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December 28, 2016

VIA UPS Overnight Delivery

Hon. Gerald W. VandeWalle
Chief Justice, Supreme Court
State of North Dakota
Judicial Wing, First Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Re: Comment Letter In the Matter of a Petition to Permit
Temporary Provision of Legal Services by Qualified Attorneys
from Outside North Dakota

Dear Chief Justice VandeWalle:

The Association of Pro Bono Counsel (“APBCo”) is a membership organization of over 180 attorneys and practice group managers who run pro bono practices in over 100 of the world’s largest law firms. Our premise is that without their access to justice, the system operates unfairly for the poor. We submit this comment letter in strong support of this Honorable Court granting the December 14, 2016 petition titled “In the Matter of a Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota.”

APBCo member firms have been following the significant access to justice issue affecting the criminal trials that have already commenced involving Dakota Access Pipeline (“DAPL”) protesters. From all accounts, there are not enough attorneys in North Dakota to take their cases. As Your Honor is aware, the Morton County Sheriff’s Department recently listed 264 people who have no lawyer at all and it is very likely that the 265 people who have been assigned public defense attorneys are not receiving adequate counsel, in light of the significant burden placed upon the public defender’s office. This is the type of situation in which attorneys often seek to offer pro bono legal help. We understand that there are attorneys who are not barred in North Dakota, but who would be willing to travel to North Dakota to provide representation to defendants who will otherwise potentially be facing a criminal proceeding without counsel. However, in light of the very burdensome application process currently in place for out-of-state lawyers to be granted permission to represent clients in North Dakota as detailed in the affidavit of William L. Tilton, sworn to December 7, 2016 (“Tilton Affidavit”), we believe that this process will certainly deter many if not all of the out-of-state attorneys who otherwise would volunteer.

Hon. Gerald W. VandeWalle
December 28, 2016
Page 2 of 2

In light of the extraordinary circumstances and strain on public defense resources associated with DAPL-related arrests and charges, the requirement that out-of-state attorneys associate with in-state attorneys is also a requirement that will prevent out-of-state attorneys from representing clients who have been arrested as a result of their protests against the DAPL. In fact, this hurdle may serve as an insurmountable barrier, as there may not be a sufficient number of attorneys in North Dakota who are willing to associate counsel for these cases, meaning that even if all of the other procedures were changed, it would still be nearly impossible for out-of-state attorneys to work with protestors needing representation. (Tilton Affidavit ¶ 19.)


Law enforcement in North Dakota has arrested hundreds of persons who are unable to afford counsel, but who have a constitutional right to representation. The State can remedy this situation, by softening the rules to allow counsel from out of state to practice in North Dakota for the sole purpose of assisting those same persons. The remedy that is requested is quite simple and within this Honorable Court's discretion to grant, whereas the increased access to counsel would provide a profound benefit not only to arrested persons who are unrepresented but to the state justice system itself. Indeed, this kind of proposal has precedent.

In the natural disaster context (as opposed to "major disaster," as Admission to Practice R. 3.2 distinguishes), the Supreme Court of Louisiana issued an emergency temporary rule for certain civil legal service relief in the wake of Hurricanes Katrina and Rita. *See* https://www.lasc.org/katrina_orders/Order-ProBono.pdf (last accessed December 28, 2016). APBCo member firm lawyers volunteered in Louisiana under that state's highest court order and successfully contributed to equal justice issues there. We believe an accommodation would be beneficial here, for similar reasons.

We appreciate Your Honor's consideration of our comments.

Respectfully submitted,

Association of Pro Bono Counsel

By: 
Kevin J. Curnin
President-Elect