**Summary of the Proposed *Pro Bono* Plan and Amendments to the Local Rules of Civil and Criminal Procedure of the Western District of New York to be Effective January 1, 2020**

The Western District of New York’s Local Rules Committee, which is chaired by the Hon. Jeremiah J. McCarthy and comprised of Court personnel and members of the bar of this Court, convenes on an annual basis to ensure that the Local Rules conform to the Federal Rules amendments and current practices of this Court, as well as to address any Local Rule concerns raised by our bar. The committee proposes amendments to the Court for consideration.

At the Court’s request, a central focus of the committee’s efforts this year has been the development of a proposal to reinvigorate the Court’s *pro bono* efforts. Our bar has a long history of providing *pro bono* representation to eligible indigent litigants in civil cases. Despite these laudable efforts, over the past four years, our District averaged 547 *pro se* cases (prisoner and non-prisoner) filed annually, and averaged only 17 *pro bono* appointments per year. Hence, only about 3% of these cases receive counsel, which is less than comparable districts. One of the reasons for that is that our District does not currently have a formal *pro bono* appointment process or plan. The use of *pro bono* counsel ensures equal access to justice, permits the Court to more effectively address these cases, and often provides valuable experience to younger attorneys. However, the lack of an effective plan inhibits the use of this tool.

To address this issue, the Court empaneled a subcommittee comprised of Court staff and members of its bar, including Robert Conklin, Amy Hemenway, Carolyn Nussbaum, Michael Perley, Rodney Personius, Stephen Schwarz, and Sheldon Smith. With their valuable input and in partnership with the Erie County Bar Association Volunteer Lawyers Project (“VLP”) and the Volunteer Legal Services Project of Monroe County, Inc. (“VLSP”), the Court developed a comprehensive plan that includes 1) formalizing the District’s *pro bono* appointment process to allow the Court to appoint counsel to a larger number of eligible *pro bono* cases, including limited scope appointments to curb the burden on appointed counsel and to assist the Court in efficiently handling these cases by providing counsel for targeted junctures of a case - *e.g.*, mediation or amendment of pleadings; 2) increasing the effectiveness of the *pro bono* representation by increasing the cap on reimbursable expenses for these cases; and 3) funding these initiatives by increasing the current admission fees and imposing a biennial registration fee on all admitted attorneys.

A summary of the proposed *pro bono* rule, as well as the other proposed amendments to the Local Rules of Civil and Criminal Procedure are set forth below.

**The Proposed *Pro Bono* Plan**

1. **Proposed Enactment of L.R. Civ. P. 83.8 (*pro bono* service)**

Consistent with the Court’s inherent authority and 28 U.S.C. §1915(e)(1), the proposed Local Rule provides a formalized framework to make appointments simpler for the Court and more equitable and transparent to the bar. To accomplish this, the proposed Local Rule creates a panel of volunteer attorneys willing to accept limited or full scope appointments. If no attorney from the volunteer panel is available, the Court will randomly select an attorney from an assignment wheel comprised of admitted attorneys with an office in this District who have entered an appearance in at least one civil or criminal case within the last two years of the appointment, subject to certain exclusions - *e.g.*, government or legal aid attorneys. The proposed Local Rule provides clear guidance on the withdrawal procedure, including specific grounds for automatic relief from an appointment (*e.g.*, a conflict of interest). It also permits attorneys to seek relief from an appointment by letter, rather than a motion.

By accepting an appointment, an attorney fulfills his or her ethical obligations, ensures equal access to the courts, and gains valuable Federal Court experience. To facilitate opportunities for newer attorneys, the proposed Local Rule creates a senior *pro bono* panel of selected attorneys to act as co-counsel to less experienced attorneys. To encourage participation from all members of the bar of this Court, the Erie County Bar Association Volunteer Lawyers Project and the Volunteer Legal Services Project of Monroe County, Inc. have agreed to treat attorneys appointed under the proposed Local Rule as volunteers to those organizations and afford them all of the accompanying benefits, including primary malpractice coverage and CLE credit for *pro bono* work. The Court will also contribute to those efforts with Court-sponsored educational opportunities.

**2. Amendments to the Guidelines Governing Reimbursement from the District Court Fund of Expenses Incurred by Court Appointed Counsel**

To increase the effectiveness of the *pro bono* representation and to make such appointments less financially onerous on attorneys, the Guidelinesare being amended to increase the presumptive cap on reimbursable expenses from $1,800.00 to $5,000.00, and reduce the standard for exceeding that threshold from “extraordinary circumstances” to “good cause shown”. The $5,000.00 presumptive cap is more in line with other comparable districts.

**3. Fee Increases**

To fund these initiatives, including the increase to the presumptive cap on reimbursable expenses, the Court is enacting modest increases to the attorney ($200.00 to $225.00) and *pro hac vice* ($150.00 to $200.00) admission fees, and the imposition of a biennial registration fee of $50.00 for attorneys with offices in the District and $75.00 for attorneys with offices outside of the District, since those attorneys have no *pro bono* obligation under the proposed Local Rule. The collection of the biennial fee will be deferred until the court has an opportunity to gauge the impact on the District Court Fund of the increased presumptive cap on reimbursable expenses and anticipated increase in appointments**.**

**Proposed Amendments to the Local Rules of Civil Procedure**

1. **L.R. Civ. P. 5.5 (procedures in Social Security cases)** -The proposed amendments are

intended to address recent case law developments impacting petitions for attorneys’ fees under 42 U.S.C. §406(b). Specifically, as a result of Sinkler v. Berryhill, 932 F.3d 83, 91 (2d Cir. 2019), the proposal applies the deadline of Fed. R. Civ. P. 54(d)(2)(B) to such petitions, and as a result of Culbertson v. Berryhill, \_\_\_ U.S.\_\_\_, 139 S. Ct. 517 (2019), the proposal eliminates L.R. Civ. P. 5.5(g)(3)(D)(i) and (ii), which currently require an attorney to disclose whether §406(a) fees have been sought.

1. **L.R. Civ. P. 83.1 (attorney admission)** - To better align the admission practices of this Court with the practices of other courts, the proposed amendment requires a personal appearance for all admissions, other than *pro hac vice*. Additionally, the proposed amendment addresses several non-substantive changes to the admission forms used by the Clerk’s Office.

**3. L.R. Civ. P. 83.2(c) and (d) (attorney withdrawal and substitution)** - Consistent with the practice of many other courts, the proposal limits the instances where counsel may withdraw or substitute without Court approval, especially where it may impact scheduled proceedings. Under the proposal, a stipulation will suffice only where counsel can certify that a successor attorney has or will simultaneously file a notice of appearance, no evidentiary hearing or trial date has been scheduled, and the withdrawal/substitution will not cause delay or require amendment of case management order deadlines.

**Proposed Amendments to the Local Rules of Criminal Procedure**

1. **L.R. Crim. P. 32 (presentence report)** - Triggered by the recent opinion in United

States v. McIlwain, 931 F.3d 1176 (D.C. Cir. 2019) and consistent with current practice, the proposed amendment prohibits the disclosure of the United States Probation Office’s sentencing recommendation to the parties unless authorized by the sentencing judge.

1. **L.R. Crim. P. 44(a) (attorney admission, appearance, withdrawal)** - The proposed amendment strikes the incorporation of L.R. Civ. P. 83.2, since the procedure for withdrawal/substitution by counsel in civil cases is not applicable to criminal cases.