration of justice.\textsuperscript{157} The commentary further notes that various programs have formally instituted this "obligation" to provide legal representation to the indigent in order to supplement the often inadequate voluntary efforts made by individual attorneys.\textsuperscript{158} The commentary concludes that "every lawyer [should] support all proper efforts to meet this need for legal services."\textsuperscript{159}

Rule 6.2 of the Model Rules of Professional Conduct, entitled "Accepting Appointments," "mandate[s] that a lawyer not decline an appointment to represent a person except for good cause," and then lists several examples of what constitutes "good cause."\textsuperscript{160}

\textsuperscript{154} \textit{Model Rules of Professional Conduct} Rule 6.1 (1983). Rule 6.1 in its entirety reads:

\begin{quote}
A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.
\end{quote}

\textit{Id.}

\textsuperscript{155} \textit{Model Rules of Professional Conduct} Rule 6.1 comment (1983).

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} "[L]egal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do." \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} The comment states, in pertinent part:

\begin{quote}
The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. . . . Every lawyer should support all proper efforts to meet this need for legal services.
\end{quote}

\textit{Id.}

\textsuperscript{160} \textit{Model Rules of Professional Conduct} Rule 6.2 (Discussion Draft 1983) states:

\begin{quote}
A lawyer shall not seek to avoid appointment by a tribunal except for good cause, such as:
\end{quote}
One example is the situation in which “the client or the cause is so repugnant” as to impair the attorney's ability to represent the client competently. A caveat contained in the commentary to Rule 6.2, however, warns that “[t]he lawyer's freedom to select clients is ... qualified,” and reminds attorneys of their Rule 6.1 “responsibility in providing pro bono publico service.” The commentary specifically recognizes the authority of the court to appoint an attorney to represent unpopular or indigent clients. The discussion draft, the commentary, and the text of Rule 6.2 itself all imply that accepting court appointments is a mandatory responsibility, an obligation which requires the attorney to assist the bench in providing necessary legal services. The words “responsibility” and “obligation” impart a compulsory meaning to the tone of the Rule; any discretionary or aspirational interpretation by the lawyer is simply not there.

While lawyers may generally reject a particular case or client in the course of regular practice, this course is not an option under court appointments except in legitimate instances of conflicts of interest, attorney incompetency, or when the acceptance of the appointment would impose an undue financial burden upon the attorney. "Good cause" is carefully circumscribed so as not to give an unwilling attorney license to withdraw capriciously. Rule 1.16(c) states that “[w]hen ordered

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
(c) the client or the cause is so repugnant to the lawyer as to impair the client/lawyer relationship or the lawyer's ability to represent the client.

Id.
161. Id.
162. Model Rules of Professional Conduct Rule 6.2 comment (1983). The comment states in full:
A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico services. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Id.
163. Id.
164. Id.
to do so by a tribunal, a lawyer shall continue representation notwithsanding good cause for terminating the representation." 166

The commentary which follows the text of the Rule refers to the "appointing authority" of a court over an attorney. 167 The ABA clearly intended that a court's request constitute an order; otherwise, the language adopted in the Model Rules would have been more permissive.

Fee-for-service, of course, inheres in the attorney/client relationship and is a value to be promoted "in order to enable the lawyer to serve [the] client effectively and to preserve the integrity and independence of the profession." 168 But because excessive cost may deter an individual from exercising his or her legal rights, or prevent his or her even knowing of such rights, 169 poverty can completely foreclose one's utilizing the judicial system in any meaningful way. In recognition of the often prohibitive cost of justice, the ABA states that "[t]hose persons unable to pay for legal services should be provided needed services." 170 The responsibility for rendering those services has historically been placed upon lawyers who volunteered their services to the needy or who "accepted court appointments on behalf of such individuals." 171 Because it is "the objective of the bar to make


168. Model Code of Professional Responsibility EC 2-17 (1966). See also ABA Opinion 302 (1961). "When members of the bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient."

Id.


170. Model Code of Professional Responsibility EC 8-3 (1966). Accord Model Code of Professional Responsibility EC 8-9. "The advancement of our legal system is of vital importance in maintaining the rule of law ... [and] lawyers should encourage, and should aid in making needed changes and improvements." Id.


Every lawyer regardless of professional prominence or professional workload should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services.

Id. "Lawyers have peculiar responsibilities for the just administration of the law, and these responsibilities include providing advice and representation for needy persons." Report of the Att'y Gen.'s Comm. on Poverty and the Administration of Criminal
legal services fully available,”172 when a court or bar association appoints or requests an attorney to represent an indigent client, the appointment should not be declined except for the most compelling reasons.173

Although no sanction for refusal to accept court appointments exists in the Disciplinary Rules of the Model Code,174 once appointed, a lawyer is subject to every professional obligation inherent in the normal attorney/client relationship.175 As such, court-appointed attorneys are subject to the same sanctions as are privately retained attorneys for lack of due diligence and competence.176

IV. THE COMMENT CASE

A. Summary of the Facts

Against this backdrop of the legal, statutory, and ethical perspectives regarding mandatory court appointments, John Mallard, a practicing member of the Iowa State Bar Association admitted to practice before the District Court for the Southern District of Iowa, challenged the federal court’s power under 28 U.S.C. section 1915(d) to compel his representation of indigent


173. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1986).

Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the case.

Id. “When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 comment (1983). In exceptional circumstances, an attorney may seek withdrawal from an appointed case because it wholly lacks merit. See Anders v. California, 386 U.S. 738, reh’g denied, 388 U.S. 924 (1967); Caruth v. Geddes, 443 F. Supp. 1295 (N.D. Ill. 1976); MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.1; Note, Withdrawal of Appointed Counsel from Friculous Indigent Appeals, 49 Ind. L. J. 140 (1974). See also, Weiner v. Fulton County, 113 Ga. App. 343, 149 S.E.2d 143 (1966), cert. denied, 385 U.S. 958 (1966) (“[E]xcept in unusual circumstances, [a lawyer] has no right ... to refuse a case which he is requested to take by a judge of the court before whom he regularly appears....”) Id.

176. Id.
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The Eighth Circuit directed its district courts to compile the names of attorneys who could accept federal court appointments. Pursuant to this directive, the Volunteer Lawyer's Project (VLP) assigned Mallard to represent two indigent federal prison inmates and one indigent former inmate of the Iowa State Penitentiary in a civil rights action brought under 42 U.S.C. section 1983 against prison officials. Mallard filed a motion to withdraw on the grounds that he was inexperienced in civil rights litigation and therefore incompetent to represent the litigants adequately. The VLP opposed the motion and contended that Mallard was competent, that he had an ethical responsibility to accept the case, and that permitting him to withdraw would obviate the court's interest in hearing indigent cases meriting court resolution. The motion to withdraw was denied by a federal magistrate who ruled that Mallard was competent to handle the case.

Mallard sought review of the magistrate's denial in federal district court and asserted, in addition to his inexperience in civil rights law, a disinclination toward litigation, stating that he did not like "the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." The district court affirmed the magistrate's decision and ruled that 28 U.S.C. section 1915(d) empowers the federal


178. To be eligible for appointment, an attorney must be a member in good standing of the Iowa State Bar Association and be licensed to practice before the United States District Courts for the Northern and Southern Districts of Iowa. Mallard, 109 S. Ct. at 1815.

179. The VLP kept a copy of the district courts' list of names from which to select attorneys for § 1915(d) assignments. Id. at 1816. Lawyers who had volunteered to do pro bono cases in state court were exempt from selection; all other attorneys were subject to random selection for appointment. Id. Compensation was not guaranteed. Id. at 1817. Attorneys could either apply to the court for reimbursement or settle for any available statutory fee award. Id.

180. The inmates alleged that prison authorities had solicited their help as informants and had failed to conceal their identities. Id. at 1817. The inmates also alleged general mistreatment by prison guards and administrators. Id.

181. Id. Mallard's practice specialty was bankruptcy and securities law. Id.

182. Id.

183. Id.

184. Id. (citing Brief for Appellant at 38).

185. Id. The district court found that Mallard's claim of incompetence was belied by the quality of the brief in support of his motion to withdraw. Traman v. Parkin, No. 87-317-B, slip op. at 3a (S.D. Iowa Nov. 5, 1987).
court to appoint attorneys and to require attorneys to accept the representation of indigent litigants in civil cases.\(^{186}\)

Mallard then sought to compel the district court to grant his motion by way of a writ of mandamus from the Eighth Circuit Court of Appeals.\(^{187}\) The circuit court denied the writ without opinion.\(^{188}\) The Supreme Court granted certiorari to resolve the question of whether 28 U.S.C. section 1915(d) authorizes the federal courts to compel a lawyer to represent an indigent civil litigant upon court appointment.\(^{189}\)

**B. The Opinions of the Court**

In a narrow five to four decision, the Supreme Court held that section 1915(d) does not authorize a federal court to compel an appointed attorney to represent an indigent civil litigant.\(^{190}\) Justice Brennan wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White and Scalia.\(^{191}\) The Court focused on the plain meaning of the statute's language, and found that section 1915(d)'s operative term "request," as ordinarily used today, clearly means an invitation to comply.\(^{192}\)

The Court contrasted the use of the term "shall" in subsection (c) of the statute with subsection (d)'s use of the term "request."\(^{193}\) Based on this comparison, the Court found that subsection (c) guaranteed an indigent the same procedural amenities accorded a party able to pay court costs, while subsection (d) did not guarantee an indigent the services of an attorney.\(^{194}\) The Court

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\(^{186}\) Id.

\(^{187}\) Id.

\(^{188}\) Mallard, 109 S. Ct. at 1817.

\(^{189}\) Id. at 1816.

\(^{190}\) Id., 109 S. Ct. at 1814.

\(^{191}\) Justice Kennedy filed a concurring opinion, in which he emphasized that the majority reached their decision solely by way of statutory interpretation. Id. at 1823. He stressed that the bar's ethical duty to the court nonetheless obligates attorneys to accept court appointments. Id. See infra notes 203—07 and accompanying text.

\(^{192}\) Id. at 1818.

\(^{193}\) Id.

\(^{194}\) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.


\(^{194}\) Mallard, 109 S. Ct. at 1818.
stated that this semantic distinction provided the "clearest proof" for holding that section 1915(d) does not authorize compulsory appointment of counsel.\textsuperscript{195}

The Court continued its analysis, examining comparable state in forma pauperis statutes that it assumed Congress had consulted before adopting section 1915(d). The Court found that these statutes gave state courts authority to "assign" or "appoint" attorneys.\textsuperscript{196} The Court concluded that, by not using the same terms employed in state statutes, Congress affirmatively intended to decline to require mandatory representation of indigent civil litigants.\textsuperscript{197} The Court noted that the state courts' power to appoint or assign attorneys empowered the courts to sanction attorneys who refused to accept the appointment, in spite of an admitted lack of evidence on that point.\textsuperscript{198} The Court reasoned that Congress deliberately avoided patterning the federal statute after the "system of coercive appointments" found in state statutes that used the terms "assign" or "appoint," by employing the more permissive verb "request."\textsuperscript{199}

The majority further analyzed how other federal statutes that empower courts to assign or appoint attorneys differ from section 1915(d).\textsuperscript{200} The Court found that those statutes provide "assigned"

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 1819.

\textsuperscript{197} The Court assumed that an "assignment" or "appointment" of counsel denotes a corollary authority to enforce the directive, and reasoned that:

Congress' decision to allow the federal courts to do no more than 'request' attorneys to serve, in full awareness of more stringent state practices, seems to evince a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them do so.

\textsuperscript{198} Id.

\textsuperscript{199} Id. at 1819.

\textsuperscript{200} Although examination of statutory intent is generally not undertaken when the terms of a statute are unambiguous, the Court nonetheless analyzed the legislative intent behind the enactment of section 1915(d). This analysis suggests that the Court perceived at least some ambiguity in the statute's otherwise "plain" meaning. Prior to § 1915(d)'s enactment, the only other federal statute authorizing appointment of counsel was the
or "appointed" counsel largely in cases in which the potential loss of liberty is great, such as in criminal proceedings.\textsuperscript{201} As a result of this comparison, the majority found that if Congress had desired to provide for court-ordered representation in section 1915(d), it would have followed these "coercive representation" statutes and used such terms as "appoint" or "assign."\textsuperscript{202}

In a concurring opinion, Justice Kennedy underscored his belief that the traditional obligations that attach to the status of an attorney as an officer of the court should be left intact.\textsuperscript{203} He emphasized that his concurrence only went to the interpretation of statutory language, and not to the professional responsibility of the attorney.\textsuperscript{204} Indeed, his very brief concur runce emphasized lawyers' obligations to the court no less than six times.\textsuperscript{205} The only point with which Justice Kennedy specifically concurred is that section 1915(d) does not explicitly mandate an attorney's acceptance of an appointment.\textsuperscript{206} Providing a fair trial for indigents by ensuring professional representation is still imputed as an ethical obligation upon the bar, however, and the \textit{Mallard} majority emphasized that attorneys should not forsake this obligation.\textsuperscript{207}

The dissent\textsuperscript{208} refused to see the issue as a matter of strict statutory construction and instead focused on the companion responsibilities of the bench and its practicing bar.\textsuperscript{209} The dissent specifically recognized the power of a court to impose certain obligations upon attorneys in order to ensure the orderly

\begin{itemize}
\item Act of April 30, 1790, ch. 9, § 23, 1 stat. 118 (current version at 18 U.S.C. § 3005 (1968)), which states that the court shall "assign" court-ordered representation to a capital defendant.
\item \textit{Mallard}, 109 S. Ct. at 1821. A federal court can also appoint defense counsel in Indian child custody proceedings, voting rights cases, and commitment proceedings. \textit{Id.} Further, a plaintiff may be appointed counsel if seeking an injunction under the Civil Rights Act of 1964 or if bringing an action under Title VII. \textit{Id.}
\item \textit{Id.}
\item Mallard, 109 S. Ct. at 1823 (Kennedy, J., concurring).
\item Id. (Kennedy, J., concurring).
\item Id.
\item \textit{Id.} The fact that the concurrence emphasized on attorney's duty to the court, considered in conjunction with the majority's holding that section 1915(d) does not authorize courts to force attorneys to accept indigent clients, strongly supports the existence of a court's inherent power to compel representation, regardless of statutory legitimacy. The Court's opinion in \textit{Mallard} certainly does not minimize the federal district court's power to equitably administer justice; further, it recognizes that courts still possess the authority to appoint. \textit{Id.}
\item Id.
\item Justice Stevens wrote the dissent, joined by Justices Marshall, Blackmun, and O'Connor. \textit{Id.} at 1823.
\item \textit{Id.}
\end{itemize}
management of its own judicial processes and an attorney's ethical duty as an officer of the court to provide legal services to the poor.

The dissent read section 1915(d) in terms of the legal context of 1892, the year that the statute was enacted. At that time, state courts had common law and statutory authority to appoint counsel, who were thus obligated to defer to the court's request. Careful reading of the legislative history showed that Congress intended to import the benefit to indigent litigants extant at the state level to federal courts so that, if a defendant removed a state case to federal court, the indigent litigant would not be summarily defeated by poverty.

The federal court's power to appoint was not seriously in dispute in Mallard; the court's power to compel acceptance of the appointment was at issue only insofar as section 1915(d) language circumscribed that obligation, if at all. Section 1915(d) was introduced in Congress "as an Act empowering courts to 'assign' counsel for poor persons" and was entitled ""An act providing when plaintiff may sue as a poor person and when

210. "[A] court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar." Id. at 1824 (Stevens, J., dissenting) (citations omitted).

211. Id. While the majority relied upon recent legal scholarship which disputed the historical accuracy of the comparison between 15th century officers of the court and their 19th century counterparts, Mallard, 109 S. Ct. at 1818—19, n.4, the dissent pointed out that the ethical tradition that emerged from such a status—however historically flawed it might be—has nevertheless been perpetuated by attorneys who have complied with court appointment. Id. at 1823, n.6 (Stevens, J., dissenting).

212. Id. at 1825 (Stevens, J., dissenting).

213. Id.

214. Justice Stevens quoted language which stated the congressional intent in enacting § 1916 to "'open the United States' courts to impoverished litigants and 'to keep pace' with the laws of these [many humane and enlightened states.'" Id. (quoting H.R. Rep. No. 1079, 52d Cong., 1st Sess., pts.1—2, at 1 (1892)).

215. Mallard, 109 S. Ct. at 1824. At the time in which section 1915(d) was enacted, state courts recognized both their power to appoint and the attorney's duty to accept: "Membership in the bar is a privilege burdened with conditions. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. His cooperation with the court was due whenever justice would be imperilled if cooperation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay." Id. n.4 (quoting Justice Cardozo as a judge on the New York Court of Appeals in People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470—71, 162 N.E. 487, 489 (1928) (citation omitted)).
counsel shall be assigned by the court.” Federal court decisions subsequent to the statute’s enactment uniformly used the term “assign” to describe the court’s power to secure counsel for indigent litigants under section 1915(d). Thus, rather than indicating a deliberate decision by Congress to deny a federal court the power to enforce its appointment authority, the dissent reasoned that the terms “assign” and “request” could be used interchangeably.

In addition, because the drafters of the statute evidently “understood these terms to impose similar obligations,” they “simply assumed that [attorneys] would perform the assigned tasks when requested to do so by the court.” The dissent construed the word “request” to mean “respectfully command” in the context of the relationship between the court and the attorneys admitted to practice before it. Any other construction of the term would render the statute a virtual nullity, since appointing counsel who could freely refuse the court’s appointment would vitiate the statute’s purpose of providing indigent litigants the means to prosecute claims in federal court.

C. Legislative History of Section 1915(d)

When Title 28 U.S.C. section 1915 was enacted by Congress, the trend in state legislatures was to codify an indigent’s right to present a claim by way of court-appointed representation. The Supreme Court’s opinion in Mallard turns on its interpretation

217. Id. at 1826 (Stevens, J., dissenting).
218. Id.
219. Id.
220. Id.
221. See supra text accompanying notes 26—29.
223. Mallard, 109 S. Ct. at 1819.

In 1892, state courts had statutory authority to order lawyers to render assistance to indigent civil litigants in a dozen States ... and common law power to appoint counsel in at least another 10 States. Congress intended to ‘open the United States courts’ to impoverished litigants and ‘to keep pace’ with the laws of these ‘many humane and enlightened States.’ (quoting H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1—2 (1892) (other citations and footnotes omitted).

Id. at 1825 (Stevens, J., dissenting).
that a district court's authority to "request an attorney to represent any such person unable to employ counsel" does not embrace the court's power to require the attorney to provide services. This conclusion is based on the majority's interpretation of the plain meaning of the term "request" and its contemporary usage as a precatory invitation to submit to the court's appointment.

The term "request," however, has various meanings that fall between permissive and obligatory connotations. While "request" can mean "to ask" in the sense of seeking compliance, it can also mean "demand." The term's connotation when section 1915(d) was enacted is especially relevant in interpreting the statute. An 1891 edition of Black's A Dictionary of Law notes that the terms "request" and "require" are of the same derivation, and defines "request" as virtually synonymous with "require."

The meaning of "request" may also change depending upon the context and circumstances under which a request arises. As an officer of the court, an attorney is not at liberty to lightly decline a court's directive. Given the nature of the superior/subordinate relationship between the court and its practicing bar, a court's request of the lawyer's services "is tantamount to a demand" from a superior officer.

226. Id.
228. Id. One definition of “request” is “the state of being sought after: demand.” Id. (emphasis added).
230. Interpreting the meaning of "request" only nine years after section 1915 was enacted, the Supreme Court of Nebraska held that “[a] request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form.” State ex rel. Freeman v. Scheve, 93 N.W. 169, 170 (1903).
231. Weiner v. Fulton County, 113 Ga. App. 343, 345 (1966). In State ex rel. Scott v. Roper, 688 S.W.2d 757, 773 (1981), Judge Blackmar dissented to an opinion that held that a court lacks inherent power to compel attorneys to accept uncompensated civil actions and exclaimed: I have often served on court appointments, and I am sure that my brethren have also. When a judge said, 'help me out,' I really felt that I had no choice. Perhaps I had in mind the old army maxim that the commanding officer's desire is the subaltern's command. Perhaps I thought the court could use its coercive power.
The *Mallard* majority’s contention that “request” is precatory is also difficult to reconcile with the language of the brief House debate concerning this section of the bill. The following exchange between the bill’s sponsor and a fellow representative clearly reveals the statute’s compulsory intent:

MR. STONE: In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?  
MR. CULBERSON: They do not get any in that event.  
MR. STONE: Then you are simply compelling the officers to do that work for nothing.  
MR. CULBERSON: We are simply in these cases of charity and humanity *compelling* these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much *ex officio* service.232

The *Mallard* Court read this exchange as referring to ancillary court officers and witnesses rather than to attorneys, despite the fact that attorneys were clearly characterized at this time as officers of the court.233

Subsection (c) of section 1915 speaks of “[t]he officers of the court” who “shall issue and serve all process, and perform all duties in such cases”; of witnesses who “shall attend as in other cases”; and of “the same remedies [that] shall be available as ... provided for by law in other cases.”234 Because subsection (d) states that “[t]he court may request an attorney” to represent an indigent litigant,235 the *Mallard* majority concluded that the intent of Congress was to *require* the service of only ancillary court officers such as bailiffs and court reporters.236 This tortured dismantling of the statute’s language and its resultant conclusion are inconsistent with the legislative history and obvious intent and purpose of the statute.

The House debate quoted above concerned the uncompensated services of officers who were compelled to serve when the court

232. 23 CONG. REC. 5199 (1892) (emphasis added).  
233. *See supra* note 146 and accompanying text.  
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decided that a case merited judicial resolution.237 These “officers”
did not have to do much ex officio service, yet they were clearly
required to do some. “Ex officio” refers to powers implied by
virtue of one’s status.238 It is a great leap of logic to assume that
incidental courtroom personnel in 1892 commanded noteworthy
salaries, operated under an ethical compulsion, or were obligated
by certain judicial responsibility that extended beyond the scope
of their defined occupation. These characteristics more aptly
describe attorneys who were professionally known as officers of
the court and who assumed corresponding privileges and duties.
It would make no sense to require service of ancillary court
officers and witnesses and exempt lawyers from compulsory
service. Nor would it make sense to require participation by
others who did not have the historical ethical obligation to
represent the indigent and not mandate the same from attorneys
who are the sole heirs to that long tradition.239

The congressional intent behind 28 U.S.C. section 1915(d) is
further illuminated by a House report revealing that Congress
was motivated to enable indigent litigants to proceed in forma
pauperis because of its belief that “judicial access should not be
denied for want of sufficient money or property to enter the
courts under their rules.”240 Congress’ goal to make the federal
courts accessible to indigent litigants241 required legislation which
would give federal courts power commensurate with that of
courts in states which had laws allowing compulsory appointment
of attorneys.242 This parity was critical to prevent defeat of an
indigent’s claim were the case strategically removed to federal
court.243 In that instance, poverty would be the sole obstacle to

237. See supra note 239 and accompanying text.
238. BLACK’S LAW DICTIONARY 597 (abridged 5th ed. 1983) defines “ex officio” as powers
not specifically conferred upon an officer, but “necessarily implied in his office.” For
example, “a judge has ex officio the powers of a conservator of the peace.” Id.
239. See supra note 3.
242. See, e.g., Hecker v. Mackey, 32 F. 574 (G.C.S.D.N.Y. 1887); Lamon v. Solano
County, 49 Cal. 158 (1874); Rowe v. Yuba County, 17 Cal. 61 (1860); Elam v. Johnson, 48
Ga. 348 (1873); Hall v. Washington County, 2 Greene 473 (Iowa 1850); Case v. Board of
County Comm’rs of Shawnee County, 4 Kan. 511 (1868); State v. Simmons, 43 La. Ann.
991, 10 So. 588 (1891); Bacon v. Wayne County, 1 Mich. 461 (1850); Johnson v. Lewis &
Clarke County, 2 Mont. 159 (1874); Dismukes v. Board of Supervisors of Noxubee County,
48 Misc. 612 (1881); House v. Whitis, 64 Tenn. 690 (1875); Dane County v. Smith, 13 Wis.
585 (1861).
243. See supra note 214 and accompanying text.
judicial resolution, a result Congress found utterly indefensible.\footnote{Will the government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice? H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892).}

The congressional intent that motivated the passage of section 1915 is also clarified by the pervading legal values attendant to the historical climate of the late 19th century. Justice Stevens’ dissent in \textit{Mallard} noted the opinion of constitutional scholar Professor Thomas Cooley on the subject of court appointments of counsel, written just prior to the statute’s enactment. Professor Cooley stated that “[n]o one is at liberty to decline such an appointment, and few, it is hoped, would be disposed to do so.”\footnote{T. Cooley, \textit{Constitutional Limitations} 334 (2d ed. 1871).} In a footnote, Professor Cooley added that

\begin{quote}
[a] court has the right to require the service whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice.\footnote{Id. at 334 n.1.}
\end{quote}

D. Precedential Authority

The \textit{Mallard} majority not only performed a superficial analysis of legislative intent, it also made a bold and unwarranted departure from precedent. Following the enactment of section 1915(d), federal courts uniformly interpreted “request” to mean that attorneys could be appointed or assigned to take indigent cases.\footnote{See, e.g., Brinkley ex rel. Vanderbilt & N.R.R. Co., 95 F. 345, 353 (C.C.W.D. Tenn. 1899) (tracing the origin of section 1915(d) to a statute of Henry VII authorizing judges to “assign” and “appoint” attorneys for poor persons); United States ex rel. Randolph v. Ross, 298 F. 64, 66 (6th Cir. 1924) (“assign”); Phillips v. Louisville & N.R.R., 153 F. 795, 797 (C.C.N.D. Ala. 1907), aff’d, 164 F. 1022 (5th Cir. 1908) (“assign”); Whelan v. Manhattan Ry. Co., 86 F. 219, 220–21 (C.C.S.D.N.Y. 1898) (“assign”); Boyle v. Great N.R., 63 F. 539 (C.C. Wash. 1894).} In \textit{Brinkley v. Louisville & Northern Railroad Co.},\footnote{Brinkley v. Louisville & Northern Railroad Co., 86 F. 219, 220–21 (C.C.S.D.N.Y. 1898).} a federal district court based its interpretation of the newly-enacted statute on an early English statute\footnote{See supra note 3.} which gave paupers the right of free access to the courts and the right of court-appointed counsel.\footnote{Brinkley, 95 F. at 353.}
The court imputed the “imperative commands”\(^\text{251}\) of the English statute to section 1915(d). Though the Brinkley court noted that a court could not compel an attorney to represent an indigent without meeting the requisite good faith and affidavit of poverty preconditions necessary to proceed in forma pauperis,\(^\text{262}\) the court implied that if those conditions were met, a court could compel an attorney to serve.

In reaching its conclusion that section 1915(d) does not authorize a federal court to require an attorney’s representation of an indigent, the Supreme Court in Mallard even ignored its own previous interpretation of the mandatory nature of court appointments. In Adkins v. DuPont de Nemours & Co.,\(^\text{253}\) the Supreme Court had interpreted section 1915(d)\(^\text{254}\) in a manner consistent with the holdings of early cases which, in turn, had simply reiterated the common law tradition of allowing the indigent unimpeded access to the courts.

The issue in Adkins was the sufficiency of an affidavit of poverty, as required by subsection (a) of section 1915.\(^\text{255}\) The Court first noted that Rule 75(m) of the Federal Rules of Civil Procedure provided a district court with the discretion to fashion for indigents a less expensive means of preserving the record for appeal.\(^\text{256}\) But reducing or waiving court costs and filing fees alone did not guarantee an indigent his day in court, since counsel fees were at least as prohibitive as procedural fees to a litigant of limited financial means.\(^\text{257}\) The Adkins Court specifically spoke

\(^{251}\) Id.

\(^{252}\) Id. at 355. “It would be an injustice to the officers of the court to compel them to work for [the plaintiff] without compensation, on his taking the pauper’s oath, merely to gratify [the plaintiff’s] obstinate ambition to try the case he thinks he makes, but does not, in the appellate courts.” Id. In this case, the court did not appoint an attorney because it determined that the case was frivolous. Id.

\(^{253}\) 335 U.S. 331 (1948).


\(^{256}\) Appeals In Forma Pauperis

Upon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court.

\(^{257}\) Adkins, 335 U.S. at 337 (citing Fed. R. Civ. P. 75(m)).
of section 1915(d) as providing for appointed counsel, in spite of the statute's "may request" language, and interpreted the provision as an assurance of legal representation when it stated that "[Section] 4 [now subsection (d) of 28 U.S.C. section 1915] of the in forma pauperis statute was plainly intended to assure legal representation to the poor." Clearly, allowing judicial modification or waiver of court costs in subsection (a) without a corollary provision guaranteeing attorney services free of charge would vitiate the statute's intent to provide judicial access for meritorious claims. Significantly, the Court noted that "[t]he same poverty that compels a litigant to avail himself of this beneficial statute makes it impossible for him to hire counsel." While the issue in Adkins did not deal directly with whether an attorney requested under subsection (d) was required to donate his legal services, the implication was obvious: appointed attorneys serve when asked by the court to represent those who cannot afford to retain counsel.

E. The Court's Affirmance of the Lawyer's Ethical Duty

Since the traditional duty of professional service was extolled by legal scholars prior to the statute's enactment, it may be assumed that Congress in 1892 was aware of the responsibilities that the legal profession owed to the court in administering justice. Ironically, the Mallard Court affirmed this obligation, despite holding that section 1915(d) does not require attorneys to accept appointments. The Court emphasized that its holding

258. Id. at 342.
259. Id. (emphasis added).
260. Id. at 343.
261. Id. at 342.
Section 1 of that statute is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States solely because his poverty makes it impossible for him to pay or secure the costs. Not content with this safeguard for the poor in federal courts, Congress in § 4 of the Act provided that the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of trial. . . .

Id. (emphasis added).
262. Id. at 343 (citing Clark v. United States, 57 F.2d 214, 216 (1932) (emphasis added)).
263. See supra notes 252—53 and accompanying text.
264. Mallard, 109 S. Ct. at 1823.
was strictly limited to a statutory interpretation of section 1915, and then added language that appears to institute by judicial fiat everything that the Court contended was absent in the legislation. The Court emphasized an attorney's "ethical obligation to assist those who are too poor to afford counsel" and stated that court requests of counsel are not to be declined capriciously. The Court stressed that an attorney's obligation to render pro bono service is especially compelling because of the great discrepancy between the poor's need for legal services and public funding for such services. Because of these ethical and policy exhortations in support of accepting court appointments of indigent cases, it appears that the Supreme Court desires the practice of court appointment and compulsory acceptance to continue, but on an ethical, rather than statutory, basis.

The majority's conclusion that section 1915(d) is not "coercive" and, therefore, not mandatory, trivializes the relationship between the court and its practicing bar. Simply put, legal professionals are motivated to accept the court's request to represent the indigent by a higher calling than the threat of punitive sanctions. For the Supreme Court to intimate otherwise denigrates the longstanding tradition of the profession's ethical responsibilities. Justice Stevens put it best when he opined in his dissent that "Congress gave its endorsement to these judicial 'requests,' assuming that it would be 'unthinkable' for a lawyer to decline without an adequate reason."

CONCLUSION

The fact that the Mallard majority so strongly emphasized an attorney's ethical obligation to render uncompensated service to the indigent makes further exposition of the value of equitable administration of justice superfluous. It is difficult to imagine reducing justice to a mere commercial transaction, void of any

265. Id. at 1822.
266. Id.
267. Id. at 1823.
268. Id. The majority insisted on holding "that § 1915(d) does not authorize the federal courts to make coercive appointments of counsel." See supra note 198 and accompanying text.
269. Id. at 1827 (footnote omitted) (Stevens, J., dissenting).
moral imperative or lacking in any revered status in history.\textsuperscript{270}

While it is laudable that the Court affirms a lawyer's ethical obligations to serve \textit{pro bono}, the assumption that attorneys will heed the court's call and voluntarily provide services is questionable. The fact that Mallard was able to withdraw from the district court's appointment because he did not like to litigate may make it easier for attorneys to decline cases that are not a part of their regular practice. This leaves the courts in a position of either turning indigents' cases away or searching for someone willing to accept the appointment.

Some courts view the increasing volume of indigents' cases in need of appointed counsel as "approaching crisis proportions."\textsuperscript{271} While courts may be reluctant to impose the burden of uncompensated service upon lawyers, they have no choice if they are to discharge their duty to assure the poor meaningful access to the judicial process.\textsuperscript{272}

A solution to the dilemma does not rest solely on the strength of the court's authority to coerce the bar to bend to its will. The problem of administering indigent civil cases reaches beyond the power of the court to remedy alone. Federal funds to compensate \textit{pro bono} services have not kept pace with the expense of such service. Consequently, an attorney may be tempted to forego some measure of the effort normally expended for a paying client.\textsuperscript{273} While courts have the power to exercise their authority over an attorney, they do not have the power to designate public funds to compensate public service.\textsuperscript{274} Ultimately the buck stops at the legislature. As Alexander Hamilton wrote in \textit{The Federalist}

No. 78:

\begin{quote}
\textsuperscript{270} The preamble to the U.S. Constitution states in part: "We the People of the United States, in Order to form a more perfect Union, establish Justice..." U.S. Const.
preamble.
\textsuperscript{271} See, e.g., State \textit{ex rel.} Wolff v. Ruddy, 617 S.W.2d 64, 66 (Mo. 1981) (en banc).
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} State \textit{ex rel.} Scott v. Roper, 688 S.W.2d 757, 768 (Mo. 1985) (en banc). "The quality of the uncompensated service can be expected to decrease in almost direct proportion to the loss of choice of the professional rendering the service." \textit{Id.}
\textsuperscript{274} See State \textit{ex rel.} Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981) (en banc).
\end{quote}
The executive not only dispenses the honors but holds the sword of the community. The Legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may be truly said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment. 275

The courts cannot allow those without enough money to hire a lawyer to fall through the cracks of justice while the legislature waits to put compensation of appointed attorneys on its agenda. "[I]t is precisely because [legal professionals'] duties go beyond what the law demands" 276 that the courts may ask the practicing bar for help, and "do so without apology." 277

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275. A. Hamilton, The Federalist No. 78, at 465 (quoted in State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 66 (Mo. 1981) (en banc)).
277. State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65 (Mo. 1981) (en banc).