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## ***Pro Bono* Attorneys Deskbook**

### **Who Will Pay the Costs?**

### **Proceeding *In Forma Pauperis***

Likely your *pro bono* client will not have the means for pay court costs and fees. This inability should not keep your client from accessing the justice system.

### **In Forma Pauperis Proceedings in State Courts**

The right of an individual to have access to our court system, regardless of income level, was well-established in Missouri before it joined the union and became a state. In fact, an *in forma pauperis* statute was one of Missouri's first enacted laws after admittance to the union. This right was further guaranteed in Article 1, § 14 of the Missouri Constitution, where it has remained unchanged. Over the years, the Missouri legislature has tried to address the practical realities of giving the poor access to the courts. Their current response is found in § 514.040. Christine E. Rollins, "Statutory Assistance for Attorneys Providing Pro Bono Services", 60 Mo Bar Journal, May-June 2004, p 112 [footnotes omitted].

Extensive reference is made to the above cited article by Christine E. Rollins: It is an excellent discussion of the *in forma pauperis* procedure. You may wish to read the [whole article](#).

Section [514.040](#), RSMo sets forth the *in forma pauperis* procedure. Also see Civil Rule [77.03](#).

An OSCA (Office of State Courts Administration) approved [Motion and Affidavit in Support of Request to Proceed as a Poor Person](#) is in this deskbook forms library.

The OSCA form does not include sheriff's service costs or publication costs. These costs should be specifically mentioned in the application, if appropriate to your client's case.

### **How does the application proceed?**

First, § 514.040(1) establishes a procedure for a client is to file a motion to proceed *in forma pauperis*. In most cases, the courts will act within their discretion and rule on the motion without requiring a

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hearing. On the rare occasion that a court wishes to hold an evidentiary hearing, it is a two-stage process. Initially, the hearing is set to determine petitioner's status as an indigent. The court may require an affidavit from the petitioner setting out particulars of his or her current financial condition. The court may require affidavits from others or "adopt some similar procedure to discover plaintiff's true financial [state]." After the client is deemed "poor," the court examines the "petition to see if it is patently and irreparably frivolous or malicious on its face so that, as pleaded, [movant] could prove no set of facts entitling him to relief." If the court deems the action to be frivolous or malicious, petitioner is not allowed to proceed. Rollins, *id* [footnotes omitted].

What costs are included if *in forma pauperis* status is granted? Filing fees, personal service attempts, service by publication related costs, and transcripts and legal files requested to pursue appeals on behalf of indigent clients are now specifically enumerated as falling within the meaning of § 514.040, RSMo.

Once the client has been determined to be indigent, the statute allows for the person to have "all necessary process and proceedings as in other cases, without fees, tax or charge as the court determines the person cannot pay." Since the inception of the statute, the courts have struggled to define "necessary process and proceedings." The legislature did not enumerate specific items or give guidance as to what would fall within the scope of that term. However, Missouri law does require that "words and phrases [of statutes] be taken in their plain or ordinary and usual sense." Therefore, the courts have found that filing fees should be waived for those determined to be indigent.

Filing the motion to proceed *in forma pauperis* may seem more trouble than it is worth to get a filing fee waived. Although these fees, and others, may seem nominal to most of us in the legal community, even these minimal amounts in many cases keep clients from pursuing actions *pro se* or contacting an attorney. If a client does request our services, and we are inclined to assist them, filing this motion will allow us to file their case free of charge. The waiving of this nominal fee, in and of itself, may open the doors of justice to additional members of our communities.

The courts have also found that the costs of service are "necessary process and proceedings" that must be waived for poor people. Law enforcement, once presented with notice from the court that the petitioner can proceed *in forma pauperis*, are bound to try and attempt personal service on the opposing party without payment of a fee. This holds true for all county sheriff's departments throughout the state of Missouri. It has been my experience that even some out-of-state service requests will be honored free of charge, depending

upon the department; however, they have no obligation to do so.

If personal service cannot be perfected, the next step, in most cases, is service by publication. The court of appeals, in *State ex rel. Taylor v. Clymer*, was faced with the question as to whether service by publication fell within the "necessary process and proceedings" meaning of § 514.040. "Respondents contend[ed] that relators [had] received complete access to the court because they [had] been allowed to file their actions as poor persons" and did not have to pay the filing fees. In addition, respondents argued that "the State [was] not further obligated to expand relators' rights by affording them services of process by publication without cost." The court disagreed. The court determined that "service accomplishes the fact of jurisdiction and not the filing" of the petition. The court held that service was within the meaning of the necessary process and proceedings language of § 514.040. Since service by publication was required to continue with the cause of action, the court held that "the order of publication should be issued without cost to relators under the mandate of our statutes and the policy of this State to provide indigents free access to our courts."

In a more recent case, *State ex rel. Holterman v. Patterson*, the court of appeals was asked to rule on whether guardian *ad litem* fees fell within § 514.040. Relator was required to pay one-third of a \$1,000 guardian *ad litem* fee. Relator argued that she should not be required to pay the fee under § 514.040 because she was indigent and could not pay costs and fees "related to the prosecution of the suit." Relator had filed a motion with the trial court to join the county as a third party and order fees paid out of public funds. The court reasoned that since it had been determined that relator was "unable to pay the costs, fees and expenses necessary to prosecute or defend the action," § 514.040 leaves no discretion for the trial judge to assess the guardian *ad litem* fee against relator. The county was required to pay the fees assessed against relator.

In two recent decisions, the Court of Appeals, Eastern District has identified additional items covered by § 514.040. First, pursuant to a writ of mandamus, *State ex rel. Wecker v. Ohmer*, May 6, 2003 (*Wecker I*), the court considered whether relator was entitled "to obtain a transcript of her termination of parental rights trial." Relator filed a timely appeal and a "certificate of . . . inability to pay cost, fees and expenses" indicating that she was proceeding as a poor person. In addition, she filed a request for the transcript in the trial court. Respondent denied her request for a trial transcript. Respondent argued that since relator had been represented by private counsel during the trial, she was not allowed to request the trial transcript as a poor person. The court was unpersuaded by this argument, since the

trial attorney filed an affidavit with the court stating that he represented relator on a *pro bono* basis. The court found that "Section 514.040.3 specifically allows for 'private counsel working on behalf of or under the auspices of [a legal aid] society.'" The court ordered the production of the trial transcript, noting that Missouri statutes provided for court costs in termination of parental rights cases in § 211.462.4: "Court costs shall be paid by the county in which the proceeding is instituted, except that the court may require the agency or person having received legal or actual custody to pay the costs."

On June 10, 2003, the Eastern District issued a second opinion in the matter, *Wecker II*, stating that for the same reasons used in *Wecker I*, the relator should not be required to pay to have the legal file prepared in order to pursue her appeal. Respondent had argued that the state was not required to pay for preparation of the legal file. The court found that preparation of the legal file fell within the meaning of § 514.040. Respondent was directed to enter all orders necessary to prepare and release the legal file to relator.

Although filing fees, in personal service attempts, service by publication related costs, and transcripts and legal files requested to pursue appeals on behalf of indigent clients are now specifically enumerated as falling within the meaning of § 514.040, this most likely is not an inclusive list. Consistently, the appellate courts are finding that if the requested item is something that a litigant is required by law to file, proceed in the prosecution of, or defend a suit against, payment will not be required if a party is deemed to be indigent. Rollins, *id.* [footnotes omitted, emphasis supplied]

A special statute Section [514.040.3](#), RSMo gives [Legal Services](#) authority to determine poverty status. Once that certification is granted by Legal Services, the court must approve payment of all costs. State of Missouri ex rel. Tressa Holterman, relator, v. Hon. Timothy J. Patterson, resp., No. ED78148, 24 S.W.3d 784 (Mo. App. 2000).

The most recent amendment to § 514.040 became effective on August 28, 1999, when subsection 3 was added. It allows for a legal aid society, a legal services or other non-profit organization, which has as its primary purpose to provide legal services to indigent persons, to certify that a client is indigent within the meaning of the statute. The certificate issued by the non-profit agency certifies to the court that the party has been determined by the agency's standards to be "unable to pay the costs, fees and expenses necessary to prosecute or defend the action." The appellate courts have determined that once a party has been certified by one of these agencies, trial courts have no discretion in the matter and must accept the person as "poor." Private counsel, who work on behalf of or under the auspices of such non-profits, would be allowed to utilize

the certificate that the non-profit provides on behalf of their clients. Therefore, if attorneys contact and volunteer to take cases from their local legal services offices, they obtain all the benefits under § 514.040 without having to work through the evidentiary hearing otherwise required. Rollins, id. [footnotes omitted]

The foregoing discussion focuses on *in forma pauperis* proceedings in state trial courts in civil matters since that is the most frequent forum for *pro bono* matters. Similar procedures are available in adult abuse cases (see Section 455.025, RSMo), state court appeals (Rule 81.04).

## **In Forma Pauperis Proceedings in Federal Courts**

In forma pauperis proceedings are authorized in federal courts by 28 U.S.C. § 1915. The two-step process requires first a determination of whether the plaintiff qualifies by economic status and second a determination of whether the cause of action is frivolous or malicious. *Martin-Trigona v. Stewart*, 691 F.2d 856 (8<sup>th</sup> Cir. 1982).

The statute divides civil plaintiffs into two categories, those who are prisoners and those who are not. For those parties who are prisoners obtaining in forma pauperis certification is somewhat more complicated. The law requires payment of installments from the prisoner's inmate trust fund account. The statute also may disqualify those from in forma pauperis consideration if they have filed three prior frivolous lawsuits. 28 U.S.C. § 1915(g). This discussion will focus on those parties who are not prisoners. If the party is a prisoner it is suggested that 28 U.S.C. § 1915 and the district court local rules be reviewed carefully to determine all of the requirements for obtaining in forma pauperis status.

For non-prisoner parties the process to initiate an in forma pauperis authorization is similar to that in state court. Most district courts require the filing of a motion or application, affidavit of the party, and the proposed complaint to be filed in the case. The affidavit of the party should include all assets and income available to the party and establish that the individual is unable to pay for fees in the action. The affidavit should also state the nature of the action, defense, or appeal that the party is seeking to redress. 28 U.S.C. § 1915(a)(1).

The local U.S. District Court rules should be consulted before filing an in forma pauperis action. Eastern District Rule 3-2.05 requires that the party file an application accompanied by an affidavit form provided by the court. The [required form](#) is available from the Eastern District web site. The rule also requires any person granted in forma pauperis status to promptly notify the court in writing of changes in their financial

status. Western District Rule 83.7 also requires a party to file, along with the application and complaint, an affidavit on a form provided by the court (or other affidavit providing similar information). [This form](#) is also available from the Western District web site. The Western District Rule also allows the court to require payment of a partial filing fee or installment payments, Rule 83.7(a)(4). If the court orders that a full or partial filing fee is required the party is granted 30 days to comply or the case can be dismissed. Rule 83.7(a)(6) also allows for the court to review the in forma pauperis status from time to time and require a party to make payment of a fee if the party becomes capable of paying.

As noted above, it is important for the in forma pauperis applicant to make a complete disclosure of all assets, income, and any other facts relevant to the applicant's financial status and ability to pay. If the court later determines that full information was not provided, the court has the authority not only to rescind the in forma pauperis status, but to also dismiss the case with prejudice. 28 U.S.C. § 1915(e)(2); *Romesburg v. Trickey*, 908 F.2d 258 (8<sup>th</sup> Cir. 1990).

If in forma pauperis status is granted, "the officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." 28 U.S.C. § 1915(d). In addition, the statute allows the court to require a record on appeal or transcript of proceedings to be prepared at no expense to the party. 28 U.S.C. § 1915(c). Other expenses are generally not covered by in forma pauperis status. *Manning v. Tefft*, 839 F. Supp. 126 (D. R.I. 1994)(Transportation expenses denied.); *Wright v. U.S.*, 948 F. Supp. 61 (M.D. Fla. 1996)(Deposition costs denied.); *Pedraza v. Jones*, 71 F.3d 194 (5<sup>th</sup> Cir. 1995)(Expert witness costs denied.); *Malik v. Lavalley*, 994 F.2d 90 (2d Cir. 1993)(Witness fees denied.). In *United States Marshals Service v. Means*, 741 F.2d 1053 (8<sup>th</sup> Cir. 1984) the court held that § 1915(d) did not allow for the payment of witness fees to compel the attendance of witnesses. However, after construing a number of federal statutes and rules, the court found discretionary authority to require the Marshals Service to pay witness fees when the United States is an opposing party to the action.

Thanks to James Smith, Legal Aid of Western Missouri, Kansas City, MO for the above discussion of federal in forma pauperis procedure.

For appropriate forms for proceedings *in forma pauperis* in federal [appeals](#) courts and [bankruptcy](#) proceedings click the underscored key word.

## How is poverty measured?

Probably the most frequently used benchmark for measuring personal poverty is the guidelines annually published by the [U.S. Department of Health and Human Services](#). [Click here](#) for a chart showing based on the HHS guidelines showing poverty level by household size by year and month from 100% to 200% of poverty.

Each agency will apply the HHS guidelines in their own way. Legal Services eligibility is based on 125% of poverty. Samaritan Center Legal Care uses 150% of poverty as a threshold for eligibility.

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