

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20160436**Comment of Bruce D. Nestor In the Matter of a Petition to Terminate the Special Provision
of Legal Services by Qualified Attorneys From Outside the State of North Dakota**

I am a 1992 graduate with highest honors of the University of Iowa Law School. I am licensed in Iowa (inactive), Minnesota and North Dakota. I am admitted to federal District Courts in Iowa, Illinois, Minnesota and North Dakota, as well as in several federal Circuit Court of Appeals and the United States Supreme Court. I have practiced criminal defense in state and federal court for over 25 years. During my career I have been a member of the Mass Defense Committee of the National Lawyers Guild and represented dozens of individuals charged with felonies and misdemeanors as a result of their involvement in social movements, demonstrations and protests. My law office is in Minneapolis, MN, approximately six hours from Bismarck, MN, by automobile.

Since being admitted to the North Dakota bar, I have individually represented nine defendants in DAPL related cases, two with felony charges. Of these cases, seven have been dismissed with two cases (including one felony) currently pending. I have made at least eight separate trips to North Dakota in connection with these cases, with each trip ranging from several days to up to one week. In addition to appearing in cases, I have observed trials, hearings, jury selection, and status conferences in multiple cases in which I am not counsel of record. I have formed working relationships with several other North Dakota attorneys who provide insight and advice on North Dakota practice, including local rules and local custom. I also represent one defendant in federal District Court in North Dakota, charged in a DAPL related case.

Under the modified pro hac vice rules approved by the North Dakota Supreme Court on January 18, 2017, I serve as the associated North Dakota attorney for sixteen experienced, non-North Dakota attorneys who have been admitted pro hac vice to work exclusively on DAPL related cases on a pro bono basis. Eleven of these attorneys have appeared in 94 DAPL related cases, including eight felonies and 86 misdemeanors. Of these 94 cases, all charges have been dismissed in 36 files with the balance of the cases currently unresolved. The five attorneys who have not appeared remain available to take cases if requested by defendants in DAPL related cases, and the eleven attorneys who have appeared also remain available to assume responsibility for additional cases. It is my understanding that many defendants still lack assigned counsel. The primary reason that pro hac vice counsel have not appeared on behalf of still unrepresented defendants is that their cases are set for trial in 2018 and were therefore given a lower priority than cases with earlier trial dates.

In my capacity as associated North Dakota counsel, I review and approve all court filings. I maintain contact with the pro hac vice attorneys by email and phone to discuss both substantive issues related to the cases as well as procedural matters with respect to filing, deadlines, and other matters. At least five of the pro hac vice attorneys working with me have spent extended time in North Dakota, forming working relationships with both local attorneys and prosecutors. Pro hac vice attorneys have taken the lead in seeking to coordinate counsel on cases joined for trial, initiating strategy discussions and sharing motions, jury instructions and other pleadings. I have never been contacted by a District Court judge, court administration, or prosecutor, with a complaint that any pro hac vice attorney acted unethically or violated any local rules. No South Central Judicial District judge has ever contacted me to request that I appear at a hearing alongside pro hac vice counsel. Had such a request been made, I am available to travel from Minnesota and appear whenever a District Court judge believes that such an appearance is necessary.

The experience and service of at least two pro hac vice attorneys with whom I am associated is worth highlighting.

Brian Fitzpatrick is an experienced criminal defense attorney who formally appeared in eight cases, five in association with myself and three in association with Bismarck attorney Amanda Harris. He also spent a substantial period of time coordinating cases and doing administrative work in the Water Protective Legal Collective office in Mandan, North Dakota. During this time he formed working relationships with prosecutors in the Morton County State's Attorney's office and facilitated the dismissal of additional cases, in which he did not formally appear, which shared similar fact patterns and legal issues with his own cases. His work was both professional and collegial, protected the rights of his clients as well as others who lacked counsel, and resulted in substantial savings of both time and expense to the North Dakota judicial system.

Peter Schoenburg is a renowned criminal defense attorney in New Mexico. He appeared as pro hac vice counsel in State v. Hebert, 30-2016-CR-01797. Mr. Hebert originally appeared without counsel at his preliminary hearing on a felony charge. Mr. Schoenburg then prevailed on a contested motion to hold a second preliminary hearing, on the basis that Mr. Hebert had not validly waived his right to counsel simply as a result of confusion about how to renew a previously denied application for appointed counsel. A second preliminary hearing was then held, at which the Honorable David W. Nelson dismissed the felony charge for lack of probable cause.

Pro hac vice counsel appearing under the modified rules authorized by the North Dakota Supreme Court have provided exemplary service to their clients. They have represented unpopular clients, perceived as "outsiders" by the vast majority of the local community, and have worked diligently to uphold the rule of law in North Dakota. Given their demonstrated service and contributions, the North Dakota Supreme Court should be cautious in reversing its decision to modify the pro hac vice rules due the unprecedented legal needs generated by the reaction of

law enforcement to the DAPL protests. The judges of the South Central Judicial originally opposed the decision of the North Dakota Supreme Court to modify the pro hac vice rules. The Petition to Terminate now filed by at least some of the South Central Judicial District judges, appears to simply be an expression of that initial opposition and fails to provide any specific factual basis to reverse and terminate what has been a highly successful program. The Petition to Terminate does not explain how requiring payment of a licensing fee by pro hac vice lawyers who provide pro bono services would serve the public interest. With respect to the appearance of associated North Dakota counsel at hearings, the judge assigned to a particular case retains the authority under the modified pro hac vice rules to require the appearance of North Dakota counsel when appropriate. The Petition to Terminate does not explain how requiring the appearance of North Dakota counsel in all pro hac vice cases, with the option to excuse such appearance, would serve the public interest or promote the fair or efficient administration of justice.

Regardless of the outcome in a particular case, the ability of experienced, out of state counsel to appear on a pro bono basis under the modified pro hac vice rules has immeasurably strengthened the belief among defendants in DAPL cases that they have been fairly treated by the criminal justice system in North Dakota. Terminating the program, absent a compelling reason to do so, would instead cause defendants – whether warranted or not – to question the fairness of the system. Terminating the program would at least create the appearance – whether warranted or not – that the judicial system had joined with prosecutors and law enforcement to ensure convictions of a disfavored and unpopular group by denying members of that group their choice of qualified counsel of their choice. The Petition to Terminate should be denied.

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