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Statutory Assistance for Attorneys Providing Pro Bono Services

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Statutory Assistance for Attorneys Providing Pro Bono Services

Missouri attorneys now have the statutory assistance they need to take a more active role in assisting the low-income and underrepresented members of our communities.

Supreme Court Rule 4-6.1, "Pro Bono Publico Service,"² reminds licensed Missouri attorneys of their responsibility to provide "public interest legal service[s]." According to this rule, attorneys are to provide services "without fee, or at a substantially reduced" rate to individuals who have legal needs falling within the areas of "poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice."³ Results of a recent survey commissioned by The Missouri Bar indicate that Missouri attorneys take this responsibility seriously.

The survey indicates that, on average, active licensed attorneys devote approximately 220 hours per year to pro bono activities.⁴ Even by the most conservative estimates, the value of this donated time approaches \$202 million a year.⁵ Community boards receive the most donated time, valued at \$78 million per year. Free legal help for the poor gets approximately \$50 million, church boards receive around \$27.5 million, reduced



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fees for legal services adds up to \$26 million, bar committees donated time is valued at \$12.5 million and, finally, helping legal services programs is valued at approximately \$7 million.⁶

Although the amount of time, energy, and resources devoted to pro bono work in Missouri is substantial and should be

commended, a substantial gap remains between the needs of low-income, underrepresented populations and the pro bono services offered by the state's attorneys. Of the 220 hours of donated pro bono time, only about one-half (110.25 hours) is offered in the way of legal assistance at reduced fees (68.36 hours annually) and free legal assistance to the poor and under-represented members of the community (41.89 hours).⁷

In [almost every] state, surveys indicate that only about 20 percent of low-income individuals' legal needs are being met. A survey conducted in Missouri showed that low-income parents had the greatest number of unmet legal needs. The Public Policy Research Centers at the University of Missouri-St. Louis assessed legal needs among indigent Missourians [over a] three-year period [and found that] approximately 345,000 low-income persons needed legal assistance but did not go to a lawyer.⁸

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² RULE 4-6.1 Pro Bono Publico Service:

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.

Mo. SUP. CT. R. 4-6.1.

³ RULE 4-6.1, Comment: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged."

⁴ *Pro Bono Work Among Missouri Lawyers: Results of Interviews Conducted on a Representative Sample of Attorneys in August 2002*, The Missouri Bar by Greg Casey, University of Missouri-Columbia, 2002, available at www.mobar.org.net/research. The breakdown of hours is: community board activities (70.51 hours), legal assistance offered at reduced fees (68.36 hours), free legal assistance to the poor (41.89 hours), activities on church boards (26.9 hours), service on bar committees (13.71 hours), helping legal services programs (8.17 hours), and judicare (10 minutes).

⁵ *Id.* To address the question of the value of time donated, the survey used the standard figure of \$100 per hour.

⁶ *Id.*

⁷ *Id.*

⁸ www.mobar.net/member/act-bono.htm. There is currently no program available to provide immediate legal assistance to older Missourians in matters dealing with consumer law, personal protections, housing, and health care. AARP Annual Report, October 2002, lists consumer matters, personal protections, housing and health as the leading concerns of help line callers. Data specific to victims of violence indicates that the numbers are on the rise. According to the Office of State Courts Administrator, in 1993 there were 8,448 orders of protection filed; in 2002, 12,966 petitions were filed. According to the American Bar Association, legal services programs in Missouri are able to serve only one in five low-income clients in need.

The Missouri Bar, Pro Bono Information. "The Legal Services Corporation believes that to provide a bare minimum of legal services – two lawyers are needed for every 10,000 people living below federal poverty levels. To provide this minimal access in Missouri, it would take 133 full-time staff attorneys – 67 more attorneys than are currently on staff at Legal Services offices [across the state]."

The main reason for their reluctance was that they did not think they could afford an attorney.

At the same time, attorneys have concerns about the cost of providing the legal representation that low-income individuals need. For many attorneys, the desire to take a more direct and active role in representing these unmet needs is dampened by the daunting expenses that they may have to incur when taking on a client. We may be willing to donate our time and office resources, or provide them at a reduced rate, but we know that, in some types of cases, the costs and fees associated with representation will exceed our capacity. We may not have responded to requests for representation in the past because the fees required by the courts themselves were beyond the financial capabilities of the individuals requesting assistance. The Missouri legislature and the Missouri courts of appeals' recent interpretation of § 514.040, RSMo 2002⁹ (hereinafter § 514.040) now provides the keys for us to open our offices to those needing representation. This article describes statutory tools presently in place that may allow Missouri attorneys to take a more active role in assisting the low-income and under-represented members of our community.

The right of an individual to have access to our court system, regardless of income level, was well-established in Missouri before it joined the union and

became a state.¹⁰ In fact, an *in forma pauperis* statute was one of Missouri's first enacted laws after admittance to the union.¹¹ This right was further guaranteed in Article 1, § 14 of the Missouri Constitution, where it has remained unchanged. Over the years, the Missouri legislature has tried to address the practical realities of giving the poor access to the courts. Their current response is found in § 514.040.¹²

First, § 514.040(1) establishes a procedure for a client is to file a motion to proceed *in forma pauperis*.¹³ In most cases, the courts will act within their discretion and rule on the motion without requiring a hearing. On the rare occasion that a court wishes to hold an evidentiary hearing, it is a two-stage process. Initially, the hearing is set to determine petitioner's status as an indigent.¹⁴ The court may require an affidavit from the petitioner setting out particulars of his or her current financial condition. The court may require affidavits from others or "adopt some similar procedure to discover plaintiff's true financial [state]."¹⁵ After the client is deemed "poor," the court examines the "petition to see if it is patently and irreparably frivolous or malicious on its face so that, as pleaded, [movant] could prove no set of facts entitling him to relief."¹⁶ If the court deems the action to be frivolous or malicious, petitioner is not allowed to proceed.

Once the client has been determined to be indigent, the statute allows for the person to have "all necessary process and proceedings as in other cases, without fees, tax or charge as the court determines the person cannot pay."¹⁷ Since the inception of the statute, the courts have struggled to define "necessary process and proceedings." The legislature did not enumerate specific items or give guidance as to what would fall within the scope of that term. However, Missouri law does require that "words and phrases [of statutes] be taken in their plain or ordinary and usual sense."¹⁸ Therefore, the courts have found that filing fees should be waived for those determined to be indigent.¹⁹

Filing the motion to proceed *in forma pauperis* may seem more trouble than it is worth to get a filing fee waived. Although these fees, and others, may seem nominal to most of us in the legal community, even these minimal amounts in many cases keep clients from pursuing actions pro se or contacting an attorney. If a client does request our services, and we are inclined to assist them, filing this motion will allow us to file their case free of charge. The waiving of this nominal fee, in and of itself, may open the doors of justice to additional members of our communities.

The courts have also found that the costs of service are "necessary process and proceedings" that must be waived for

⁹ Section 514.040, RSMo 2000. Section 514.040.1, RSMo 2000.

Except as provided in subsection 3 of this section, if any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay all or any portion of the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge as the court determines the person cannot pay; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.

¹⁰ Territorial Laws of Missouri, 340, chapter 121 (1842). Paupers Act of January 2, 1815.

¹¹ Territorial Laws of Missouri, 843 chapter 363 (1842).

¹² Prior Laws and Revisions: 1889, § 2918; 1899, § 1545; 1909, § 2261; 1919, § 1692; 1929, § 1240; 1939, § 1404. The most recent amendment to the statute and its beneficial impact on an attorney's ability to assist indigent clients will be discussed at the end of the article.

¹³ It should be noted that this motion may be made "before or after the commencement of any suit pending before [the court]." Section 514.040(1), RSMo 2000. The motion is usually accompanied by an affidavit of the party setting forth their financial status.

¹⁴ Although "petitioner" will be used in this article, respondents may utilize § 514.040, RSMo 2000, as well.

¹⁵ *State ex rel. Coats v. Lewis*, 689 S.W.2d 800 (Mo. App. W.D. 1985), wherein prison authorities were asked to produce affidavits to discover plaintiff's true financial status.

¹⁶ *Id.* at 806.

¹⁷ Section 514.040.1, RSMo 2000.

¹⁸ Section 1.090, RSMo 2000, *State ex rel. Taylor v. Clymer*, 503 S.W.2d 53, 55 (Mo. App. W.D. 1973).

¹⁹ A filing fee is required but "payment is not required at any particular time." A filing fee may be paid, not paid or waived. *Trice v. State*, 792 S.W.2d 672, 674 (Mo. App. W.D. 1990).

poor people.²⁰ Law enforcement, once presented with notice from the court that the petitioner can proceed *in forma pauperis*, are bound to try and attempt personal service on the opposing party without payment of a fee. This holds true for all county sheriff's departments throughout the state of Missouri. It has been my experience that even some out-of-state service requests will be honored free of charge, depending upon the department; however, they have no obligation to do so.

If personal service cannot be perfected, the next step, in most cases, is service by publication.²¹ The court of appeals, in *State ex rel. Taylor v. Clymer*,²² was faced with the question as to whether service by publication fell within the "necessary process and proceedings" meaning of § 514.040. "Respondents contend[ed] that relators [had] received complete access to the court because they [had] been allowed to file their actions as poor persons" and did not have to pay the filing fees. In addition, respondents argued that "the State [was] not further obligated to expand relators' rights by affording them services of process by publication without cost."²³ The court disagreed. The court determined that "service accomplishes the fact of jurisdiction and not the filing" of the petition.²⁴ The court held that service was within the meaning of the necessary process and proceedings language of § 514.040. Since service by publication was required to continue with the cause

of action, the court held that "the order of publication should be issued without cost to relators under the mandate of our statutes and the policy of this State to provide indigents free access to our courts."²⁵

In a more recent case, *State ex rel. Holterman v. Patterson*,²⁶ the court of appeals was asked to rule on whether guardian *ad litem* fees fell within § 514.040. Relator was required to pay one-third of a \$1,000 guardian *ad litem* fee.²⁷ Relator argued that she should not be required to pay the fee under § 514.040 because she was indigent and could not pay costs and fees "related to the prosecution of the suit." Relator had filed a motion with the trial court to join the county as a third party and order fees paid out of public funds. The court reasoned that since it had been determined that relator was "unable to pay the costs, fees and expenses necessary to prosecute or defend the action," § 514.040 leaves no discretion for the trial judge to assess the guardian *ad litem* fee against relator.²⁸ The county was required to pay the fees assessed against relator.

In two recent decisions, the Court of Appeals, Eastern District has identified additional items covered by § 514.040. First, pursuant to a writ of mandamus, *State ex rel. Wecker v. Ohmer*,²⁹ May 6, 2003 (*Wecker I*), the court considered whether relator was entitled "to obtain a transcript of her termination of parental rights trial."³⁰ Relator filed a timely appeal

and a "certificate of . . . inability to pay cost, fees and expenses" indicating that she was proceeding as a poor person. In addition, she filed a request for the transcript in the trial court. Respondent denied her request for a trial transcript. Respondent argued that since relator had been represented by private counsel during the trial, she was not allowed to request the trial transcript as a poor person. The court was unpersuaded by this argument, since the trial attorney filed an affidavit with the court stating that he represented relator on a pro bono basis. The court found that "Section 514.040.3 specifically allows for 'private counsel working on behalf of or under the auspices of [a legal aid] society.'"³¹ The court ordered the production of the trial transcript, noting that Missouri statutes provided for court costs in termination of parental rights cases in § 211.462.4: "Court costs shall be paid by the county in which the proceeding is instituted, except that the court may require the agency or person having received legal or actual custody to pay the costs."³²

On June 10, 2003, the Eastern District issued a second opinion in the matter, *Wecker II*,³³ stating that for the same reasons used in *Wecker I*, the relator should not be required to pay to have the legal file prepared in order to pursue her appeal. Respondent had argued that the state was not required to pay for preparation of the legal file. The court found that preparation of the legal file fell

²⁰ *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 759 (Mo. banc 1985). "§ 514.040 . . . require[s] that all officers of the court serve without fee [beyond their annual salary.] During the colonial period, the judge, bailiff, clerk and sheriff were 'paid [in most cases.] by [the] fees collected for their services.' Silverstein, 'Waiver of the Court Costs and Appointment of Counsel for Poor Persons in Civil Cases,' 2 VAL. U. L. REV. 21, 27 (1967)."

²¹ Section 506.160, RSMo 2000.

Service by mail or publication shall be allowed in all cases affecting a fund, will, trust estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court, or in any special proceedings in which notice by mail or by publication is authorized, including but not limited to actions to quiet title and actions to ascertain and determine title to real estate.

²² 503 S.W.2d 53.

²³ *Id.* at 56.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 24 S.W.3d 784 (Mo. App. E.D. 2000).

²⁷ *Id.* at 785. Because Legal Services of Eastern Missouri represented her, relator fell within subsection 3 of the statute, which will be discussed later in the article. The holding by the court pertains to the rights granted by § 514.040 regardless of whether the client falls within subsection 1 or 3.

²⁸ *Id.*

²⁹ 105 S.W.3d 511 (Mo. App. E.D. 2003).

³⁰ *Id.* at 512

³¹ *Id.* at 513. Although *Wecker I* and *II* (see note 33) involved a private attorney working in conjunction with a legal aid society, any party who was allowed to proceed *in forma pauperis* would be entitled to the items identified by the court of appeals pursuant to § 514.040.1, RSMo 2000.

³² Section 211.462, RSMo 2000.

³³ *State ex rel. Wecker v. Ohmer*, 108 S.W.3d 129 (Mo. App. E.D. 2003).

within the meaning of § 514.040. Respondent was directed to enter all orders necessary to prepare and release the legal file to relator.

Although filing fees, in personal service attempts, service by publication related costs, and transcripts and legal files requested to pursue appeals on behalf of indigent clients are now specifically enumerated as falling within the meaning of § 514.040, this most likely is not an inclusive list. Consistently, the appellate courts are finding that if the requested item is something that a litigant is required by law to file, proceed in the prosecution of, or defend a suit against, payment will not be required if a party is deemed to be indigent.

The most recent amendment to § 514.040 became effective on August 28, 1999, when subsection 3 was added.³⁴ It allows for a legal aid society, a legal services or other non-profit organization, which has as its primary purpose to provide legal services to indigent persons, to certify that a client is indigent within the meaning of the statute. The certificate issued by the non-profit agency certifies to the court that the party has been determined by the agency's standards to be "unable to pay the costs, fees and expenses necessary to prosecute or defend the action."³⁵ The appellate courts have

determined that once a party has been certified by one of these agencies, trial courts have no discretion in the matter and must accept the person as "poor."³⁶ Private counsel, who work on behalf of or under the auspices of such non-profits, would be allowed to utilize the certificate that the non-profit provides on behalf of their clients. Therefore, if attorneys contact and volunteer to take cases from their local legal services offices, they obtain all the benefits under § 514.040 without having to work through the evidentiary hearing otherwise required.

Currently there are four legal aid offices servicing the state: Legal Aid of Western Missouri, located in Kansas City; Legal Services of Southern Missouri, located in Springfield; Legal Services of Eastern Missouri, located in St. Louis; and Mid-Missouri Legal Services Corporation, located in Columbia. Each of these agencies has satellite offices in various communities across the state. Interested attorneys can either call their local office or, alternatively, The Missouri Bar has made it easy to volunteer by providing a volunteer form link from their web site (www.mobar.org). The legal services offices screen all cases, then match volunteer attorneys with appropriate clients. Volunteer lawyers will be asked to take no more than two cases per year

unless they indicate otherwise.

I hope this article provides some insight into the tools available to Missouri attorneys and their clients. The first enumerated purpose listed in the preamble of the U.S. Constitution is to "establish justice." Providing justice is the mandate of our state, our ethical standards as attorneys, and our free society as a whole. I hope that more attorneys will take advantage of these tools to provide services for indigent parties and those under-represented members of our community who need legal assistance.

³⁴ Section 514.040.3, RSMo 2000.

Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by moneys appropriated by the general assembly of the state of Missouri, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society, all costs and expenses related to the prosecution of the suit may be waived without the necessity of a motion and court approval, provided that a determination has been made by such society or organization that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that a certification that such determination has been made is filed with the clerk of the court.

³⁵ *Id.*

³⁶ 24 S.W.3d 784 (Mo. App. E.D. 2000).

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