

# PRO BONO PANEL PERIODICAL

## FALL/WINTER 2022-23 EDITION

This issue of the Panel Periodical features several administrative reminders about Panel membership; news about an upcoming training seminar; formal roll-out of the Civil Pro Bono Library; a request for input on whether to create a Civil Pro Bono Panel Listserv/"web forum" for members to share advice and guidance, or instead exchange a directory of members, to allow direct communications between members. **The Panel Periodical is especially pleased to present the latest "Recent Tenth Circuit Cases" synopsis of recent decisions that impact the types of cases typical to the Civil Pro Bono Panel.** We hope you find this edition informative and helpful, and please contact [Ed Butler](#) or [Ashley Sheehan](#) (303-335-2466) if you have any thoughts or suggestions.

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### **ADMINISTRATIVE REMINDER OF PRO BONO PANEL APPOINTMENT PROCEDURES**

The Attorney Services Division of the clerk's office – the department responsible for administering the appointment of pro bono process – would like to remind all Civil Pro Bono Panel members of a few basic guidelines. These come from the local rule on pro bono representation, **LAttyR 15 - CIVIL PRO BONO REPRESENTATION**:

- Within 14 days after the filing of an Appointment Order, the clerk selects a member of the Panel to represent the unrepresented party.
- The clerk contacts the Panel member and provides relevant, case-specific documents. *No later than five days after contact, the member notifies the clerk whether the member is available.*
- *On receipt of notice of acceptance of appointment from the Panel member,* the clerk files a Notice of Appointment and serves the pro se party with the Appointment Order, the Notice of Appointment, and a copy of local rule LAttyR 15.
- *No later than 30 days after receipt of the Notice of Appointment, the attorney must file an Entry of Appearance, or a Notice Declining Appointment stating good cause for declining the appointment.*

It is extremely important for Panel members, when contacted directly by the Attorney Services Department (i.e., Ashley Sheehan or Ed Butler) *to respond to the e-mail or phone call.* Unfortunately, many Panel members in the past year do not respond to our e-mails ... and not because they've changed law firms.

A copy of the entire local rule is attached to this Fall/Winter Panel Periodical. Please review the rule for a refresher on the procedure, including details on Panel membership requirements, attorney and pro se party eligibility for pro bono representation, duties of pro bono counsel, fee agreements, reimbursement of expenses, and withdrawal from representation. Finally, please keep in mind LAttyR 15(c)(2)'s Panel membership requirement:

***"A member of the Panel shall be available and willing to accept an appointment when reasonable and appropriate."***



**From the Pro Bono page of the Faculty of Federal Advocates website**

**Video of "Representing Pro Bono Clients in Federal Court - Part 1" [see screen image of one part of the presentation]**

This CLE was presented by knowledgeable speakers who handle cases through the U.S. District Court's Civil Pro Bono Panel. Click [HERE](#) for the recording of the program. The passcode is fhQ%b5.y The materials are available [HERE](#), [HERE](#) and [HERE](#).

### Pro Bono Resource Library

The Civil Pro Bono Panel now has a "Pro Bono Resource Library" that allows Panel members who would like to brush up on a topic to visit the Pro Bono Resource Library in person and physically check out one of the treatises on common pro bono case topics.

Under the copyright doctrine of "First Sale," these items are available for distribution from the clerk's office on the first floor of the Arraj Courthouse since they are available physically. A check-out card, a due date of three weeks – all your favorite parts of a physical lending library are once again available, at the U.S. District Court!

The location is on the **first floor, Arraj U.S. Courthouse**. **Ask for Ashley or Ed**, once you know which title you're interested in (a full **list of holdings** is available at the counter of the Intake section of the clerk's office). Any book donations from Panel members are welcome!

-Below are the titles available:

- [The Practitioner's Guide to Colorado Employment Law](#), Third Edition – CBA/CLE
- [Sword and Shield: A Practical Approach to Section 1983 Litigation](#), Fifth Ed., ABA
- [Deadly Force Script: How the Police in America Defend the use of Excessive Force](#), ABA
- [The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers](#), Third Ed., American Bar Association
- [Jailhouse Lawyers Handbook 2021](#), Center for Constitutional Rights/Nat'l Lawyers Guild
- District of Colorado's [Federal Court Prison Litigation Handbook](#)
- [Section 1983 Litigation](#), Third Edition – by the Federal Judicial Center of the United States Courts
- Links to the Federal Judicial Center's Publication Catalog at [FJC.gov](http://FJC.gov), includes videos, case commentaries, etc.



“A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”

— American Bar Association, Model Rules of Professional Conduct: 2011

## Important Attorney Administrative Matters

### REMINDER – Please Pay the Biennial / Renewal Fee:

Please note that **beginning Oct. 1, 2022 and ENDING Dec. 31, 2022**, the U.S. District Court is collecting the biennial (every two years) renewal fee. In 2022 the mandatory fee is **\$60.00**, collected from all bar members who wish to renew their bar status and remain in good standing. Please be aware that all funds collected through the biennial fee program are directed to the U.S. District Court’s [Federal Pro Se Clinic](#) and the [Federal Pro Se Bankruptcy Clinic](#), both of which are operated by the Colorado Bar Association. [If interested in volunteering with either clinic, please contact managing attorneys Jane Andrews (District Court clinic) at [jandrens@cobar.org](mailto:jandrens@cobar.org) or Matt Skeen (Bankruptcy Court clinic) at [mskeen@cobar.org](mailto:mskeen@cobar.org).]

For information about the Biennial Renewal Fee, please visit the U.S. District Court website’s [Biennial Renewal Fee](#) page; for a link to the Fee Payment Instructions, click [HERE](#):

Biennial / Renewal Fee Information

Judicial Officers ▾ Court Operations ▾ Juror Information ▾ Attorney Information ▾ Representing Yourself ▾

Biennial / Renewal Fee Information

**CLICK HERE FOR INSTRUCTIONS FOR PAYMENT OF THE 2022 BIENNIAL FEE FOR ATTORNEYS**

Overview of the Biennial Fee

- The 2022 biennial fee is **\$60.00**.
- The 2022 biennial fee collection is **Oct. 1, 2022 - Dec. 31, 2022**.
- Attorneys must be considered In Good Standing before they can pay the biennial fee. To check your bar status, visit the court's Attorney Status page on the website or click [here](#).
- Payment is made through the court's case management system ("CM/ECF"), as indicated in the instructions above. **The payment is made in the specially-designated case, 22-mc-6000, and NOT a case in which you are currently or in the past have been an attorney of record (i.e., do not file it in a civil case).**
- **Attorneys must link their PACER and CM/ECF accounts before they can pay the biennial fee. Click [here](#) for instructions.**
- Attorneys admitted between **January 1st - September 30, 2022**, will be required to pay the biennial fee during the collection period.
- The biennial fee is waived for **federal agency attorneys**, including federal public defenders, and **attorneys employed by the U.S. Government in a legal capacity**.
- Attorneys practicing before this Court must pay the \$60 Biennial/Renewal fee to the U.S. District Court. They must also have upgraded and linked their District Court ECF account, in addition with the Bankruptcy Court linking that occurred a few years ago. For linking instructions, see the fifth bullet point instruction above.
- Attorneys who fail to pay the fee by **December 31, 2022**, will be administratively removed from the court's attorney roll.
  - If an administratively-removed attorney wishes to practice before the court later, the attorney must reapply for bar membership and pay the full admission fee.

Authority for the Biennial Fee

General Order 2022-7: Establishment of a Biennial Fee to Assist the Funding of the Federal Pro Se Clinic Program

Frequently Asked Questions

**From the Faculty of Federal Advocates and the Civil Pro Bono Panel: Part II of Pro Bono Training – Prison Litigation**

**Please join Featured Speakers with an Introduction by U.S. Magistrate Judge Mix and U.S. District Judge Daniel D. Domenico on:**

**"Representing Pro Bono Clients in Federal Court - Part II"**

**Please register [HERE](#)**

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*FACULTY OF FEDERAL ADVOCATES*

**FRIDAY, DECEMBER 9, 2022**

**"REPRESENTING PRO BONO PRISONER CLIENTS IN FEDERAL COURT" (PART 2 OF FFA PRO BONO SEMINARS)**

**8:30 A.M. - 1 P.M.**

**DAVIS, GRAHAM & STUBBS, LLP  
1550 17TH STREET, SUITE 500, DENVER**

**There is no charge for this CLE but registration is required.**

Why take a U.S. District Court for the District of Colorado Civil Pro Bono Panel case? And how do you take such a case? This half-day seminar will cover the many great reasons for taking U.S. District Court (Colorado) Civil Pro Bono Panel cases and how to do so effectively.

It also will cover issues involved with the representation of prisoners, including: working with an in-custody client; exhaustion of administrative remedies; limited scope representation; discovery in inmate cases; and more.

Attendees will hear from local attorneys who are leaders in these fields and from attorneys who have successfully litigated Civil Pro Bono Panel cases through trials and settlements. Attorneys newer to practicing in Colorado should benefit greatly from attending and participating in the USDC Civil Pro Bono Panel.

5 general CLE credits approved.

## Question for the Panel – A CIVIL PRO BONO PANEL MEMBERS’ Message Board? Or a Shared Directory?

To allow Civil Pro Bono Panel members the means to share ideas, practice tips, key caselaw, and advice, the Civil Pro Bono Panel program is considering either creating a “Listserv”-type message board, through a service such as Google Groups.

In the alternative, the program could offer to create a directory of Panel members – to be shared only with other Panel members – where members could directly contact each other. If the latter, the directory could list each attorney’s practice area (“these are the areas of expertise that I am interested in/have experience in”), so other members could directly seek advice. **An e-mail will go out asking members for what type of service would be their preference.**

Any expertise or experience in creating a web forum, listserv, etc.? Please let us know! Contact Ed Butler at [edward\\_butler@cod.uscourts](mailto:edward_butler@cod.uscourts), 303-335-2043.

THE [FEDERAL COURT PRISON LITIGATION HANDBOOK](#) IS NOW AVAILABLE FOR ALL ATTORNEYS INTERESTED IN REPRESENTING INCARCERATED LITIGANTS:



### FEDERAL COURT PRISON LITIGATION HANDBOOK

Fall 2021 Edition

This handbook provides procedural and substantive information for pro bono attorneys representing incarcerated people in civil actions in the District of Colorado.

Contributors to this Handbook:

Laura Rovner  
Nora Q.E. Passamaneck  
Dan Shaffer  
Danielle C. Jefferis  
Alec Gibson, CU Fellow Scholar for U.S. Magistrate  
Judge Kristen L. Mix  
Nicole Salamander-Irby  
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Photo of Colorado State Penitentiary courtesy of the Colorado Department of Corrections website

Disclaimer: The contents of this guide are provided for informational purposes only and do not constitute legal advice.

Save the Date: Wednesday, December 14<sup>th</sup>, 5 p.m.

### The Faculty of Federal Advocates

Invites all Civil Pro Bono Panel Members to the

“FFA Virtual Annual Business Meeting/ Civil Pro Bono Panel Recognition”

Which will start with a judicial recognition and thank-you to the Civil Pro Bono Panel members and all who accepted cases in 2022.

The FFA will send an invite to all members, but remember to mark the date on your calendar!

## Article: Recent Tenth Circuit Cases

**By Nora Passamaneck and Leah Fugere (WilmerHale LLP)**

**“We provide the following summary of some recent Tenth Circuit decisions that may be of interest to the Panel.”**

*(The views of the attorneys do not represent the views of the U.S. District Court for the District of Colorado.)*

### Inmate Civil Rights – Bivens Claims – Excessive Force

*Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022)

Declining to “expand the judicially implied cause of action” outlined in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the panel affirmed the dismissal of an inmate’s Eighth Amendment excessive force claims arising from injuries he allegedly suffered when—while he was restrained—a corrections officer entered his cell and assaulted him. The panel first noted that to allow Silva’s Eighth Amendment excessive force claim would be an impermissible expansion of *Bivens* because it did not fall squarely within the precedent set by *Carlson v. Green*, 446 U.S. 14 (1980). There, the Supreme Court permitted an Eighth Amendment *Bivens* claim in the deliberate-indifference-to-medical-needs context—not the excessive-force context, under which Silva’s claims arose. The panel then applied the *Bivens* analysis recently articulated by the Supreme Court in *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022). In *Egbert*, the Supreme Court re-emphasized that expanding *Bivens* is essentially impermissible, and the Court also appeared to alter the existing two-step *Bivens* framework, indicating that a court may dispose of *Bivens* claims by finding that either (1) “Congress is better positioned to create remedies in the [context at issue]” or (2) “the Government already has provided alternative remedies that protect [the plaintiff.]” *Egbert*, 142 S. Ct. at 1804. Consequently, the panel concluded that Silva’s access to the Bureau of Prison’s Administrative Remedy Program was sufficient to foreclose his *Bivens* claims.

### Title VII – Retaliation – Religious Employer – Ministerial Exception – Collateral Order Doctrine

*Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1025 (10th Cir. 2022)

In a 2-1 decision, the majority concluded that it lacked jurisdiction over an interlocutory appeal from the district court’s denial of summary judgment on whether the defendant—a religious employer—could assert the ministerial exception defense. The plaintiff, who served as a teacher and chaplain, had raised claims under Title VII, alleging that the defendant had fired him in retaliation for opposing a racially hostile environment in the school by conducting a chapel meeting on race and faith. The defendant sought to dismiss the case by asserting the ministerial exception defense, but the district court converted the motion to one for summary judgment and denied it. The district court explained that although the defendant could assert the ministerial exception, the question of whether the plaintiff was a minister was genuinely disputed on the evidence in the record. The defendant immediately appealed, invoking the Court’s jurisdiction based on the collateral order doctrine. The collateral order doctrine permits appellate review of non-final orders that (1) “conclusively determine the disputed question,” (2) “resolve an important issue completely separate from the merits of the action,” and (3) are “effectively unreviewable on appeal from a final judgment.” *Tucker*, 36 F.4th at 1033. The majority reasoned that because the application of the ministerial exception defense could be effectively reviewed after the conclusion of litigation in the district court, denying summary judgment on this defense does not qualify as the type of order that can confer jurisdiction under the collateral order doctrine. The majority thus dismissed the case for lack of jurisdiction. Judge Bacharach dissented, writing that the ministerial exception satisfies the collateral order doctrine because—among other things—the “ministerial exception protects not only against liability but also against the suit itself.” *Id.* at 1056 (J. Bacharach, dissenting). Judge

Bacharach further opined that, under de novo review, the defendant would have enjoyed immunity from the plaintiff's suit under the ministerial exception.

First Amendment – Retaliation – Qualified Immunity – Municipal/Monell Liability

*Frey v. Town of Jackson, Wyoming*, 41 F.4th 1223, 1229 (10th Cir. 2022)

The panel affirmed the district court's grant of a motion to dismiss plaintiff's 42 U.S.C. § 1983 claims arising from plaintiff's refusal to cooperate in a pat-down in airport security and from events during his subsequent arrest and booking. The plaintiff filed various First Amendment and other constitutional claims against involved officers and municipal defendants, claiming that, among other things, the defendants impermissibly retaliated against his exercise of First Amendment rights. Addressing qualified immunity, the panel concluded that the plaintiff failed to allege a violation of a constitutional right because the officers had a constitutional basis to arrest the plaintiff and because First Amendment law does not prohibit the force used against him—that is, the use of a wristlock during his arrest. Nor did the plaintiff sufficiently plead a First Amendment retaliation claim that his requests for a lawyer prolonged his detention. The panel further concluded that the plaintiff's claims under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), failed because the defendants did not violate the plaintiff's constitutional rights. Finally, the panel affirmed the district court's award of attorney's fees to the defendants and entry of sanctions against plaintiff's counsel.

Title VII – Sex Discrimination – Race Discrimination – *McDonnell Douglas* – Hostile Work Environment – Failure to Promote

*Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1210 (10th Cir. 2022)

In a case arising from alleged sex- and race-based discrimination against the plaintiff—a Black woman and former employee of a life insurance company—the panel affirmed the district court's entry of summary judgment against the plaintiff's Title VII discrimination claim but reversed summary judgment against her retaliation claim, hostile work environment claim, and constructive discharge claim. The Equal Employment Opportunity Commission had filed a separate, earlier suit against the defendant for engaging in unlawful discrimination on the basis of race and sex. As the only intervening party who did not join the resulting consent decree, the plaintiff was the only party who could individually pursue her claims against the defendant. On her discrimination claim, the panel concluded that the plaintiff had provided no direct evidence of discrimination and that—when applying the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)—indirect evidence did not support her arguments that the defendant discriminated against her by failing to promote her and by the terms and conditions it placed upon her employment. On her retaliation claim, however, the panel reversed the district court on plaintiff's failure-to-promote theory of retaliation, concluding that the plaintiff had presented sufficient evidence of pretext. As for her hostile work environment claims, the panel concluded that a reasonable jury could find that the defendant maintained a race- and sex-based hostile work environment. Moreover, continued the panel, there was a genuine dispute about its pervasiveness. The panel found the defendant's arguments that it “promptly and effectively addressed” these issues were unavailing because the plaintiff presented evidence that the discriminatory treatment continued. *Ford*, 45 F.4th at 1234. Finally, the panel reversed the dismissal of the plaintiff's constructive discharge claim because it was premised solely on the failure of the hostile work environment claim.

Substantive Due Process Rights – Special Relationship Doctrine for Foster Children – Qualified Immunity

*Hunt v. Montano*, 39 F.4th 1270, 1274 (10th Cir. 2022)

The representatives of three foster children brought claims under 42 U.S.C. § 1983 against the New Mexico Children, Youth, and Families Department (CYFD) and various employees, alleging violations of the children’s substantive due process rights resulting in severe neglect and—in the case of one child—death. In denying the defendants’ motion for judgment on the pleadings, the district court denied the CYFD employees’ assertion of qualified immunity, finding that the plaintiffs had plausibly alleged substantive due process rights violations under the special relationship doctrine. But the district court declined to determine whether the rights at issue were clearly established because the CYFD employees had not raised it in their briefing. The CYFD employees appealed. Examining each defendant’s liability with respect to the special relationship doctrine, the panel affirmed in part and reversed in part. The panel noted that a special relationship is created when the state assumes control over an individual, triggering an affirmative duty to provide protection. As to the CYFD employees who failed to properly license, inspect, and monitor the foster home, the panel concluded that the employees’ “actions shock our conscience enough to impose liability under the special relationship doctrine.” *Id.* at 1282. But for the CYFD employees who issued the license and handled abuse allegations, the panel concluded that the children’s representatives failed to sufficiently establish the special relationship doctrine’s causation element. On the clearly established prong analysis, the panel concluded that the district court had erred in finding this prong waived “because doing so erroneously shifted the children’s representatives’ burden to the CYFD employees.” *Id.* at 1284. The panel thus remanded for the district court to conduct this analysis in the first instance.

Pretrial Detainee Civil Rights – Eighth Amendment – Deliberate Indifference – Qualified Immunity –

Municipal/Monell Liability – Americans with Disabilities Act (ADA)

*Est. of Beauford v. Mesa Cnty., Colorado*, 35 F.4th 1248, 1256 (10th Cir. 2022)

The panel reversed in part and affirmed in part the district court’s grant of summary judgment to a corrections officer and county defendants for 42 U.S.C. § 1983 deliberate indifference claims arising from the death of a pretrial detainee. One night during the decedent’s detention, the decedent—who suffered from epilepsy and severe mental health disorders—experienced at least one seizure in the presence of corrections and medical staff. Later that night, a corrections officer observed the decedent lying face-down on the floor of his cell but waited about ten minutes before alerting the medical staff. The efforts of medical staff and paramedics failed to revive the decedent. The decedent’s estate brought § 1983 claims for violations of the Eighth and Fourteenth Amendments for lack of adequate medical care and violation of due process, a claim under the Americans with Disabilities Act (ADA), and wrongful death and survival state law claims. The panel concluded that the district court erred in entering summary judgment for the corrections officer on qualified immunity grounds. Specifically, the panel concluded that (1) there was a material factual dispute as to whether the corrections officer’s delay in reporting the plaintiff’s condition resulted in substantial harm and (2) deliberate indifference to a detainee’s serious medical need—including the failure to provide life-saving measures to an inmate in obvious need—is a clearly established constitutional right. The panel also reversed and remanded for reconsideration of municipal liability, as the district court had entered summary judgment on the grounds that none of its employees had committed an underlying constitutional violation. The panel otherwise affirmed the district court’s entry of summary judgment on the other claims, including the dismissal of the ADA claims for failure to provide any evidence that the plaintiff wanted access to a service and was denied.



In a case set against a quintessentially Western backdrop, a Tenth Circuit panel affirmed the district court’s entry of judgment on the pleadings but reversed the denial of plaintiff’s motion for leave to amend, concluding that amendment would not be futile. The plaintiff had allegedly closed corral gates several times in apparent protest of livestock grazing on public land, and after days of conflict with local authorities, she was charged with two misdemeanors and two felonies related to the conflict and her advocacy. During a preliminary hearing, a county prosecutor made statements that later became the basis for the plaintiff’s 42 U.S.C. § 1983 claims for violations of First, Fourth, and Fourteenth Amendment rights—all related to the prosecutor’s allegedly knowing and/or reckless material factual misrepresentations. The panel affirmed the district court’s grant of judgment on the pleadings, concluding that (1) the prosecutor enjoyed absolute prosecutorial immunity for the statements because he had acted in his role as an advocate of the court; (2) the prosecutor was entitled to Eleventh Amendment sovereign immunity in his official capacity; and (3) the plaintiff failed to state a claim against the county for municipal liability because although the prosecutor was employed by the county, he prosecuted the plaintiff for violations of the *state* criminal code. But a split panel reversed the district court’s denial of plaintiff’s motion to amend her complaint. The majority concluded that additional uncovered evidence of a secret, pre-prosecution meeting of the county board discussing the plaintiff and possible criminal charges against her could plausibly provide a basis for municipal liability. Judge Carson concurred in part but dissented from the panel’s conclusion that plaintiff’s proposed complaint stated a plausible municipal liability claim. Judge Carson reasoned that “[n]othing in the proposed amended complaint suggests that San Juan County commissioners had final policymaking authority over what charges the state brought.” *Chilcoat*, 41 F.4th at 1222.

**Remember – You Can Access Civil Pro Bono Panel Documents, News, and Events on the U.S. District Court’s Civil Pro Bono Panel [Webpage](#):**

