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## The Lawyer's Role in the Independent Adoption Process: Parental Consent and Best Interests of the Child

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# APPEALABILITY, UNDER THE COLLATERAL ORDER DOCTRINE, OF ORDERS DENYING MOTIONS FOR APPOINTMENT OF COUNSEL IN FEDERAL CIVIL LITIGATION AFTER *RICHARDSON-MERRELL, INC. v. KOLLER*

## INTRODUCTION

This note examines the issue of whether a denial of a plaintiff's<sup>1</sup> forma pauperis motion for appointment of counsel in federal civil litigation should be given interlocutory review under the collateral order doctrine.<sup>2</sup> The majority of the courts of appeals have ruled against such review. Most of these decisions are based either on the United States Supreme Court's decision in *Firestone Tire and Rubber Co. v. Risjord*,<sup>3</sup> finding that orders denying motions to disqualify counsel in federal civil cases are not collateral orders, or on the Court's decision in *Flanagan v. United States*,<sup>4</sup> finding that orders granting motions to disqualify counsel in federal criminal cases are not collateral orders.

In 1985, the Supreme Court decided in *Richardson-Merrell, Inc. v. Koller*<sup>5</sup> that a district court's grant of a motion to disqualify counsel in a civil case is not appealable as a collateral order. Of all the Court's decisions regarding appealability of orders concerning motions to disqualify counsel, the situation in *Koller* seems most analogous to the situation in which a motion for appointment of counsel in a civil case is denied. This decision will, therefore, be the most convincing reason for the courts of appeals within the minority to overrule their decisions allowing interlocutory review of denials of ap-

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1. This note discusses the two statutes most often invoked by parties seeking court-appointed counsel in federal civil cases, 28 U.S.C. § 1915(d) and Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1)(B). Although the latter statute provides for appointed counsel only for "complainants," the former does not distinguish between plaintiffs and defendants in providing for appointed counsel. On its face, 28 U.S.C. § 1915(d) allows a court to appoint counsel for indigent plaintiffs as well as defendants. This note, however, will refer to the litigant seeking counsel as the "plaintiff," since, as the leading cases discussed herein indicate, the litigants who move for appointment of counsel are invariably plaintiffs.

2. See *infra* notes 23-38 and accompanying text for detailed treatment of the collateral order doctrine.

3. 449 U.S. 368 (1981).

4. 465 U.S. 259 (1984).

5. 472 U.S. 424 (1985).

pointed counsel. This author believes that interlocutory review of denials of counsel should not be denied on the basis of *Koller*, since disqualification of counsel is not the same as denial of counsel. A denial of counsel is a collateral order in its own right, for reasons addressed in this note.

## I. APPOINTMENT OF COUNSEL FOR CIVIL INDIGENTS IN FEDERAL COURTS

In federal<sup>6</sup> and most state<sup>7</sup> criminal proceedings, a defendant has the constitutional right to assistance of counsel if he is indigent, but no such right exists for a party in a federal civil proceeding.<sup>8</sup> An indigent party in a civil case may move a district court to appoint counsel under Section 706 of the Civil Rights Act of 1964<sup>9</sup> if he

6. U.S. CONST. amend. VI.

7. See *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the United States Supreme Court ruled that a criminal defendant's sixth amendment right to counsel is a fundamental right essential to a fair trial, and the fourteenth amendment requires the states to appoint counsel for indigent criminal defendants regardless of whether the offense charged is a capital offense. The Supreme Court extended the right of an indigent criminal defendant to appointed counsel in holding that the right is not governed by the technical classification of the offense charged, and thus encompasses prosecutions for misdemeanors. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

8. See, e.g., *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982) ("A civil rights complainant has no right to the automatic appointment of counsel."); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 430 (10th Cir. 1966) ("[T]he appointment of counsel in a civil case is a privilege and not a right."), *cert. denied*, 386 U.S. 977, *reh'g. denied*, 386 U.S. 1043 (1967); *Carter v. Teletron*, 452 F. Supp. 939, 943 (S.D. Tex. 1978) ("The indigent plaintiff is accorded a privilege, not a right, and the scope of this privilege rests heavily in the court's discretion."); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) ("There is little doubt that there is no constitutional right to appointed counsel in a civil case."), *cert. denied*, 459 U.S. 1214 (1983); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) ("[G]enerally speaking (sic) no right to counsel exists in § 1983 actions. . . ."), *cert. denied*, 459 U.S. 1214 (1983); *Merritt v. Faulkner*, 697 F.2d 761, 763 (7th Cir.) ("[I]ndigent civil litigants have no constitutional or statutory right to be represented by a lawyer."), *cert. denied*, 464 U.S. 986 (1983); *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1981) ("[T]he [litigant] has no constitutional right to [appointment of counsel under 28 U.S.C. § 1915(d)] unless the denial of representation would result in fundamental unfairness impinging upon the [litigant's] due process rights. . . .").

9. In order to ensure that those persons whom Congress intended to protect against employment discrimination would have an adequate chance to secure legal remedy for such injury, § 706 of Title VII of the Civil Rights Act of 1964 was enacted. It provides, in pertinent part, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (1964) (codified at 42 U.S.C. § 2000e-5(f)(1)(B) (1982)).

For Congress' intent in enacting § 706 of Title VII, see 110 CONG. REC. 12,721 (1964). For the purpose of the 1972 amendment, see the remarks of Senator Javits in 118 CONG. REC. 954 (1972).

seeks to vindicate his rights to equal employment opportunity under Title VII of the Act.<sup>10</sup> In all other civil cases,<sup>11</sup> including those brought under 42 U.S.C. § 1983,<sup>12</sup> an indigent may petition a court under 28 U.S.C. § 1915(d)<sup>13</sup> for appointment of counsel. Section 706 of the Civil Rights Act of 1964 provides that a court "may appoint"<sup>14</sup> counsel to represent a litigant seeking legal remedy for employment discrimination, while 28 U.S.C. § 1915(d) provides that a court "may request"<sup>15</sup> counsel to represent a litigant in other types

10. 42 U.S.C. § 2000e. The purpose of this legislation is to prohibit disparate hiring in the workplace on the basis of race, religion, sex, or national origin, *Gilbert v. General Electric Co.*, 519 F.2d 661 (4th Cir.), *rev'd on other grounds*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977); and to make whole victims of unlawful employment discrimination, *Darnell v. City of Jasper*, 730 F.2d 653, 655 (11th Cir. 1984).

11. Although Section 706 of the Civil Rights Act of 1964 and 28 U.S.C. § 1915(d) are the two forma pauperis statutes most often invoked by those seeking appointed counsel in federal civil litigation on the grounds of indigence, 25 U.S.C. § 1912(b) is also available for parents or Indian custodians involved in State proceedings concerning foster care placement of or termination of parental rights in Indian children and who seek court-appointed counsel because of indigence. Owing to its special nature, this statute will not be discussed herein.

12. Commonly referred to as the "Civil Rights Statute", Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen or the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

13. Congress has made professional representation possible for those who cannot afford this service by enacting section 1915(d) of Title 28 of the United States Code. This statute states that "[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue or if satisfied that the action is frivolous or malicious." Act of June 25, 1948, ch. 646, § 1915(d), 62 Stat. 869, 954.

See generally *Sander v. McGuire*, 516 F.2d 820, 823 (3d Cir. 1975) ("The purpose of § 1915 is to provide an entre, not a barrier, to the indigent seeking relief in the federal court."); *Harlem River Consumer's Coop. v. Associated Grocers of Harlem*, 71 F.R.D. 93, 96 (S.D.N.Y. 1976) ("The purpose of providing for leave to proceed in forma pauperis is to assure that litigants will not be deprived of access to the judicial system because of their financial circumstances.") (citing *S.O.U.P., Inc. v. Federal Trade Comm'n*, 449 F.2d 1142, 1144 (D.C. Cir. 1971) (Bazelon, C.J., dissenting)). See also Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967) (for a comparison between this statute and the right of an indigent criminal defendant to assistance of counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963)); Zeigler and Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 159, 187-96 (1972) (discussing the mechanics of a section 1915 motion).

14. See *supra* note 9.

15. See *supra* note 13.

of civil cases: in either case, the decision whether to appoint counsel is within the discretion of the court.<sup>16</sup>

Although the two statutes allow a federal court to appoint an attorney to represent a plaintiff in a civil proceeding pro bono, they do not enunciate the criteria for deciding a motion for this. Counsel, however, will be appointed if the plaintiff's motion satisfies an "exceptional circumstances" analysis developed under federal common law,<sup>17</sup> whereby a court must consider the merit of the plaintiff's claims, his ability to retain counsel and the diligence of his effort to do so, and the difficulty the plaintiff would encounter if forced to proceed pro se.<sup>18</sup> This test will be satisfied if the plaintiff has a colorable claim, establishes that he cannot afford counsel, has failed to secure counsel willing to represent him and the case is not sufficiently simple for the plaintiff to proceed pro se.<sup>19</sup> Once the test is met, the plaintiff acquires the right to counsel. Failure of a court to

16. See *supra* note 8.

17. See, e.g., *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981) (threshold issue is whether indigent litigant's claim has merit; then the court must consider such other factors as the litigant's chance of success, the complexity of the factual issues presented, the complexity of the legal issues raised, and the capability of the indigent to prepare and present his case); *Branch v. Cole*, 686 F.2d 264 (5th Cir. 1982) (The exceptional circumstances test is the proper standard according to which a federal court should exercise its discretion. The "two basic factors" of the test are the "type and complexity of the case, and the abilities of the individual bringing it."); *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982) (appointment of counsel is a privilege, not a right, and is required only in exceptional circumstances); *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982) (Although federal court has broad discretion in appointing counsel for an indigent, appointment cannot be denied in circumstances in which denial would "result in fundamental unfairness impinging on [the indigent's] due process rights."); *Caruth v. Pinkney*, 683 F.2d 1044 (7th Cir.) (test for appointment of counsel requires consideration of the merit of an indigent's case, his chances of success, the complexity of the factual and legal issues presented, and the indigent's capability of preparing and presenting his case), *cert. denied*, 459 U.S. 1214 (1982); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983) ("The circumstances of a particular case may make the presence of counsel necessary."); *Childs v. Duckworth*, 705 F.2d 915 (7th Cir. 1983) (following the criteria set forth in *Maclin v. Freake*). See generally Annot., 69 A.L.R. FED. 666, 670-71 (1984), and 32 AM JUR. 2D *Federal Practice and Procedure* §§ 239-240, for discussion of the "exceptional circumstances" test.

18. See *McKeever v. Israel*, 689 F.2d 1315, 1320-21 (7th Cir. 1982). Some important factors related to the "difficulty" element include the complexity of the legal issues in the action and the plaintiff's ability to prepare his case, present it, handle conflicting evidence, and, if necessary, perfect an appeal. The two essential ingredients of the "exceptional circumstances" test are whether the action has merit and the difficulty a plaintiff would have if he proceeded without appointed counsel. See Annot., 69 A.L.R. FED. 666, 670 (1984).

19. See Annot., 69 A.L.R. FED. 666, 670 (1984).

appoint counsel after that point constitutes an abuse of discretion and is reversible error.<sup>20</sup>

The overriding policy is to analyze a motion strictly, in order to avoid burdening an attorney with a weak case that is likely to be non-remunerative.<sup>21</sup> A court is reluctant to force an attorney to work on a case he probably would not have accepted had the plaintiff privately requested the attorney's services.<sup>22</sup> The rationale of the test is sound, because it saves both the attorney and the court the injustice of providing low-cost professional service to an undeserving litigant.

If a court finds any of the elements wanting, it may deny the motion. The party affected may, of course, appeal the denial if he believes it to be an abuse of the court's discretion. The issue is *when* should the plaintiff who is so affected be allowed to appeal. Such a litigant should not be forced to wait until a final judgment on the entire case before having the opportunity to have the denial reviewed. The unavailability of such appeal disserves the plaintiff who is truly indigent by depriving him of professional assistance in situations where it is almost indispensable, disserves the court system by forcing the plaintiff to pursue his case without an attorney to help clarify the issues and expedite the litigation, and defeats Congress' plan to provide such professional assistance to indigent plaintiffs in federal civil litigation.

## II. THE FINAL JUDGMENT RULE AND THE COLLATERAL ORDER DOCTRINE

A motion under either statute is invariably made at the inception of the suit.<sup>23</sup> Since an order denying counsel comes before a final judgment of the underlying case, it is interlocutory. Ordinarily, such orders are not immediately appealable, since the federal Final Judgment Rule<sup>24</sup> allows appeals from only final decisions. The United States Supreme Court, however, has recognized that an aggrieved

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20. See, e.g., *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982) (appellate court held that denial of counsel by district court to be an abuse of discretion and reversible in light of ample evidence showing satisfaction of exceptional circumstances test).

21. See Annot., 69 A.L.R. FED. 666, 670 (1984).

22. *Id.*

23. See *Henry v. City of Detroit Manpower Dep't.*, 763 F.2d 757, 760 (6th Cir.), *cert. denied*, 106 S. Ct. 604 (1985).

24. The modern basis for federal appellate procedure, § 1291 of Title 28 of the United States Code states:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal

litigant has the right, under this statute, to immediate review of cer-

Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Act of June 25, 1947, ch. 646, 62 Stat. 929, amended by Act of April 2, 1982, Pub. L. No. 97-169, § 124, 96 Stat. 36.

For Congress' intentions in enacting § 1291, see *Fox v. City of West Palm Beach*, 383 F.2d 189 (5th Cir. 1967) (the "purpose of [§ 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."); *United States v. Feeney*, 641 F.2d 821, 824 (10th Cir. 1981) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)) ("[§ 1291] embodies a strong congressional policy against piecemeal reviews. . . ."); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) ("[Congressional] insistence on finality and prohibition of piecemeal review discourage (sic) undue litigiousness and leadenfooted administration of justice. . . .").

The origins of § 1291 of the Judiciary Code can be traced to the Judiciary Act of 1789. That early federal statute provided:

Final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, . . . upon writ of error. . . [a]nd upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court. . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court.

Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84.

Generally, an appellate court should wait until an entire case has been decided before hearing an appeal. *Canter v. American Insurance Co.*, 28 U.S. (3 Pet.) 307, 318 (1830) (legislative mandate requires review of final decrees so that waste of time caused by "fragmented" appeals may be avoided); *United States v. Girault*, 52 U.S. (11 How.) 22, 32 (1850) (entire case must be decided before an appellate court may review it, so that entire record may be before such court); *Holcombe v. McKusick*, 61 U.S. (120 How.) 552, 554 (1857) (writ of error is conditioned upon disposition of entire case before trial court). See generally Crick, *The Final Judgment as a Basis for Appeals*, 41 YALE L.J. 534 (1932).

The origins of § 1291 can also be traced to the English common law rule of obtaining writs of error from the Kings Bench for review of final judgments of the law courts. See *Metcalf's Case*, 77 Eng. Rep. 1193 (K.B. 1615) (case must reach final judgment before a writ of error will be issued). Due credit has been given by the United States Supreme Court to English common law for the Final Judgment Rule. *Holcombe v. McKusick*, 61 U.S. (120 How.) 552, 554 (1857); *United States v. Girault*, 52 U.S. (11 How.) 22, 32 (1850).

Section 1291 authorizes a federal court of appeals to hear an appeal from a final "decision" of a district court. A decision is considered final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945) (citing *St. Louis, Iron Mountain & Southern R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883)).

The primary reason for the so-called Final Judgment Rule is to prevent piecemeal review of trial court orders. The Supreme Court's long-standing rule against piecemeal review was created to avoid long delays in case dispositions, disruptions of the fact-finding process, and unnecessary expenditures by the federal judiciary. *Cobbledick v. United States*, 309 U.S. 323 (1940); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974); *Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1978); *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Flanagan v. United States*, 465 U.S. 259 (1984); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). Piecemeal review may keep an action pending for years, and during that time, evidence may disappear and memories of witnesses deteriorate. It also tends to make the task of the trial judge unwieldy.

tain interlocutory orders within a narrow class involving rights "separable from, and collateral to"<sup>25</sup> the merits of the underlying cause of action, in order to protect these rights from the irreparable loss which deferring appeal until final judgment would cause.

This right to interlocutory appeal has come to be known as the collateral order doctrine<sup>26</sup> and was announced by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*<sup>27</sup> Although it seems to function as an exception to the Final Judgment Rule, the doctrine

The six policy reasons for the Rule are: first, swift disposition of justice, *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429-30 (1985); second, deference to the trial court through preventing appellate court supervision of each step taken by the court, *Firestone*, 449 U.S. at 374 (the independence of the district court would be "undermined" by piecemeal review); *Flanagan*, 465 U.S. at 263-64 ("[T]he Final Judgment Rule helps preserve the respect due trial judges by minimizing appellate court interference with the numerous decisions [trial judges] must make in the prejudgment stages of litigation."); third, avoidance of appeals which may become moot if the party affected by an order ultimately wins the case (*Cf. infra* note 107, for the alarming conclusion that pro se litigants rarely, if ever, prosecute their cases to fruition, much less favorable disposition; thus, this policy reason makes sense in the abstract, but hardly applies to litigants whose motions for appointed counsel are denied.); fourth, recognition that the trial judge is better prepared to hear and rule on factual matters and set the course of the litigation; fifth, prevention of interlocutory appeals taken as dilatory tactics or as settlement devices, *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (the Final Judgment Rule prevents liberal use of interlocutory review to harass an adversary in litigation); *DiBella v. United States*, 369 U.S. 121, 124 (1962) (insistence upon finality "discourage[s] undue litigiousness"); *Flanagan*, 465 U.S. at 263-64 (the Rule makes harassment of one's adversary difficult); *Firestone*, 449 U.S. at 374 (finality reduces a litigant's ability to use interlocutory appeals for untoward purposes) (*Cf. Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1315 (9th Cir. 1981)); sixth, and not least of all, amelioration of the appellate court dockets with too many cases, 80 to 90% of which are affirmed, *Flanagan*, 465 U.S. at 264 ("[The Rule] reduces the ability of litigants to . . . clog the courts through a succession of costly and time-consuming appeals."); *Miller v. Pleasure*, 425 F.2d 1205 (2d Cir.) (stating that appellate court dockets nationwide had increased 200% from 1960 to 1969), *cert. denied*, 400 U.S. 880 (1970) [hereinafter *Miller II*]; *Koller*, 472 U.S. at 434 (citing 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (1976)).

The Rule continues the early American and English common law concept that appellate review is most effective when all prejudicial errors to which timely objections have been made are presented in one proceeding.

25. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

26. 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911 (1976).

27. 337 U.S. 541 (1949). This landmark case involved a derivative suit by Cohen, a shareholder of the defendant Beneficial Industrial Loan Corporation. The plaintiff alleged in a federal diversity action brought in the United States District Court for the District of New Jersey that certain officers of the defendant corporation had fraudulently and negligently squandered \$100 million of corporate assets over an 18-year period.

Since the plaintiff's family's ownership of the corporation amounted to approximately 0.0125% of the outstanding stock, the plaintiff was required by New Jersey law to post a bond securing payment of the defendant's reasonable litigation costs in the event the defendant prevailed. The court denied the defendant's motion to order the plaintiff to comply with this law,



represents the Court's relaxed interpretation of the Rule. Under the doctrine, interlocutory review of certain<sup>28</sup> district court orders is available as of right.<sup>29</sup> As defined in *Cohen*, it applies to orders

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on the grounds that the state law had no effect in federal court. *Cohen v. Beneficial Indus. Loan Corp.*, 7 F.R.D. 352 (D.N.J. 1947).

The defendant immediately appealed the interlocutory order to the Court of Appeals for the Third Circuit, using a rationale similar to the Supreme Court's delineation of the collateral order doctrine.

The court found jurisdiction and reversed the order. *Beneficial Indus. Loan Corp. v. Smith*, 170 F.2d 44 (3d Cir. 1948)(citing primarily *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

Cohen's petition for a writ of certiorari was granted by the Supreme Court. *Cohen v. Beneficial Indus. Loan Corp.*, 336 U.S. 917 (1949). In affirming the Third Circuit's reversal of the district court's order, the court ruled that § 1291 of the Judicial Code should not be interpreted with such technicality that no pre-trial order could be reviewed by a court of appeals before a district court decides the entire case. The collateral order doctrine represents the court's relaxation of the Final Judgment Rule due to the recognition that true review of the legality of some pre-trial orders that are themselves final, and concern questions separate from the main issues of the case, cannot be obtained after the case is adjudicated by the trial court.

28. The Supreme Court has held that interlocutory orders are appealable before final judgment under the collateral order doctrine in the following instances: *Stack v. Boyle*, 342 U.S. 1 (1951) (order denying a motion to reduce bail); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974)(order requiring class action defendants to bear 90% of the plaintiff's notice expenses); *Abney v. United States*, 431 U.S. 651 (1977)(order rejecting a defense of double jeopardy); *Helstoski v. Meanor*, 442 U.S. 500 (1979)(order violating a congressman's rights under the Speech and Debate Clause of the United States Constitution not to be questioned about certain legislative activities); *Roberts v. United States District Court*, 339 U.S. 844 (1950)(order denying a motion for leave to proceed in forma pauperis in a federal civil proceeding); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)(order denying defendant's motion to require plaintiff in derivative suit in federal court to pay security for reasonable litigation expenses as per state law).

Interlocutory orders have been held immediately appealable as collateral orders by the federal courts of appeals in the following cases: *Collins v. Miller*, 198 F.2d 948 (D.C. Cir. 1952)(dismissal of petition for removal of administrator); *Higgins v. United States*, 205 F.2d 650 (9th Cir. 1953)(determination that a criminal defendant is unable to stand trial due to present insanity); *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1958)(award of counsel fees and expenses); *Wythe v. Massey*, 262 F.2d 60 (9th Cir. 1958)(order holding plaintiff accountable for marshal's costs for storage of attached property and subject to immediate execution); *United States v. Schiano*, 504 F.2d 1 (3d Cir.) (order prohibiting reporters from publishing the fact that a criminal defendant has other indictments pending against him), *cert. denied*, 419 U.S. 1046 (1974); *United States v. Wilson*, 639 F.2d 5000 (9th Cir. 1981)(denial of motion to dismiss criminal case on grounds of selective prosecution); *United States v. Yellow Freight System*, 637 F.2d 1248, 1251 (9th Cir. 1980) (denial of motion to dismiss criminal case for lack of indictment), *cert. denied*, 454 U.S. 815 (1981); *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970)(order rejecting class action settlement). Four federal circuits currently hold that a denial of a motion for appointed counsel in a civil proceeding is a collateral order. *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981); and *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983).

29. In stating that section 1291 was to be interpreted in a practical way in order to permit occasional appeal of pre-final judgment decisions, the Court in *Cohen* gave parties aggrieved by decisions qualifying as collateral orders the same right of appeal under section 1291 as they would have for final judgments. 337 U.S. at 546. The court in *Firestone* again cited *Cohen's*

which finally determine claims of right that are separable from the underlying rights asserted in the action, but require immediate review so that such rights are not irretrievably lost and important questions can be resolved.<sup>30</sup> The hallmark of this decision is that the Final Judgment Rule is to be given a "practical rather than a technical construction,"<sup>31</sup> in order to protect certain collateral rights the importance and benefit of which will be destroyed if appellate consideration is deferred until the whole case is adjudicated. The four elements under *Cohen* are finality, separability from the underlying merits, irreparable injury if review is deferred until final judgment, and the precedential value an appellate decision will have for other courts.<sup>32</sup>

The elements of the doctrine were redefined by the Supreme Court in *Coopers and Lybrand v. Livesay*,<sup>33</sup> in which it was held that to qualify as an appealable collateral order, a decision must be final, involve important rights completely separate from the merits of the action, and be effectively unreviewable after a final judgment has been rendered.<sup>34</sup> This decision suggests, though, that the fourth requirement of the *Cohen* test, that an order concern a question of important precedential value, is no longer part of the test.<sup>35</sup> Pres-

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provision of a "practical rather than technical construction" of section 1291. 449 U.S. at 375. This "long tradition" referred to in *Cohen* was supported by citations to *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6, 15 (1839) (debtor-defendant permitted to seek interlocutory review of federal court's decree of foreclosure and sale of mortgaged property before case was finalized by the confirmation of the sale by court decree so that irreparable injury may be prevented); *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848) (final judgment rule in effect in 1848 to be given "liberal" rather than "strict and technical" construction in order to allow review of a pre-final judgment decree of federal court ordering conveyance of real property and slaves to plaintiff); *Branson v. LaCrosse & Milwaukee R.R. Co.*, 67 U.S. (2 Black) 524, 530-31 (1863) (although pre-final judgment decree of sale of property mortgaged by railroad is not technically final for appeal to lie, appeal nevertheless permitted through practical construction of finality in order to prevent injury to the litigant's rights).

30. The oft-quoted portion of the *Cohen* decision which serves as the foundation of the collateral order doctrine states that:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *The Court has long given this provision of the statute this practical rather than technical construction* (emphasis added).

337 U.S. 541, 546 (1949).

31. *Id.*

32. *Id.*

33. 437 U.S. 463 (1978).

34. *Id.* at 468.

35. Although it is not clear whether the fourth *Cohen* element has been affirmatively rescinded, it appears from Supreme Court decisions that it is ignored. C WRIGHT, LAW OF FED-

ently, the collateral order doctrine seems to be comprised of three elements: finality, separability, and irreparable harm. An order must be a court's final word on the motion and not subject to change,<sup>36</sup> and it must involve an issue sufficiently removed from the crux of the action so that an appellate court will not decide the factual and legal issues at the heart of the case.<sup>37</sup> In addition, the effect of the order must be such that important rights of the party affected will be lost or will lose their practical value if immediate review is not granted.<sup>38</sup>

### III. NO SUPREME COURT PRONOUNCEMENT ON THE ISSUE

The Supreme Court has never directly ruled on whether an order denying appointed counsel in a federal civil case is appealable under the collateral order doctrine.<sup>39</sup> During its 1985 Term, the Court declined to consider the issue when it denied a petition for a writ of certiorari<sup>40</sup> brought by the plaintiffs in four civil rights cases<sup>41</sup> consolidated for en banc review by the Court of Appeals for the Sixth

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ERAL COURTS § 101 (3d ed. 1976) (Court made no reference to requirement of "serious unsettled question" in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)); 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3911 (1976) (several federal court decisions allow interlocutory appeal of cases which will not settle important questions).

36. 437 U.S. at 469.

37. *Id.* (citing *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)).

38. 437 U.S. at 468.

39. In addition to its denial of certiorari in *Henry v. City of Detroit Manpower Dep't*, 106 S.Ct. 604 (1985), the Supreme Court has declined on other occasions within the last twenty-five years to consider the issue of whether an order denying a motion under 28 U.S.C. § 1915(d) or § 706 of Title VII is immediately appealable under the collateral order doctrine: *Miller v. Pleasure*, 296 F.2d 283 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962) [hereinafter *Miller I*]; *Miller II*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970); *Hudak v. Curators of Univ. of Mo.*, 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979).

40. 106 S. Ct. 604 (1985). Justice White, however, voted to grant a writ of certiorari to settle the inconsistencies among the federal courts of appeals. *See infra* notes 43 and 44.

41. The four plaintiffs-appellants who sought Supreme Court review under docket number 85-237 were Artell Henry, Douglas Jordan, Norman Cox, and Ronny Lee Parrish. Henry sued the Manpower Department of Detroit in the United States District Court for the Eastern District of Michigan under Title VII, alleging employment discrimination. His motion for court-appointed counsel was denied.

Jordan, a prisoner in a Kentucky penal institution, sued the prison authorities in the United States District Court for the Western District of Kentucky under 42 U.S.C. § 1983 for deprivation of his constitutional rights to adequate medical care. His motion for appointed counsel was brought under section 1915(d) of the Judiciary Code and was likewise denied.

Cox filed a complaint against Union Carbide Corporation in the United States District Court for the Eastern District of Tennessee, alleging employment discrimination. He sued under Title VII and moved for appointed counsel under section 706, only to have his motion denied.

Circuit in *Henry v. City of Detroit Manpower Department*.<sup>42</sup> The issue remains unsettled among the federal courts of appeals. Six<sup>43</sup> courts of appeals presently refuse to allow appeal of a denial of appointed counsel before final judgment, while four<sup>44</sup> allow appeal under the doctrine.

In 1950, however, the Supreme Court did decide in *Roberts v. United States District Court for the Northern District of California*<sup>45</sup> that an order denying a plaintiff leave to proceed in forma pauperis was an appealable collateral order. The precedential value of this decision is admittedly questionable, since it was rendered per curiam<sup>46</sup> with absolutely no analysis of how such an order passed scrutiny under *Cohen*.<sup>47</sup> Not surprisingly, only four<sup>48</sup> courts of appeals have considered *Roberts* in deciding whether a denial of appointed counsel is a collateral order. The Courts of Appeals for the

Parrish sued the United States Army under Title VII in the United States District Court for the Western District of Kentucky, alleging employment discrimination on the basis of his race. His motion for appointed counsel was denied.

Each plaintiff then brought an interlocutory appeal to the Court of Appeals for the Sixth Circuit. Consolidating the four appeals, the court established its jurisdiction under the collateral order doctrine and accordingly ruled on the merits of each appeal. *Henry v. City of Detroit Manpower Dep't*, 739 F.2d 1109 (6th Cir. 1985). The thirteen judge court reconsidered the jurisdictional issue and vacated its prior decision, holding that a denial of appointed counsel is not a collateral order. *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985).

42. 763 F.2d 757 (1985), *cert. denied*, 106 S. Ct. 604 (1985).

43. The majority is comprised of six courts of appeals which currently refuse to allow interlocutory appeal of denials of appointed counsel: *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983); *Miller II*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970); *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390 (10th Cir. 1981).

44. The minority consists of four courts of appeals which currently allow interlocutory appeal of denials of appointed counsel: *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983).

45. 339 U.S. 844 (1950).

46. Summary dispositions rendered by federal appellate courts are to be given slight precedential weight. A summary affirmance is an affirmance of only the result of the judgment the court is asked to review, not the reasoning used to reach the judgment. Such appellate review concerns only the facts of the particular case the court considers, and has importance only for the parties to the case. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975).

47. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

48. Four courts of appeals have considered *Roberts* in deciding whether a denial of appointed counsel is a collateral order: *Miller II*, 425 F.2d 1205 (2d Cir.), *cert. denied*, 400 U.S. 880 (1970); *Henry v. City of Detroit Manpower Dep't*, 739 F.2d 1109, 1113-14 (6th Cir. 1984); *Henry v. City of Detroit Manpower Department*, 763 F.2d 757, 762-63 (6th Cir. 1985); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1308-09 (9th Cir. 1981).

Second<sup>49</sup> and Sixth<sup>50</sup> Circuits have held that while an order denying a plaintiff *forma pauperis* status may effectively "close the door to the courthouse"<sup>51</sup> by depriving an indigent his right to his day in court, a refusal to appoint counsel is nothing more than the exercise of a district court's discretion not to provide the litigant an "added facility"<sup>52</sup> in maintaining his suit.

#### IV. DIVISION AMONG THE FEDERAL CIRCUITS AND RELIANCE ON THE SUPREME COURT'S ATTORNEY-DISQUALIFICATION CASES

Most of the courts of appeals have considered the three-prong test set forth in *Coopers and Lybrand v. Livesay* in addressing the issue of whether a denial of appointed counsel is a collateral order.<sup>53</sup> The principal points of disagreement are whether denial of counsel satisfies the requirements of separability and irreparable harm.<sup>54</sup> Those courts that have found that appellate consideration of the propriety of the trial court's denial would involve the higher court in the merits of the case have ruled this way because one of the factors to be

49. *Miller II*, 425 F.2d 1205 (2d Cir. 1970).

50. *Henry*, 763 F.2d 757, 762-63 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 604 (1985).

51. 425 F.2d 1205.

52. *Id.*

53. See *Appleby v. Meachum*, 696 F.2d 145, 146-47 (1st Cir. 1983); *Smith-Bey v. Petsock*, 741 F.2d 22, 25-26 (3d Cir. 1984); *Robbins v. Maggio*, 750 F.2d 405, 410-13 (5th Cir. 1985); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761-64 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1304, 1306-07 (9th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981).

54. A denial of appointed counsel was found to satisfy all three criteria set forth in *Coopers and Lybrand* in the following cases: *Robbins v. Maggio*, 750 F.2d 405, 410 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1306 (9th Cir. 1981); *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340, 1341-42 (11th Cir. 1983).

Failure to satisfy the second and third criteria was the reason the courts of appeals in the following cases held that denial of counsel is not a collateral order: *Appleby v. Meachum*, 696 F.2d 145, 146 (1st Cir. 1983) (denial of counsel fails to satisfy any of the criteria); *Smith-Bey v. Petsock*, 741 F.2d 22, 24-25 (3d Cir. 1984) (denial of counsel fails to satisfy any of the criteria); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 764 (6th Cir. 1985) (denial of counsel fails to satisfy any of the criteria).

In the following cases, though, two federal courts of appeals held that a denial fails to satisfy the third element set forth in *Coopers and Lybrand*: *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981). As only two circuits have expressly found that the requirement of finality is not fulfilled, it seems that the primary points of disagreement are separability and loss of effective review.

considered on review is whether the case has merit.<sup>55</sup> This suggests that the "exceptional circumstances" test, as it presently stands, will never enable a district court to render a denial of appointed counsel that will qualify for appeal under the doctrine.

The courts of appeals that have found that effective review of a denial can be obtained if deferred until after final judgment have held that the possibility of reversal and an order by the appellate court of a new trial with appointed counsel is sufficient to protect the truly indigent plaintiff's right to legal assistance.<sup>56</sup> The only injury to a plaintiff, it is held, would be the delay in legal remedy caused by a reversal and re-trial.<sup>57</sup>

Since 1981, the courts of appeals have reconsidered the issue in light of the Supreme Court's rulings in *Firestone Tire and Rubber Company v. Risjord*,<sup>58</sup> *Flanagan v. United States*,<sup>59</sup> and *Richardson-Merrell Inc. v. Koller*.<sup>60</sup> These cases address the appealability of decisions, under the collateral order doctrine, concerning motions to disqualify opposing counsel. Notwithstanding the Court's decision in *Roberts*, six courts of appeals have almost entirely disregarded the analogy between that case and the issue of interlocutory appealability of denials of appointed counsel.<sup>61</sup> Instead, reliance has been on the Court's current inclination to contain the growth of the doctrine

55. See *Appleby v. Meachum*, 696 F.2d 145, 147 (1st Cir. 1983); *Smith-Bey v. Petsock*, 741 F.2d 22, 24-25 (3d Cir. 1984); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762 (6th Cir. 1985); *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985); *Miller II*, 425 F.2d 1205, 1206 (2d Cir. 1970).

56. See *supra* notes 17 through 19 and accompanying text for the criteria under the "exceptional circumstances" test for determining whether a plaintiff is truly indigent and deserving of appointed counsel.

57. See *Appleby v. Meachum*, 696 F.2d 145, 146-47 (1st Cir. 1983) (pro se litigants are presumed to be as capable of maintaining an action to the appeal stage as any other litigants); *Smith-Bey v. Petsock*, 741 F.2d 22, 25 (3d Cir. 1984) ("[T]he remedy of a new trial is . . . available, after trial and upon appeal from the final judgment, to redress erroneous denial of counsel."); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981) (vacatur of denial of counsel and order of new trial sufficient relief if denial is found to constitute prejudicial error); *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (irreparable injury is prevented by the availability of "post-judgment reversal and a new trial").

58. 449 U.S. 368 (1981).

59. 465 U.S. 259 (1984).

60. 472 U.S. 424 (1985).

61. In the following cases, the federal courts of appeals have either ignored or refused to rely on the Supreme Court's decision in *Roberts* in deciding whether a denial of appointed counsel in a civil proceeding is a collateral order: *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983); *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981); *Kuster v. Block*, 773 F.2d 1048 (9th Cir. 1985); *Cotner v. Mason*, 657 F.2d 1390 (10th Cir. 1981).

as shown in these recent attorney-disqualification cases.<sup>62</sup> As mentioned above, the majority of the circuits hold that interlocutory review of denials of appointed counsel is unavailable.<sup>63</sup> These courts have relied on the disqualification cases in ruling that a plaintiff, whose motion for appointed counsel has been denied, is no more disadvantaged than the litigant who is adversely affected by a court order concerning an attorney-disqualification motion.<sup>64</sup> Accordingly, it is reasoned that since the latter has been found not to be a collateral order, neither should the former.

A pre-trial order denying a motion to disqualify opposing counsel in civil litigation was held not appealable under the doctrine in *Firestone*,<sup>65</sup> since the propriety of the order could be effectively reviewed

62. The Supreme Court's desire to contain the growth of the number of collateral orders was expressly stated in *Firestone*:

Permitting wholesale appeals on the ground that [interlocutory orders may be erroneous] not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in Section 1291. *This we decline to do* (emphasis added).

449 U.S. 368, 378.

This desire was again expressed in *Flanagan v. United States*, 465 U.S. 259, 269 (1984) ("The costs of [expanding the doctrine] are great, and the potential rewards are small."), and in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985) (refusing to broaden the "limited exception carved out in *Cohen*").

63. See *supra* note 43.

64. The difficulty in distinguishing between the harm caused by a denial of counsel and the harm caused by an order concerning disqualification of counsel is cited in the following cases which disallow appeal of denials under the collateral order doctrine: *Smith-Bey v. Petsock*, 741 F.2d 22, 25 (3d Cir. 1984) (since the effect of a disqualification order on a proceeding is essentially the same as the effect of a denial of appointed counsel, the latter order should not be appealable); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981) (denial of appointed counsel is "no less reviewable upon final judgment than an order denying disqualification of counsel"); *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (The characteristic of effective review after final judgment "is shared by numerous other pretrial orders which are not immediately appealable, such as the order denying a motion to disqualify counsel at issue in *Firestone*").

65. 449 U.S. 368 (1981). This case involved four consolidated products liability suits against Firestone. After discovering that Risjord, the lead attorney for the four plaintiffs, performed occasional legal service for Firestone's liability insurance carrier, Home Insurance Company, the defendant moved the court to disqualify Risjord for fear that his conflicting interests would lead him to fashion a case that would relieve Home Insurance of any obligation to indemnify Firestone for an adverse judgment. After the plaintiffs and an official from the insurance carrier stated in affidavits that Risjord's representative of the plaintiff caused them no concern, the court denied Firestone's motion.

Firestone sought immediate appeal by way of the collateral order doctrine. The Court of Appeals for the Eighth Circuit, sitting en banc, overruled its prior law and held that a denial of a motion to disqualify opposing counsel in a civil proceeding was not a collateral order. In *re Multi-Piece Rim Products Liability*, 612 F.2d 377 (8th Cir. 1980). In what was held to be fairness to the appellant Firestone, however, the court nevertheless made this ruling prospec-

if the issue were deferred until after final judgment.<sup>66</sup> In light of this decision, the Court of Appeals for the First<sup>67</sup> and Tenth<sup>68</sup> Circuits refused interlocutory appeal of denials of appointment of counsel, while the Court of Appeals for the Seventh<sup>69</sup> Circuit overruled prior case law and joined the circuits that refused such review. The Court of Appeals for the Third<sup>70</sup> and Ninth<sup>71</sup> Circuits, though, distinguished *Firestone* and allowed interlocutory review because of the difference in harm these orders cause the parties affected.

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tive and considered the merits of *Firestone's* appeal. *Id.* at 379. The order of the district court was affirmed. *Id.*

The United States Supreme Court granted *Firestone's* petition for a writ of certiorari. *Firestone Tire and Rubber Co. v. Risjord*, 446 U.S. 934 (1980). On review, the Court vacated the decision of the court of appeals. 449 U.S. 368 (1981). It agreed with the court of appeals that a denial of a motion to disqualify opposing counsel in a civil proceeding is not a collateral order. *Id.* at 374. In so ruling, though, the court further held that the court of appeals could not even consider the merits of this appeal, since it was without jurisdiction to do so. This decision was the first of the three Supreme Court cases concerning the appealability of pre-trial orders concerning disqualification motions, and signified the court's intention to contain the expansion of collateral orders.

The holding of *Firestone* is discussed in Note, *Appealability of Orders Denying Attorney Disqualification Motions in Armstrong v. McAlpin*, DET. C.L. REV. 151, 164-72 (1981).

66. *Firestone*, 449 U.S. at 378.

67. *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983). Kenneth Appleby, a prisoner in a Massachusetts state facility sued several officials of the Massachusetts Department of Corrections under 42 U.S.C. § 1983 for, *inter alia*, deprivation of his freedom of religion and infliction of cruel and unusual punishment. The plaintiff's motion for appointment of counsel pursuant to 28 U.S.C. § 1915(d) was denied, and interlocutory appeal ensued. The Court of Appeals for the First Circuit relied on *Firestone* in finding that the denial was not within the collateral order doctrine. 696 F.2d at 146.

68. *Cotner v. Mason*, 657 F.2d 1390 (10th Cir. 1981). The Court of Appeals for the Tenth Circuit found it had no jurisdiction to hear the appeal of a denial of the plaintiff's motion for appointed counsel by the U.S. District Court for the Western District of Oklahoma, since, under *Firestone*, the plaintiff could have received meaningful review of the propriety of the denial upon appeal from a final judgment. 657 F.2d at 1392.

69. *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981). Payton Randle, a former prisoner at the Federal Correctional Institution at Marian, Illinois, sued the defendant in the United States District Court for the Northern District of Indiana for damages for injuries allegedly caused by the defendant's products. After the plaintiff's § 1915(d) motion was denied, he sought immediate review. The Court of Appeals for the Seventh Circuit held it had no jurisdiction to hear the appeal and overruled its prior law in *Jones v. WFYR Radio/RKO General*, 626 F.2d 576 (1980). This change was largely due to the finding that a denial failed to meet the condition of ineffective review upon deferral of appeal.

70. *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (order denying appointment of counsel differs from a disqualification of an attorney, since the decision concerning appointment "must be made before trial if it is to be of any practical effect to [the plaintiff]").

71. *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1312 (9th Cir. 1981) (effect of disqualification differs from harm caused by denial of counsel, since the harm the former may cause at the time such order is rendered is ordinarily "speculative" or "hypothetical", while the harm caused by denial of counsel—the overwhelming likelihood that the plaintiff will be unable to proceed to a judgment—is obvious and "impossible to ignore").



The Supreme Court ruled in *Flanagan v. United States*<sup>72</sup> that an order granting a motion to disqualify counsel in a criminal proceeding is also not a collateral order. This ruling caused an even greater change than *Firestone* in the number of circuits which did not allow interlocutory appeal of a denial of counsel in a civil case.<sup>73</sup>

The Court in *Firestone* left open the issue of whether an order granting disqualification of counsel in a civil case was collateral.<sup>74</sup> Since the effect of a disqualification in a civil case is most analogous to the effect of a denial of counsel in comparison to orders concerning disqualification, the resolution of this issue would be most important. In *Robbins v. Maggio*,<sup>75</sup> the Court of Appeals for the Fifth

72. 465 U.S. 259 (1984). The petitioners were four Philadelphia policemen who were defendants in a federal criminal case, indicted for various civil rights offenses. They were all represented by one law firm. After three of the defendants moved to sever their cases from the fourth defendant's, the United States responded by moving to disqualify the firm from its multiple representation on the grounds of conflict of interests. The government's motion was granted. *United States v. Flanagan*, 527 F. Supp. 902 (E.D. Pa. 1981). An immediate appeal to the Court of Appeals for the Third Circuit followed, although no question concerning jurisdiction was raised. The court nevertheless ruled *sua sponte* that the disqualification was appealable as a collateral order and exercised jurisdiction. *United States v. Flanagan*, 679 F.2d 1072 (3d Cir. 1982). The disqualification was affirmed.

On certiorari, the United States Supreme Court reversed this decision on the grounds that the order was not collateral. *Flanagan v. United States*, 465 U.S. 259 (1984). The appeal was dismissed. Maintaining its strong policy of limiting the number of collateral orders in criminal cases, the Court found that disqualifications in criminal cases fail to satisfy the *Coopers and Lybrand* requirements of separability and loss of effective review. *Id.* at 267-69.

73. After the Supreme Court's decision in *Flanagan*, six courts of appeals ruled that a denial of appointed counsel is not a collateral order, thus establishing the majority rule among the federal circuits. See *supra* note 43 for the leading cases.

74. The Court expressly reserved the question of whether an order granting a motion to disqualify opposing counsel in a civil case is appealable as a collateral order in *Firestone*, 449 U.S. at 372 n.8.

75. 750 F.2d 405 (5th Cir. 1985). This case involved the appeals of three prisoners in Louisiana state penal facilities. Plaintiff Johnny Robbins sued the warden of the Louisiana State Penitentiary under 42 U.S.C. § 1983, complaining that his constitutional rights were violated after being denied competent medical care and an adequate diet. The district court denied Robbins' § 1915(d) motion, and Robbins appealed.

Alleging that the warden of the Saint Martin Parish Jail denied him adequate medical treatment, plaintiff Charles Bolden sued in federal district court under 42 U.S.C. § 1983 for redress of constitutional violations. The court denied his motion for counsel and he appealed.

Plaintiff Kenneth Midkiff filed a section 1983 suit against an official at the Lafayette Parish Jail, complaining that the jail's inadequate medical treatment of his broken hand deprived him of his constitutional rights. He filed an interlocutory appeal when his motion for appointment of counsel was denied.

After consolidating the three appeals, the Court of Appeals for the Fifth Circuit held that despite the appellees' argument that the court should have overruled its law allowing immediate appeal of a denial of counsel in light of the Supreme Court's effort to contain the size of the class of collateral orders in *Firestone* and *Flanagan*, a denial was a collateral order since all three criteria of the *Coopers and Lybrand* test were satisfied. 750 F.2d at 412.

Circuit distinguished *Flanagan* in ruling in favor of interlocutory review of a denial of counsel, since *Flanagan* "narrowly applie[d] to orders disqualifying counsel in criminal cases."<sup>76</sup> The court further indicated that its ruling disallowing interlocutory appeal of attorney disqualifications in civil cases<sup>77</sup> would not persuade it to likewise disallow such appeal of a denial of counsel, since a litigant whose attorney is disqualified is merely deprived of the attorney of his choice, whereas the litigant whose motion for appointed counsel has been denied is invariably left without counsel altogether.<sup>78</sup>

The Supreme Court finally decided the unanswered question in 1985 in *Richardson-Merrell, Inc. v. Koller*,<sup>79</sup> holding that an order disqualifying an attorney in a civil proceeding is not a collateral or-

76. 750 F.2d at 410.

77. 750 F.2d at 413. At the time of *Robbins v. Maggio*, the Court of Appeals for the Fifth Circuit had held that district court orders disqualifying attorneys in civil proceedings were not collateral orders. *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984). In addition to distinguishing the rule of *Flanagan* due to the peculiar need for as few collateral orders as possible in criminal cases, the court also found disqualifications of attorneys in civil proceedings inapposite to denials of appointed counsel in civil proceedings. It remains to be seen whether the Fifth Circuit will still maintain this distinction, given the merger of *Gibbs v. Paluk* with the Supreme Court's decision in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), the decision holding that disqualifications of attorneys in federal civil proceedings are not appealable as collateral orders. *See infra* note 79.

78. 750 F.2d at 413.

79. 472 U.S. 424 (1985). The plaintiff-respondent, Anne Koller, was born without normal arms and legs. She sued the petitioner for products liability, claiming that her birth defects were caused by her mother's use of the petitioner's product, Bendectin, during her mother's pregnancy. After two law firms initially represented the plaintiff, two attorneys from a Los Angeles firm were admitted to represent the plaintiff *pro hac vice* during the discovery stage of the suit.

Three months later, one of the new attorneys offered as evidence against Richardson-Merrell, Inc. a report prepared by his firm describing the birth defects of children whose mothers had taken Bendectin. The report had been submitted to the Food and Drug Administration a month earlier. After the court held the report inadmissible, the attorney publicly discussed the report and the case with a reporter from the Washington Post, leading to an article on the case.

The defendant-petitioner moved to disqualify the new attorneys for this conduct and for alleged witness tampering. Finding the conduct of these attorneys improper, the court disqualified them. Koller appealed the order under 28 U.S.C. § 1291, contending the disqualification was within the collateral order doctrine.

The Court of Appeals for the District of Columbia Circuit found it had jurisdiction under the doctrine to review the case and reversed the disqualification on its merits. *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038 (D.C. Cir. 1984).

A writ of certiorari was granted by the Supreme Court after Richardson-Merrell, Inc. petitioned for review of the jurisdictional ruling and the propriety of the appellate court's decision to reverse the disqualification. *Richardson-Merrell, Inc. v. Koller*, 469 U.S. 915 (1984). On review, the Court held that a disqualification of counsel in a federal civil proceeding fails to satisfy the second and third elements of the collateral order analysis set forth in *Coopers and Lybrand v. Livesay*, separability and loss of effective review. 472 U.S. 424, 438-40 (1985).

der. This decision virtually completes the Court's exclusion of any federal court orders concerning attorney-disqualifications from the "small class of orders" within the doctrine. Since many courts of appeals have come to rely on the Court's pronouncements in this area in deciding the issue of interlocutory appealability of denials of appointed counsel, the rule of *Koller* will probably offer the greatest basis for the courts within the minority to eventually overrule their law and make unanimous within the federal system the law that denials of counsel are not collateral orders. This is predictable, unless the Supreme Court itself decides the issue.

A Supreme Court decision is unlikely, given its denial of a writ of certiorari in *Henry v. City of Detroit Manpower Department*.<sup>80</sup> It seems that the Court intends that its decision in *Koller* guide the minority circuits to change their law. This has occurred in the Ninth Circuit, where the Court of Appeals held in *Kuster v. Block*<sup>81</sup> that a denial of counsel in a section 1983 action is not a collateral order. Rendered in light of *Koller*, this decision represents a major change in the law of the Ninth Circuit, since a large number of cases in which motions for counsel are made are so-called "section 1983" actions. The rule of *Bradshaw v. Zoological Soc'y of San Diego*,<sup>82</sup> still the law of that circuit and, of all the leading cases dealing with the

80. 106 S. Ct. 604 (1985).

81. 773 F.2d 1048 (9th Cir. 1985).

82. 662 F.2d 1301 (9th Cir. 1981). The plaintiff, Nancy Bradshaw, originally filed suit in 1975 against the Zoological Society under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, alleging that the defendant unlawfully denied her employment in 1969 and in 1971 because of her gender, marital status, and past complaints of discrimination. The United States District Court for the Southern District of California held that the suit was barred by the statute of limitations. This decision was reversed by the Court of Appeals for the Ninth Circuit in 1978 and remanded to the district court. *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066 (9th Cir. 1978).

The suit resumed in April, 1978, and Bradshaw moved for appointment of counsel under § 706 of Title VII, as well as leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). The latter motion was granted, but appointment of counsel was denied. After motions for reconsideration and certification of permissive interlocutory appeal under 28 U.S.C. § 1292(b) were denied, the plaintiff appealed to the Court of Appeals for the Ninth Circuit for interlocutory review.

The court of appeals found that all three *Coopers and Lybrand* criteria were fulfilled, and heard the appeal. *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1305-06, 1320. A particularly noteworthy portion of the opinion was the pronouncement that an Equal Employment Opportunity Commission (EEOC) finding of probable cause for actionable civil rights violation was conclusive of the merit of the plaintiff's underlying claim and thereby eliminated any need for a court to become enmeshed in the facts of the case. *Id.* at 1309. Of equal importance was the court's refusal to assume that an indigent plaintiff effectively left without counsel has the ability to prosecute his case to a final judgment. *Id.* at 1310-11. On the merits, the court found that the denial of counsel was an abuse of discretion.

issue, the one with the most exhaustive analysis of the issue of appealability to date,<sup>83</sup> has been seriously weakened.

#### V. *KOLLER* AND THE ATTORNEY-DISQUALIFICATION CASES SHOULD BE DISTINGUISHED IN DETERMINING INTERLOCUTORY APPEALABILITY OF ORDERS DENYING APPOINTMENT OF COUNSEL

A denial of appointment of counsel should be appealable under the collateral order doctrine, since the rule of *Koller* is not truly analogous to this issue. Interlocutory appealability of denials of counsel is good for judicial economy and respects Congress' intention to provide, by statute, assistance of counsel for people who cannot afford to vindicate their rights. The issues addressed in *Koller*, as well as in *Firestone*<sup>84</sup> and *Flanagan*,<sup>85</sup> are not the same as the immediate issue. Despite this, the majority of the circuits have found guidance in these cases to resolve the issue, notwithstanding the Supreme Court's holding in *Roberts*<sup>86</sup> that an order denying a litigant forma pauperis status, such as an order deciding a motion made under 28 U.S.C. § 1915(a),<sup>87</sup> the companion subsection of § 1915(d), is a collateral order. The law of *Roberts* should not be perfunctorily discarded by the courts of appeals in deciding the issue.

The Court in *Koller* held that attorney disqualifications in civil cases are not collateral orders, since they do not concern issues separate from the underlying merits<sup>88</sup> and are effectively reviewable after

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83. At sixteen pages, this opinion is the lengthiest of the leading cases on this issue.

84. 449 U.S. 368 (1981).

85. 465 U.S. 259 (1984).

86. 339 U.S. 844 (1950).

87. Enacted as part of the same legislation with subsection (d) of § 1915 of Title 28 of the United States Code, subsection (a) provides:

any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

Judiciary and Judicial Procedure Act, 28 U.S.C. § 1915(a) (1948).

88. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 438-40 (1985). In determining whether disqualifications of attorneys in civil proceedings are collateral orders, the Supreme Court maintained its opinion that interlocutory review of orders concerning motions to disqualify does not satisfy the second requirement of the collateral order doctrine, separability. It was again found that separability was next to impossible, since any error which the aggrieved party could assign to substitute counsel at the point of substitution would be purely speculative. Furthermore, questioning the attorney whose disqualification is sought about his alleged con-

final judgment of the case.<sup>89</sup> Failure to satisfy the second and third requirements of the *Coopers and Lybrand* test are also the reasons why the Court held in *Flanagan* that orders disqualifying attorneys in criminal cases are not collateral orders.<sup>90</sup> In *Firestone*, failure to satisfy the third requirement of the test led the Court to hold that orders denying disqualifications of attorneys in civil cases are also not within the doctrine.<sup>91</sup>

A district court order granting or denying a motion to disqualify opposing counsel in a civil or criminal proceeding is often not separate from the issues to be tried in a case. The Supreme Court acknowledged in *Koller* that an attorney whose disqualification is sought will often have to testify about the issues to be tried in order to resist disqualification.<sup>92</sup> Review of this evidence before judgment would cause an appellate court to delve into attorney-client or other factual matters highly germane to the substance of the case or its strategy. Failure of a disqualification to satisfy the separability element of the *Coopers and Lybrand* test cannot and should not be used to conclude that a denial of appointed counsel likewise fails to satisfy this element, since the consideration which an appellate court must give to the merit of the case of a plaintiff whose motion for appointed counsel has been denied is not as extensive as the consideration which the court must give to the propriety of a disqualification order. Indeed, the decision rendered by an appellate court concerning a disqualification would be merged into the ultimate resolution of the triable issues.

Effective review of a disqualification can be obtained after—and only after—final judgment, since errors that stand to be assigned for appeal will only be speculative at the time of interlocutory review.<sup>93</sup> Actual errors, if any, can be properly assigned if the trial is allowed

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flicting interests would cause the appellate court to begin deciding matters properly left to the district court's purview. *Id.*

89. *Id.* at 2765.

90. An order disqualifying counsel in a criminal proceeding fails to meet the requirement of separability. 465 U.S. 259, 268 ("[A] disqualification order, though final, is not independent of the issues to be tried."). It also fails to satisfy the requirement of loss of effective review if deferred. *Id.* at 267 ("post-conviction review of a disqualification order is fully effective. . . .").

91. 449 U.S. 368, 376 ("[P]etitioner is unable to demonstrate that an order denying disqualification is 'effectively unreviewable on appeal from a final judgment' within the meaning of our cases."). For whatever reason, the Supreme Court assumed, without deciding, that such an order is separate from the merits of the case. *Id.*

92. 472 U.S. 424, 438-40 (1985).

93. See, e.g., *Bradshaw*, 662 F.2d 1301, 1312-13 (9th Cir. 1981).

to run its course.<sup>94</sup> Effective review of a denial of appointed counsel can, however, be obtained at the time of interlocutory review, since the question at that point is whether the trial court abused its discretion after applying the "exceptional circumstances" test to all the known relevant information.<sup>95</sup> Moreover, there is a genuine risk that effective review of a denial of counsel cannot be obtained if deferred because of the damaging mistakes a pro se plaintiff may commit throughout the proceeding.<sup>96</sup>

The greatest difference between a disqualification and denial of appointed counsel in a civil proceeding is the harm each order causes the party affected. Although in each case a litigant is left without counsel (at least temporarily), the harm to a litigant denied appointed counsel is greater. Despite the Supreme Court's effort to narrow the list of collateral orders through *Koller*, a denial should be among such orders. When counsel is disqualified by a district court, the client-litigant is merely deprived of the attorney of his choice, for reasons usually relevant to the particular case. When an indigent plaintiff is denied counsel, though, that person is often left *without any counsel at all*.<sup>97</sup> A party whose attorney has been disqualified will often have the wherewithal to retain substitute counsel,<sup>98</sup> and the case will experience a usually short, though inevitable, delay. The plaintiff whose motion for appointed counsel has been denied is in a more difficult position, since he cannot afford to retain counsel, nor find one willing to prosecute his case. This may lead to more than a temporary delay. The end of the case or its mismanagement due to lay prosecution is likely.

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94. *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (party aggrieved by a denial of a motion to disqualify failed to demonstrate a "single concrete example of the indelible stamp or taint" which the involvement of opposing counsel would cause); *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (propriety of attorney disqualification cannot be adequately reviewed until after disposition of the case).

95. See, e.g., *Robbins v. Maggio*, 750 F.2d 405, 412 (5th Cir. 1985) (citing *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982)). See Annot., 69 A.L.R. FED. 666 (1981) (threshold issue to be determined at outset of suit, is whether merit is found from perusal of complaint).

96. Some of the damaging things which may be done by a pro se plaintiff which cannot be undone, assuming his case reaches a judgment on the merits, include: neglecting to properly appeal the very order which created his difficulty; allowing disclosure of items which an attorney would have duly resisted, unwisely stipulating to certain facts, impeding the case by refusing to stipulate to anything, or failing to object to inadmissible evidence not readily recognizable as plain error.

97. See, e.g., *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1312 (9th Cir. 1981); *Robbins v. Maggio*, 750 F.2d 405, 413 (5th Cir. 1984). See also Note, *The Collateral Order Doctrine After Firestone Tire & Rubber Co. v. Risjord: The Appealability of Orders Denying Motions for Appointment of Counsel*, 62 B.U.L. REV. 845, 864 (1982).

98. See, e.g., *Robbins v. Maggio*, 750 F.2d 405, 413 (5th Cir. 1984).

Attorney disqualifications are also different from denials of counsel because of difference in the parties aggrieved. Often, the party truly aggrieved by a disqualification may not be the litigant, but the attorney.<sup>99</sup> The client-litigant can often retain equally satisfactory counsel, but the attorney's reputation is tarnished. Despite the availability under the Judicial Reform and Judicial Conduct and Disability Act of 1980<sup>100</sup> of the mechanism for a disqualified attorney to remedy any injury that may cause his professional reputation to suffer, the attorney may seek an interlocutory appeal normally available to clients to protect their interests. Disallowing interlocutory appeal when the true appellant is the attorney is correct, since such appeal would be a violation of ethics.<sup>101</sup> The litigant denied counsel, however, is the aggrieved party in his suit. The reason for disallowing interlocutory appeal of a disqualification in this respect is, therefore, not applicable to the issue of interlocutory appealability of denials of appointed counsel.

Despite its age and weak precedential value,<sup>102</sup> the *Roberts* decision represents the type of pre-trial order that is more akin to a denial of counsel than a disqualification. That case has stood for the premise that a pre-trial order, such as a denial of leave to proceed in forma pauperis for relief of court costs, that "closes the door to the courthouse to a plaintiff having a right to enter if he is [truly] indigent"<sup>103</sup> should come within the collateral order doctrine. A denial of appointed counsel is clearly such an order. The rule of *Roberts* especially supports appealability since the elements of the test of whether a litigant should be accorded forma pauperis status for court costs are essentially the same elements of the "exceptional circumstances" test used to decide motions for appointed counsel: the indigence of the litigant and the merit of his case.<sup>104</sup>

Upon perusing the leading federal appellate decisions involving denials of counsel, one notices that many of the plaintiffs whose mo-

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99. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) ("An attorney who is disqualified for misconduct may well have a personal interest in pursuing an immediate appeal, an interest which need not coincide with the interests of the client.").

100. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. at 435. An attorney who believes his disqualification has harmed his professional reputation may avail himself of the Judicial Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 332(d)(1).

101. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b), 2.1 (1985).

102. See *supra* notes 45 and 46.

103. *Miller II*, 425 F.2d 1205 (2d Cir. 1970).

104. See *Bradshaw*, 662 F.2d 1301, 1308 (9th Cir. 1981) ("Forma pauperis status requires two findings very similar to those required [to determine whether a litigant should have appointed counsel]: (1) a finding of indigency, and (2) a finding that the underlying claim has some merit.").

tions are denied are prisoners.<sup>105</sup> They are fairly representative of the type of litigant who will make such a motion and whom Congress sought to benefit through the pertinent legislation. Admittedly, the recitation in *Koller* that most pre-trial orders of district court judges are ultimately affirmed by appellate courts<sup>106</sup> ably suggests that most denials would be affirmed if appealed after final judgment, but the possibility of error and reversal exists. In many cases, it will never be known whether either possibility would have occurred, since the plaintiff, forced to proceed without counsel, will invariably abandon his case.<sup>107</sup> A denial of appointed counsel satisfies the criteria for collateral orders. Interlocutory appeal should not be denied on the basis of *Koller*. It should be permitted to rectify this situation.

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105. The plaintiffs whose motions for appointment of counsel were denied in the following cases were prisoners in either federal or state correctional facilities: *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983); *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984); *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985) (one of the plaintiffs in three other lawsuits consolidated for review with *Henry* was Douglas Gordon, an inmate in a Kentucky state institution); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981).

106. *Koller*, 472 U.S. 424, 434 (1985) (citing 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (1976)).

107. The abandonment of one's case due to the lack of professional counsel is an unfortunate reality. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in Federal Courts*, 47 N.Y.U. L. REV. 159, 201-02 (1972). In a study of 200 cases brought pro se in the Southern District of New York during 1966 through 1971, it was found that *only once* did a plaintiff prevail, and it could be considered a "victory" only because the defendant settled. *Id.* at 201. Plaintiffs voluntarily dismissed nine cases, while forty-six cases remained pending, but inactive. Where a plaintiff does not simply dismiss his case, he will often let the case remain on the docket in a dormant stage for years. This is attributed to the grim prospect of prosecuting a case for which the plaintiff is poorly financed and inadequately trained against a defendant who is ably represented by professional counsel.

In the two cases that actually went to trial, the defendants prevailed. *Id.* at 202. This is why pro se litigants as a class have been called a "society of losers." Flannery and Robbins, *The Misunderstood Pro Se Litigant: More Than a Pawn in the Game*, 47 BROOKLYN L. REV. 769, 770 (1975). See also Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 624-25 (1979), for a discussion of the futility of pro se litigation by prisoner-plaintiffs in federal courts. Cf. *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 764 (6th Cir. 1985) (possibility that a denial of counsel "may" induce an indigent to abandon his case is an insufficient reason to consider denial of counsel "a final decision within the meaning of § 1291"); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981) ("[T]he refusal of the district court to appoint counsel, while it may make the proceeding more difficult, does not end the litigation on the merits. The pro se litigant remains free to present his claim to the court on his own."); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) ("[W]e are aware of no circumstances which would preclude this pro se litigant from presenting his claim to the district court and, if need be, to this court after the entry of final judgment.").



## VI. A DENIAL OF APPOINTED COUNSEL IS A COLLATERAL ORDER UNDER *COOPERS AND LYBRAND*

The major reasons cited by the majority of courts of appeals for refusing interlocutory appeal of a denial of appointed counsel are: first, allowing such appeal would inhibit judicial economy;<sup>108</sup> second, a denial fails to satisfy the second element of the *Coopers and Lybrand* test—separability;<sup>109</sup> third, failure to satisfy the third element of the test—irreparable harm if review is deferred until after final judgment;<sup>110</sup> and fourth, a denial should not be appealable in light of the Supreme Court's rulings regarding interlocutory appealability of orders concerning attorney disqualifications in federal courts.<sup>111</sup> As the difference between denial and disqualification of counsel was previously considered, this part will address the other three reasons for the majority rule.

The decision by the Court of Appeals for the Sixth Circuit in *Henry v. City of Detroit Manpower Department*<sup>112</sup> is based on all these reasons;<sup>113</sup> additionally, the court found that a denial of counsel fails to meet the first requirement of the collateral order doctrine, finality. It was held that a denial "should be presumed tentative . . .

108. See *Appleby v. Meachum*, 696 F.2d 145, 147 (1st Cir. 1983) (interruption of district court proceeding for several months by interlocutory appeal against judicial economy); *Miller II*, 425 F.2d 1205, 1206 (2d Cir. 1970) (allowing denial of counsel to be appealed as a collateral order would unduly add to already overburdened appellate court dockets); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762-63 (6th Cir. 1985) (quoting *Miller II*, 425 F.2d 1205 (2d Cir. 1970)); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065, 1066 (7th Cir. 1981) (allowing interlocutory review of denials of counsel would violate the policy reasons behind the Final Judgment Rule).

109. See *Appleby v. Meachum*, 696 F.2d 145, 147 (1st Cir. 1983); *Miller II*, 425 F.2d 1205, 1206 (2d Cir. 1970); *Smith-Bey v. Petsock*, 741 F.2d 22, 24-25 (3d Cir. 1984); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762 (6th Cir. 1985); *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985).

110. See *Appleby v. Meachum*, 696 F.2d 145, 146-47 (1st Cir. 1983); *Smith-Bey v. Petsock*, 741 F.2d 22, 25-26 (3d Cir. 1984); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 763-64 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066-67 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981).

111. See *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) (prior law allowing interlocutory review of denial of counsel "effectively overruled" by the decision in *Flanagan v. United States*); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 762 (6th Cir. 1985) (denial of counsel fails to satisfy second and third criteria of collateral order doctrine, in light of *Flanagan*); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981) (decision that denial of counsel is not appealable is based on *Firestone Tire and Rubber Co. v. Risjord*); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (while denial of counsel may satisfy the first and second criteria of the analysis, it fails to satisfy the third).

112. 763 F.2d 757 (6th Cir. 1985). See *supra* note 41 for the facts of the four cases consolidated in *Henry*.

113. *Id.* at 762.

unless [it] is expressly made final,"<sup>114</sup> since such motions are often made without any evidence of the plaintiff's means or effort to retain counsel, or are occasionally made before the filing of a complaint (thereby leaving the court no basis to assess the merit of a case). The court suggested that an appellate court would be doing a plaintiff a favor by refusing interlocutory appeal, since appealability would force a plaintiff to perfect his appeal immediately or be time-barred when final judgment is rendered.<sup>115</sup> The *Henry* decision represents the most aggressive reasoning why a denial should not be deemed a collateral order.

The foregoing reasons for disallowing interlocutory appeal may be refuted in part by the cogent reasoning used by the Court of Appeals for the Ninth Circuit in *Bradshaw v. Zoological Society of San Diego*.<sup>116</sup> In that case, the court stated that interlocutory review serves judicial economy without conflicting with the concepts espoused by the Final Judgment Rule.<sup>117</sup> Although such appeal may stay a district court proceeding for an appreciable amount of time, this time would be well spent, since a reversal of an erroneous denial would achieve substantial justice and avoid the even more time-consuming specter of a new trial with appointed counsel if the order is reversed only after final judgment. Such a specter would prolong the time necessary to remedy a legal dispute that occurred years before final judgment<sup>118</sup> and create the unsalutary result of rendering the initial trial a sham and waste of resources. This could easily cause a plaintiff to voluntarily dismiss a legitimate case. Admittedly, affirmance of a denial on interlocutory appeal would have no salutary effect if the plaintiff elected to continue his suit. Ironically, such an affirmance may still serve judicial economy by convincing a plaintiff not to continue a suit which was weak or vexatious in the first place.<sup>119</sup>

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114. *Id.* (citing *Harris v. Walgreen's Distrib. Center*, 456 F.2d 588 (6th Cir. 1972)).

115. 763 F.2d at 764.

116. 662 F.2d 1301 (9th Cir. 1981). *See supra* note 82 for the facts of the case.

117. *Id.* at 1316-17 (appointment of counsel for one untrained in law helps case progress more quickly to disposition, and benefits both plaintiff and defendant; therefore, interlocutory review of erroneous denial of counsel would also aid such resolution). *See infra* notes 118 and 119 and accompanying text.

118. It is estimated by the Ninth Circuit Court of Appeals that had the plaintiff Nancy Bradshaw not obtained interlocutory review by the court of the denial of her motion for appointment of counsel, she would have finally obtained judicial remedy for the alleged employment discrimination committed by the defendant Zoological Society seventeen years after the alleged wrongful conduct! *Bradshaw*, 662 F.2d 1301, 1311 n.25 (9th Cir. 1981). It is difficult to understand how a court could consider this effective review.

119. *See, e.g., Bradshaw*, 662 F.2d at 1315-16.

Of course, a plaintiff whose denied motion is not immediately appealable would have little reason to appeal after final judgment if he has won his case. This, though, is unrealistic since it assumes that such a plaintiff can and will continue his suit pro se until final judgment.<sup>120</sup> It may never be known whether a denial would have been affirmed after final judgment because the plaintiff may very well abandon his suit.<sup>121</sup>

It is unlikely that an indigent plaintiff would abuse an interlocutory appeal as a dilatory tactic, especially if he seeks equitable relief, since this would only prolong the time necessary to vindicate his rights.<sup>122</sup> One who not only cannot afford an attorney but has failed to obtain leave to proceed in forma pauperis is more likely to be financially drained by a long, pro se litigation.

Contrary to the argument that immediate appeal is out of step with the Final Judgment Rule, such review would not cause an appellate court to invade a trial court's bailiwick. An appellate ruling would only concern the collateral order. The *Bradshaw* court held that this would not "cause the appellate court to decide the underlying factual and legal issues of the case."<sup>123</sup> A decision on a motion for appointed counsel is sufficiently separate from the merits of a case so that neither the district court would decide them when considering the motion, nor would the appellate court do so on reviewing the district court's decision. The Supreme Court in *Cohen* and *Coopers and Lybrand* did not contemplate absolute, perfect separateness, but merely an issue "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>124</sup>

It is conceded that consideration of the propriety of a denial would cause an appellate court to determine whether a claim has merit, but, like the consideration given by the trial court, need only be perfunctory. In *Bradshaw*, the court held that appellate consideration of the merits would, at most, be "minimal"<sup>125</sup> and would not constitute a ruling on the underlying cause of action. In a Title VII action, the letter issued by the Equal Employment Opportunity Commission,

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120. *Id.* at 1310-11.

121. *See supra* note 107.

122. 662 F.2d at 1315.

123. *Id.* at 1309.

124. *Id.* at 1307 (quoting *Cohen*, 337 U.S. 541, 546 (1949)).

125. *Id.* at 1308.

finding reasonable cause to sue,<sup>126</sup> would serve as a sufficient finding of merit, thereby obviating further inquiry by either the trial or the appellate court.<sup>127</sup> Although a non-Title VII civil litigant may not have the benefit of such a letter from a governmental agency, the consideration of a case's merits need only determine whether a claim is colorable.

The argument that the possibility of a reversal of a denial of counsel and an order of a new trial with counsel renders a denial effectively reviewable after final judgment is weak because it assumes unrealistic possibilities. It assumes that a pro se plaintiff is capable of prosecuting his suit to a final disposition—and even winning the suit. It also assumes that he can perfect an appeal if and when that is necessary. The Court in *Bradshaw* found these assumptions to be overly aggressive and contrary to Congress' purpose in enacting the statutes providing for court-appointed counsel.<sup>128</sup> It is difficult to understand how a court could expect an untrained lay person to prevail over an adversary who is professionally represented. Many plaintiffs who move for appointment of counsel sue on civil rights claims. This area of law is complex, and one seeking to vindicate such rights is inherently injured if denied counsel.<sup>129</sup> Although the *Bradshaw* court did not address the possible prejudice to a plaintiff in an action not involving a civil rights claim, it is arguable that a denial is equally as harmful to an indigent plaintiff in a non-civil rights case.

If forced to appeal a denial only after final judgment, a pro se plaintiff would no doubt find himself in the anomalous position of assigning error to something he had done or failed to do, and then demonstrating to the appellate court how a court-appointed attorney would have handled matters differently. As the litigant is learning as

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126. The Equal Employment Opportunity Commission, by virtue of 42 U.S.C. § 2000e-5(b), may issue a letter finding reasonable cause for an aggrieved person to sue another party for employment discrimination. The law states that:

[W]henever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship. . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge. . . on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b) (1982).

127. *Bradshaw*, 662 F.2d 1301, 1308.

128. *Id.* at 1310.

129. *Id.* at 1311.

he goes along, he may not recognize all his errors at appropriate times in order to preserve them for appeal. Given that the law expects federal litigants to appeal all contested points in one proceeding,<sup>130</sup> those points not appealed will be lost. The injustice of this possibility becomes obvious if one of the errors not preserved for appeal would have led to a reversal by the appellate court. This quagmire may force a plaintiff to dismiss his case. This disserves justice and Congressional mandate, and has led the Court of Appeals for the Fifth Circuit to find in *Robbins v. Maggio*<sup>131</sup> that a denial will not be effectively reviewable if deferred.<sup>132</sup>

The irreparability of harm to a plaintiff who is not fortunate to have sued in one of the minority circuits is very real. His options at the point when his motion is denied are: continuing his suit without representation, at the risk of committing damaging errors;<sup>133</sup> seeking permissive interlocutory appeal under the Interlocutory Appeals Act of 1958;<sup>134</sup> seeking a writ of mandamus from the appellate court

130. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 86 (federal habeas corpus petitioner has no due process right to review of state court ruling, the propriety of which he failed to seasonably challenge), *reh'g denied*, 434 U.S. 800 (1977).

131. 750 F.2d 405 (5th Cir. 1985).

132. *Id.* at 412-13.

133. See *supra* note 96.

134. Enacted as part of the Interlocutory Appeals Act of 1958, this statute provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order. Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall order.

28 U.S.C. § 1292(b) (Supp. III 1986).

Enacted to give the federal courts flexibility in deciding the appealability of district court decisions, this statute enables the district court to certify its opinion that certain exceptional interlocutory decisions not otherwise appealable under federal statute or the collateral order doctrine are worthy of immediate review to advance the disposition of the case. The criteria of certification are that the order involves an issue important to the disposition of the case, of which fair jurists may have different opinions, the immediate review of which will advance the case toward a final judgment.

While the district court is required to consider the three criteria, the court of appeals is not. An order which is certified by a district court may be refused review by a court of appeals simply because the higher court prefers to review more important cases previously docketed. 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3929 (1976).

under the All Writs Act;<sup>135</sup> or dismissing or abandoning his suit. None of these alternatives are very promising.

Permissive interlocutory appeal is also a discretionary device that is to be used sparingly.<sup>136</sup> It is a two-step process in which the trial court and the appellate court agree that certain questions should be given interlocutory review.<sup>137</sup> The trial court must first certify that an order involves a controlling question of law, about which there is substantial ground for difference of opinion, and that an immediate appeal of such order will materially advance the ultimate disposition of the case. The appellate court then has the discretion to accept the appeal. If the trial court refuses to certify the appeal, the process

135. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law." 28 U.S.C. § 1651 (1982).

A remedy intended for even less frequent use than permissive interlocutory appeal, an extraordinary writ may be issued by an appellate court to a lower court to command the latter to act within its jurisdiction or as it is legally obligated. *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943) (The writ is a means by which an appellate court "confine[s] an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."); *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) (extraordinary writ is properly granted to correct usurpation of power by inferior court, not mere error in use of its lawful authority); *Parr v. United States*, 351 U.S. 513, 520 (1956) (extraordinary writs should be issued only in cases in which an inferior court has exceeded or refused to exercise its jurisdiction); *Will v. United States*, 389 U.S. 90, 95 (1967) (prevention of judicial action beyond its jurisdiction justifies the use of an extraordinary writ); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976) (writs of mandamus are properly issued only in "exceptional circumstances" in which serious jurisdictional issues arise) (citing *Will*, 389 U.S. at 95); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-10 (1964) (clear abuse of discretion justifies issuance of a writ of mandamus).

The most common writ, mandamus, may be issued entirely at the discretion of the appellate court. The policy of issuing such writs only in cases where no other adequate remedy exists dates back to the beginning of federal civil procedure, as evidenced by sections 13 and 14 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 80-82.

136. See 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3929 (1976). In 1974, only 100 such applications were made nationwide. Fifty of these were granted. C. WRIGHT, *LAW OF FEDERAL COURTS* § 102 (3d ed. 1976) (citing Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 n.5 (1975)). The futility of the permissive interlocutory appeal as an alternative to appeal under the collateral order doctrine is illustrated by the denial of the plaintiff's § 1292(b) motion by the District Court for the Southern District of California in *Bradshaw*, 662 F.2d 1301, 1303 (9th Cir. 1981).

137. Although it was originally proposed that the interlocutory appeals statute leave the decision of whether to grant review entirely up to the courts of appeals, this was rejected for fear that too much flexibility for the courts of appeals to exercise would greatly diminish the force of the Final Judgment Rule. See 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3929 (1976). Since the district court would be better prepared than the court of appeals to decide whether a particular order would be appropriate for interlocutory review, the initial decision concerning review was given to the district court, and the two-step process was adopted.

ends.<sup>138</sup> In situations in which counsel is denied, questions would arise whether a denial involves a controlling question of law, or whether an appeal would materially advance the conclusion of the litigation. Even if the trial court finds these conditions are met, the appellate court is not bound by these findings and may refuse to hear the appeal in its sole discretion.<sup>139</sup> An acceptable reason is simply the higher court's preference to review more important cases previously docketed.<sup>140</sup> Furthermore, trial courts ordinarily will not certify nor will appellate courts accept an appeal of a matter that is entirely within the trial court's discretion.<sup>141</sup> Appellate courts will rarely entertain such appeals, since, by their permissive nature, such appeals may be brought upon final judgment.<sup>142</sup> A permissive interlocutory appeal is, therefore, not a realistic alternative for a plaintiff.

A writ of mandamus is even less useful, since an appellate court is less inclined to issue one. It is issued in "extraordinary situations"<sup>143</sup>

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138. The statute plainly provides that a district court must certify the appeal in writing before a court of appeals can exercise its discretion to hear the appeal. Several courts of appeals have interpreted the law accordingly: *Wiltse v. Clarkson*, 542 F.2d 363 (6th Cir. 1976) (appellate court has no jurisdiction to review interlocutory order under 28 U.S.C. § 1292(b) where district court has not certified the appeal as per statute); *Refrigerated Food Line v. Republic Indus.*, 449 F.2d 756 (8th Cir. 1971) (permissive appeal not allowable absent lower court's certification); *Oppenheimer v. Los Angeles County Flood Control District*, 453 F.2d 895 (9th Cir. 1972) (no jurisdiction for § 1292(b) review without lower court's certification); *In re Doe*, 546 F.2d 498, 501-02 (2d Cir. 1976) (trial court certification of appeal is absolute condition of § 1292(b) review).

Furthermore, a court of appeals will resist motions to compel a district court through a writ of mandamus to certify an appeal. *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("[m]andamus to direct the district judge to exercise his discretion to certify [the appeal is not] an appropriate remedy"); *Leaseco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (since Congress intended that permissive appeal should be given only when the court of appeals and the district court agree that appeal is proper, appellate court "coercion" of the trial court to certify the appeal would defeat such intent); *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 698 (9th Cir.) (mandamus to direct the trial court judge to certify appeal is inappropriate), *cert. denied*, 434 U.S. 829 (1977).

139. 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3929 (1976).

140. *Id.* at 141.

141. *See* 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3930 (1976).

142. *See* C. WRIGHT, *LAW OF FEDERAL COURTS* § 102 (3d ed. 1976).

143. A writ of mandamus is properly issued only in "exceptional" situations in which no other adequate remedy, such as an ordinary appeal after final judgment, will prevent irreparable harm which will come to a litigant due to a court's conduct beyond its jurisdiction, failure to act as obligated, or gross abuse of discretion. *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943) (mandamus to direct district court to vacate order striking criminal defendant's plea in abatement to indictment inappropriate since court was within its jurisdiction in so ordering); *Ex parte Fahey*, 332 U.S. 258 (1947) (mandamus to direct district court not to

where the trial court has acted beyond its jurisdiction, failed to do something it is legally obligated to do, or committed an egregious abuse of discretion.<sup>144</sup> Because of the availability of permissive interlocutory appeal, an appellate court is hesitant to issue a writ of mandamus when the petitioner has not sought appeal through that device.<sup>145</sup> "Mandamus" literally means "we command," and represents an imperative of the appellate court to the trial court to act as it commands. The trial judge himself becomes a litigant. This is why appellate courts resist ordering a trial judge to do something he had discretion not to do.<sup>146</sup> The option of mandamus is a poor justification for disallowing appeal of a denial of appointed counsel under the collateral order doctrine.

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award counsel fees inappropriate); *Kerr v. United States District Court*, 426 U.S. 394 (1976) (mandamus to compel district court to vacate order allowing prisoner-plaintiff in class action suit discovery of defendant-correctional facility's personnel files inappropriate); *Will v. United States*, 389 U.S. 90 (1967) (mandamus ordering district court to vacate order compelling prosecutor to disclose to defendant names and addresses of persons to whom incriminating statements were made deemed inappropriate).

*Cf. La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus appropriate to compel district court not to refer anti-trust case to master for trial before issues of conspiracy and liability had been determined by court); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (mandamus appropriate to compel district court to vacate order requiring litigant to submit to mental and physical examinations in absence of good cause for same).

144. *See, e.g., Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."); *Parr v. United States*, 351 U.S. 513, 520 (1956) ("[Mandamus is appropriate] where a court has exceeded or refused to exercise its jurisdiction."); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (mandamus is to be issued to limit inferior court to act within the scope of the rules of law); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976) (only judicial "usurpation of power" justifies use of mandamus); *Schlagenhauf v. Holder*, 379 U.S. 109, 110 (1964) ("clear abuse of discretion" by inferior court justifies use of mandamus); *Will v. United States*, 389 U.S. 90, 104 (1967) (use of mandamus appropriate to "confine the lower court to the sphere of its discretion"); *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) ("clear abuse of discretion" by inferior court justifies use of mandamus).

145. *See Allstate Ins. Co. v. United States District Court*, 264 F.2d 38, 39-40 (6th Cir. 1959) ("extraordinary circumstances" justifying issuance of writ of mandamus cannot be found where petitioner has failed to seek relief by way of permissive interlocutory appeal under section 1292(b) of Title 28 of the United States Code); *Evans Elec. Constr. Co. v. McManus*, 338 F.2d 952, 953 (8th Cir. 1964) (attempt to appeal adverse interlocutory order by way of § 1292(b) is absolute prerequisite to petition for writ of mandamus); *Mohasco Indus. v. Lydick*, 459 F.2d 959, 960 (9th Cir. 1972) (motion for permissive interlocutory appeal should be made before writ of mandamus is issued).

146. *See* 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3932 (1976). *See also* *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257-58 (1957); *Will v. United States*, 389 U.S. 90, 107 (1967); *Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976).



Continuing his suit without an attorney is disadvantageous for the plaintiff because of the risk that he may commit any of a number of irreparably harmful errors. This option, as well as the option (or non-option) of voluntarily dismissing his suit, will deprive the plaintiff of the benefits which Congress intended to provide a poor person in an age when law, particularly trial procedure, has become too complex for the lay person to handle.<sup>147</sup>

It is interesting that the Court of Appeals for the Sixth Circuit found in *Henry* that a denial is presumptively tentative,<sup>148</sup> given that most of the other courts of appeals have not made this conclusion.<sup>149</sup> To hold that a denial should not be deemed final unless declared so by the trial court, simply because empirical evidence indicates that a large number of motions are made at the wrong time or fail to sufficiently detail the plaintiff's means, leaves an important question unanswered. One wonders if a denial of counsel can ever be deemed final, even if the motion is correctly made. The defective motions referred to in *Henry* are, no doubt, incorrectly made and can be properly denied. Courts, however, may grant the petitioners leave to renew the motions. If subsequent motions are properly made and denied, it is fair to say, for purposes of the collateral order doctrine, that such orders are final. Since these orders are, and other courts of appeals agree, final, it makes little sense to argue that these orders do not meet the *Coopers and Lybrand* requirement of finality.

The idea posited in *Henry* that deferred review of a denial actually benefits a plaintiff<sup>150</sup> by relieving him of the burden of immediate perfection of appeal in order to preserve the point for post-judgment review is a fallacy for two reasons. First, the plaintiff faces no danger of losing the disputed point if he fails to appeal under the collateral order doctrine because it has never been established that

147. See Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 625 (1979). The article's principle argument is that pro se litigation too often disserves justice as well as efficient court administration since the litigant's lack of knowledge and resources causes the district court dockets to become overcrowded with cases that deserve adjudication but instead languish for long periods and are ultimately dismissed for failure to prosecute.

148. 763 F.2d 757, 762 (6th Cir. 1985).

149. The federal courts of appeals have expressly found denials to be final in the following cases: *Robbins v. Maggio*, 750 F.2d 405, 412 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984); *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1306 (9th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) (despite having held that a denial of counsel is not a collateral order for other reasons).

The question of finality was not addressed in *Miller II*, 425 F.2d 1205 (2d Cir.), cert. denied, 400 U.S. 80 (1970).

150. *Henry*, 763 F.2d at 764 (6th Cir. 1985).

failure to appeal a collateral order, when rendered, works a forfeiture of the appeal upon final judgment.<sup>151</sup> *Forgay v. Conrad*<sup>152</sup> and *Corey v. United States*<sup>153</sup> have been cited for the proposition that failure to perfect an appeal of a collateral order should not cause a forfeiture of such an appeal upon final judgment. The risk of forfeiture would force an unwary litigant to perfect a protective appeal or suffer loss of review for "guessing wrong about an unclear rule."<sup>154</sup> Secondly, a plaintiff is done no favor by being required to defer his appeal, since the damaging acts or omissions of pro se litigation may have occurred by the time of the later appeal.

### CONCLUSION

The collateral order doctrine was created by the Supreme Court to prevent the irreparable loss to litigants of certain rights and privileges which a strict application of the Final Judgment Rule can cause. While appointment of counsel in a federal civil proceeding is not a constitutional right, but one created by statute, an important plan of Congress will be frustrated, and a *sine qua non* of modern civil litigation—professional representation—will be absent unless a denial of appointed counsel is deemed to be within the small class of collateral orders. A pre-trial order denying counsel in a civil case meets all three requirements of the test set forth in *Coopers and Lybrand v. Livesay*. Despite the Supreme Court's effort in the attorney-disqualification cases to keep the class of collateral orders small, these cases should not be analogized to the situation in which appointed counsel is denied to exclude such orders from the collateral order doctrine.

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151. See 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911 (1976).

152. 47 U.S. (6 How.) 201 (1848).

153. 375 U.S. 169 (1963).

154. See 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911 (1976):

Any rule that requires forfeiture of appellate opportunities for guessing wrong about an unclear rule would greatly increase the costs of the collateral order doctrine by forcing protective appeals in many situations of doubtful appealability. Forfeiture, moreover, would trap some parties in a box framed by a rule designed to alleviate untoward risks, not to create them. The system can live easily with a double opportunity for appeal. It should be provided.

*Id.* at 498-99.

