

SIXTH CIRCUIT REVIEW

Will a Judge Read My Brief? Prejudice to Pro Se Litigants from the Staff Attorney Track

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I. INTRODUCTION

Few outside of court employees and appellate attorneys know there is a two-track system at the Sixth Circuit and all other federal appellate courts. On the familiar track, the appeal is assigned to a federal judge, who will receive input from her clerks, discuss the case with her colleagues, often after oral argument, and issue a reasoned decision applying the law to the facts. On the less well-known track, the case is assigned to staff attorneys who will review the briefs and draft a succinct opinion without oral argument. Unlike law clerks, staff attorneys do not work for a particular judge, and are usually supervised by a more senior staff attorney rather than a judge.¹ The opinion drafted by the staff attorney will be reviewed and approved by a panel of federal judges, and will sometimes result in an unsigned per curiam opinion.²

The appeals that are shunted to the alternate track are filed by those with the least ability to protect themselves in the system, including almost all pro se

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¹ See 6TH Cir. I.O.P. 202(c)(3) (“The court appoints a senior staff attorney and supervisory staff attorneys to supervise the staff attorney’s office. The office provides legal support to the court as a whole, rather than to individual judges by making dispositional recommendations in those cases that the court has decided do not require oral argument . . .”).

² LAURAL HOOPER ET AL., FEDERAL JUDICIAL CENTER, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS, 39 (2d. ed. 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/\\$file/caseman2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/$file/caseman2.pdf) [http://perma.cc/49CA-RXS5] (cataloguing differing procedures on handling pro se appeals).

litigants—including civil, prisoner, and immigration appeals.³ The staff attorney system was implemented as a band-aid during the enormous expansion of federal appeals by pro se litigants during the 1970s, and remains the only workable solution to a much-expanded judicial caseload. Pro se appeals make up the vast majority of the cases decided by staff attorneys—and the majority of all appeals decided by the Sixth Circuit and other federal circuit courts.⁴ To handle these thousands of pro se appeals, the Sixth Circuit has hired staff attorneys, roughly two such attorneys per active judge.⁵ Other circuits (such as the First, Second, and Fourth) have three staff attorneys per active judge, in addition to the four elbow clerks.⁶ Staff attorneys also review new appeals for appellate jurisdiction and draft proposed opinions on motions.

This short Article examines whether the creation of this alternate track results in worse outcomes for pro se litigants, and concludes that staff attorney review makes it more likely that a pro se appeal receives close scrutiny from federal appellate courts and may result in a higher chance of reversal for pro se appellants.

II. CRITICISM OF THE STAFF ATTORNEY TRACK

The fact that the unrepresented, the prisoner, and the non-citizen systematically receive different treatment in the federal appellate courts raises serious due process issues and questions of fundamental fairness. Some scholars have argued that this the alternate track for pro se appellants leads to “less” and “different” justice for pro se parties.⁷ They argue that pro se parties

³ See *About the Staff Attorney's Office*, U.S. CT. OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/staff_attorneys/sao_about.html [http://perma.cc/BB4Z-QE8K] (last updated Oct. 16, 2013) (the Staff Attorney's Office “handles the court's immigration docket” and “all pro se appeals and motions, counseled motions, and successive petitions for habeas corpus relief”); Pierre Bergeron, *Interview with Sixth Circuit Clerk Leonard Green*, SIXTH CIRCUIT APPELLATE BLOG (July 1, 2011), <http://www.sixthcircuitappellateblog.com/interviews/we-sat-down-recently-with> [http://perma.cc/ZZ8T-THRQ] (“Staff attorneys devote substantial time to the Circuit's pro se cases.”).

⁴ *U.S. Courts of Appeals*, U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx> (last visited Feb. 20, 2015) [http://perma.cc/7385-L39F]. In addition, nearly 95% of the original proceedings filed in the Sixth Circuit, such as applications for a writ for mandamus, are filed by a pro se party. *Id.*

⁵ Colter Paulson, *Case Management at the Sixth Circuit: The Role of Staff Attorneys*, SIXTH CIRCUIT APPELLATE BLOG (Aug. 12, 2011), <http://www.sixthcircuitappellateblog.com/news-and-analysis/case-management-at-the-sixth-circuit-the-role-of-staff-attorneys/> [http://perma.cc/8VSM-96PR].

⁶ *Id.*

⁷ William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277, 292 (1996); see also Marin K. Levy, *Judging Justice on Appeal: The United States Courts of Appeals in Crisis*, 123 YALE L.J. 2386, 2391 (2014) (discussing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013)).

“disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk”—leading to unfair outcomes.⁸ Some scholars question both the competence and impartiality of staff attorneys when dealing with pro se parties.⁹ Many have said that the only solution to this problem is to dramatically increase the number of federal appellate judges.¹⁰ Admittedly, that is the only way to ensure that an Article III judge will have time to carefully read the briefs in every appeal.

Given the amount of political will that would be required to expand the judiciary, the empirical question of the actual harm pro se parties receive from the alternate track has great significance. An important part of that question is whether the *outcomes* of appeals by pro se litigants are adversely affected because they are placed on the staff attorney track. One would expect that pro se litigants would lose more often than represented litigants both because they fail to follow appellate procedures (such as filing a timely notice of appeal) and because their claims are intrinsically less likely to succeed (else, at least in civil cases, an attorney would be interested in the case). The question, then, is whether pro se parties do worse than they would otherwise because their cases are sent to staff attorneys to draft a proposed decision.

As discussed below, however, there is significant evidence that pro se parties benefit from the current two-track system and very little evidence that staff attorney review causes otherwise valid appeals to be dismissed for non-merits reasons.

⁸Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 32, 49 (2005); see also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 *STAN. L. REV.* 1435, 1492 (2004) (decrying “the delegation of much judicial work either to clerks or to staff attorneys who are often junior, inexperienced, minimally trained, and dissatisfied with the tasks assigned them, mean that judges often do not read any part of the record of an appeal before ‘signing off’ on an unpublished opinion written by a staff attorney”).

⁹Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 *ARIZ. ST. L.J.* 1, 35–36 (2007); Jeffrey O. Cooper and Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOKLYN L. REV.* 685, 699 (2000) (“The rise of the staff attorney therefore fairly may be said to have a substantive impact on the performance of the judicial function and thus further dilutes the extent to which circuit judges control doctrinal developments in their courts.”). See generally Penelope Pether, *Constitutional Solipsism: Toward a Third Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 *WM. & MARY BILL RTS. J.* 955 (2009).

¹⁰Richman & Reynolds, *supra* note 7, at 277.

III. THERE IS LITTLE OR NO EMPIRICAL EVIDENCE THE ALTERNATE TRACK RESULTS IN WORSE OUTCOMES FOR PRO SE LITIGANTS IN THE FEDERAL APPELLATE COURTS

There is no question that pro se appeals *are* generally less successful than the average. In one Ohio state court, pro se criminal appeals were six times less likely to win reversal than in represented cases.¹¹ Represented litigants before the Board of Immigration Appeals are four times more successful than unrepresented,¹² and roughly three times more successful before the United States Court of Appeals for Veterans Claims.¹³ In a comprehensive study of the federal circuit courts of appeals, counseled appeals were more than ten times more successful than pro se appellants.¹⁴ Given the practice of appointing counsel only in cases that appear likely to succeed, these statistics do not say much about the chances for a pro se litigant on appeal—and say nothing about the staff attorney process.

Interestingly, studies about *decisions* in pro se cases suggest that pro se litigants are just as likely to win a reversal in a federal appeals court as any other litigant.¹⁵ One study found that the reversal rate in written decisions in pro se prisoner cases in the Eleventh Circuit was significantly *higher* than the average reversal rate.¹⁶ Similarly, a review by the Fifth Circuit found that the reversal rate for pro se prisoner appeals was the same as its overall reversal rate.¹⁷ A recent review of one year of the Sixth Circuit decisions in civil pro se cases found that the reversal rate for pro se litigants was actually *higher* than the average reversal rate.¹⁸

¹¹ *Pro Se Appeals: Are They Worth Trying?*, OHIO ST. B. ASS'N (Dec. 15, 2013), <https://www.ohioabar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-591.aspx> [<https://perma.cc/FZ26-EJ2M>].

¹² DEP'T OF JUSTICE, BD. OF IMMIGRATION APPEALS, THE BIA PRO BONO PROJECT IS SUCCESSFUL 12 (2004), <http://www.justice.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf> [<http://perma.cc/HSD5-J6XT>].

¹³ Barton F. Stichman, *The Impact of the Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 866 (1992).

¹⁴ Karen M. Allen, et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 751 (1982).

¹⁵ Similar results may occur in the district courts when a case is actually decided on the merits. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 445 (2004) (finding that trial win rates in different type of employment discrimination cases are not affected by differences in the percentage of pro se representation).

¹⁶ Bruce S. Rogow, *Two Years of the First Amendment in the United States Court of Appeals: The 2007 and 2008 Yin and Yang over Speech and Punishment*, 63 U. MIAMI L. REV. 813, 820–21 (2009).

¹⁷ Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 63 (1999).

¹⁸ Compare Ryan Goellner, *Pro Se Litigants in the Sixth Circuit: A Year in Review*, SIXTH CIRCUIT APPELLATE BLOG (Nov. 12, 2014), <http://www.sixthcircuitappellate>

One article reaches a contrary conclusion based on data that unpublished decisions in the Ninth Circuit are more likely to go against asylum seekers, arguing that this shows the hand of the staff attorneys.¹⁹ But because more than 80% of all opinions are unpublished—a number that often reaches almost 90% in the Ninth Circuit—unpublished status is a poor indicator of whether it was written by staff attorneys.²⁰ Opinions that are issued unsigned or per curiam, rather than unpublished, are a far better indicator because that status allows judges to issue an opinion written by a staff attorney as the decision of the panel without any dishonesty. Strangely, while the article uses data from an earlier study, it *rejects* that study's conclusions about the data.²¹

To look for differences in outcome between staff-written and judge-written opinions, I searched Sixth Circuit opinions in non-prisoner civil cases over the last five years where at least one litigant appeared pro se.²² (Civil cases should provide the most accurate data because the Sixth Circuit appoints counsel in certain pro se criminal and habeas appeals, often on the basis of merit.²³ Many of those cases then go to a panel of judges.) Out of the 145 cases where the pro se party was the appellant, that party won at least a partial reversal in 32 cases—approximately a 22% reversal rate. This is significantly higher than the 13% reversal rate for all civil cases over the same period.²⁴ However, the Sixth Circuit was also more likely to reverse where the appellee

blog.com/news-and-analysis/pro-se-litigants-in-the-sixth-circuit-a-year-end-analysis/ [http://perma.cc/8QEX-KBTB] (four out of five pro-se appellants received some relief on appeal), with TABLE B-5. U.S. COURTS OF APPEALS—APPEALS TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B05Sep13.pdf> [http://perma.cc/6BF4-RY2V] [hereinafter TABLE B-5] (showing the Sixth Circuit's reversal rate in civil cases between 4.5% and 13.9%).

¹⁹ See Pether, *supra* note 9, at 40–43.

²⁰ See, e.g., TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S03Sep13.pdf> [http://perma.cc/T7UD-6C7K] [hereinafter TABLE S-3, 2013]; TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2012 (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S03Sep12.pdf> [http://perma.cc/6VJ4-GSJ6] [hereinafter TABLE S-3, 2012]. Even in 1997, the Ninth Circuit's unpublished decision rate was over 80%. See TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 1997 (1997), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s03sep97.pdf> [http://perma.cc/364T-WBSS].

²¹ Pether, *supra* note 9, at 42 (“[T]here is an apparently more plausible interpretation of the data . . .”).

²² There were also two opinions, which were excluded from the study, where both sides proceeded pro se.

²³ See 18 U.S.C. § 3006A(a)(2)(B), (c) (2012).

²⁴ TABLE B-5, *supra* note 18.

was pro se, reversing at least partially in 8 of the 21 cases—a 38% reversal rate in that small sample.

These high reversal rates are surprising given that pro se parties are far more likely to appeal than those represented by counsel. Pro se appellants filed 28,800 appeals in 2013, which means that roughly that 38% of the 77,311 pro se cases in the district court resulted in an appeal.²⁵ The remaining 207,293 district court cases where both parties were represented by attorneys generated just 27,675 appeals, an appeals rate of just 13% of filed cases.²⁶ One answer to this is that pro se cases probably do not settle, though at least one study has shown that pro se parties settle at the same rates as represented parties.²⁷ Nor are these only habeas seekers pursuing a hopeless appeal under AEDPA, because less than half of pro se appeals come from prisoner petitions.²⁸

Data from the Sixth Circuit also refutes the assumption that pro se cases were more likely to end up with a “lesser” per curiam opinion. During 2013, the Sixth Circuit issued 1,079 signed and 2,502 unsigned per curiam opinions.²⁹ A search for per curiam opinions in pro se cases for those same dates shows only 113 opinions during that time—less than 10% of the total number.³⁰ Indeed, while per curiam decisions generally make up about 60–70% of all of the Sixth Circuit’s decisions, only 37% of the circuit’s opinions in pro se cases in the past five years were issued per curiam. And a mere 27% of the opinions in civil cases with a pro se litigant were issued as an unsigned opinion by the panel. These statistics support the idea that pro se cases receive more scrutiny from the Sixth Circuit and less deference to the lower court than in the usual appeal.

²⁵ TABLE C-13. CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C13Sep13.pdf> [<http://perma.cc/B3SD-VWCD>]; TABLE D. CASES, U.S. DISTRICT COURTS—CRIMINAL CASES COMMENCED, TERMINATED, AND PENDING (INCLUDING TRANSFERS) DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2012 AND 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D00CSep13.pdf> [<http://perma.cc/7MGP-XQ4T>]; TABLE S-4. U.S. COURTS OF APPEALS—SOURCES OF PRO SE APPEALS DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2012 AND 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S04Sep13.pdf> [<http://perma.cc/S9SX-ZUUL>] [hereinafter TABLE S-4].

²⁶ *Id.*

²⁷ Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 145–46 (2002) (“Where the rates of settlement were analyzed by type of claim, the rate of settlement was virtually identical to the rate in the general sample of represented parties.”).

²⁸ TABLE S-4, *supra* note 25.

²⁹ TABLE S-3, 2013, *supra* note 20.

³⁰ The reporting year for the federal courts is September 30, 2011 to September 30, 2012. The statistics were similar in 2012, when the Sixth Circuit issued 1,261 signed and 2,220 per curiam opinions. TABLE S-3, 2012, *supra* note 20. There were only 198 per curiam opinions in pro se cases during 2012—still less than 10% of the total.

The difference between the *overall* appellate success rates for pro se litigants versus their success rate in written decisions is almost certainly due to non-merits dismissals.³¹ Of the 5,462 appeals that the Sixth Circuit terminated in 2013, almost 30% were terminated for procedural reasons.³² This included 476 for lack of jurisdiction and another 700 for default or other reasons, which includes the failure to prosecute and follow procedural rules.³³ Almost all of those non-jurisdictional terminations were performed by staff attorneys and clerks, suggesting that most of the terminations involved pro se parties.³⁴ But this provides no reason to criticize the use of staff attorneys, who are no more likely than busy federal judges to dismiss appeals for failure to prosecute. And Article III judges review every jurisdictional dismissal (though there is little to no discretion involved in such dismissals).³⁵ These high attrition rates for non-merits reasons are not unexpected—failure to comply with procedure is the first trap for those proceeding unrepresented.

While proceeding pro se can be devastating to the chances of winning on appeal, there is little or no empirical evidence that the alternate track harms a pro se litigant's chances of winning on appeal.

IV. CONCLUSION

It may be difficult to defend, from a normative perspective, the decision to place the most vulnerable litigants on an alternate track for decisions where they receive less direct scrutiny from federal judges. But given the political unlikelihood of a dramatic increase in the number of appellate federal judges, determining the extent of the actual detriment that staff attorneys cause to pro se parties is critical to understanding the importance of finding a better solution. This small study finds that pro se parties in civil cases fare far better, at least once their appeal reaches the merits, than one would otherwise expect. Instead of finding that pro se appellants quickly lose through unpublished per curiam decisions, pro se parties are winning more often and receive more signed opinions than do parties that are represented by counsel.

³¹Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 455 (2009) (noting the “high attrition rates suffered by pro se litigants at every step in the litigation process”).

³²TABLE B-1. U.S. COURTS OF APPEALS—APPEALS COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B01Sep13.pdf> [<http://perma.cc/7VL4-WKK6>]; TABLE B-5A. U.S. COURTS OF APPEALS—APPEALS TERMINATED BY PROCEDURAL JUDGMENTS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B05ASep13.pdf> [<http://perma.cc/B4N4-MEPK>] [hereinafter TABLE B-5A].

³³TABLE B-5A, *supra* note 32.

³⁴*Id.*

³⁵*Id.*

This data casts doubt on the generalized arguments that pro se parties are intrinsically harmed by the practice of all federal appellate courts of placing them on the alternate track. Either the staff attorneys themselves or the process of federal appellate judges reviewing the draft opinions from the staff attorneys is resulting in better outcomes for those vulnerable parties.