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RIGHT TO COUNSEL—THE THIRD CIRCUIT DELIVERS INDIGENT CIVIL
LITIGANTS FROM “EXCEPTIONAL CIRCUMSTANCES”

I. INTRODUCTION

As a general proposition, there exists no constitutional right to counsel for litigants in civil cases.¹ On the contrary, the United States Supreme Court has stated that the Sixth Amendment right to counsel only attaches when an accused defendant is threatened with the loss of personal liberty.² Although the Supreme Court has never directly addressed whether a constitutional right to counsel exists in civil proceedings, several federal appellate courts have held that the Constitution does not provide a right to appointed counsel in civil cases.³

Federal courts do have statutory authority, however, to request counsel for indigent litigants in civil proceedings under 28 U.S.C. § 1915.⁴

1. *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981). *Lassiter* involved the termination of parental rights of an indigent who was not represented by counsel. *Id.* In that case, the Supreme Court discussed the development of the right to counsel in criminal cases. The Court ultimately concluded that these cases raise the presumption that a constitutional right to counsel only extends to cases in which the defendant may be deprived of physical liberty. *Id.* at 25; see also Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 446-47 (1993) (noting that idea of constitutional right to counsel in civil cases has been squarely rejected by federal courts); Todd MacFarlane, Note, *Mallard v. United States District Court: Without Imposing Compulsory Service, How Can the Legal Profession Meet Indigent's Pressing Needs for Legal Representation?*, 1990 UTAH L. REV. 923, 925 (stating general rule that provision of counsel for indigents is limited to criminal cases).

2. *Lassiter*, 452 U.S. at 25. For a discussion of the facts and holding in *Lassiter*, see *infra* note 29 and accompanying text.

3. See, e.g., *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993) (stating that civil litigants have no constitutional right to appointment of counsel); *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990) (“Appointment of counsel in a civil case is not a constitutional right.”); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986) (“There is normally . . . no constitutional right to counsel in a civil case.”); *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983) (finding no constitutional right to appointment of counsel unless denial of counsel would impinge on due process rights); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (noting that defendant could cite no authority supporting existence of constitutional right to counsel in civil cases); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (holding that appointment of counsel in civil actions allowed only in exceptional circumstances); *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (noting that indigent litigant has no statutory or constitutional right to counsel in civil case).

4. 28 U.S.C. § 1915 (1988). The relevant sections of the statute provide:

(a) 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 affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of

Congress enacted this statute in 1892, intending to open the courts to those persons previously denied access due to their inability to pay.⁵ While federal courts have widely held that § 1915 grants discretionary authority to appoint counsel for indigent civil litigants,⁶ circuit courts disagree as to the proper exercise of this discretion.⁷

the action, defense or appeal and affiant's belief that he is entitled to redress

. . . .
 (d) The 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.

Id.

The United States Supreme Court has interpreted the word "request" in § 1915(d) to mean that federal district courts do not have the authority to require unwilling attorneys to accept pro bono appointments in civil cases. *Mallard v. United States District Court*, 490 U.S. 296, 298 (1989). A discussion of this aspect of § 1915(d), however, is beyond the scope of this Comment. For complete coverage of *Mallard* and its impact, see generally Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990); Peter K. Rofes, *Ducking the Question: Some Observations on Mallard v. United States District Court and the Case of the Unwilling Lawyer*, 55 BROOK. L. REV. 1129 (1990); Kimberly B. Ward, *Request or Require—The Federal Courts' Authority to Appoint Counsel for Indigent Civil Litigants: Mallard v. United States District Court for the Southern District of Iowa*, 36 LOY. L. REV. 235 (1990); Beth M. Coleman, Note, *The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard*, 68 N.C. L. REV. 575 (1990); MacFarlane, *supra* note 1; James J. Vinch, Comment, *Mallard v. United States District Court: Section 1915(d) and the Appointment of Counsel in Civil Cases*, 51 OHIO ST. L.J. 1001 (1990); Lisa M. Windfelt, Note, *Pro Bono Representation—A Lawyer's Statutory Right to "Just Say No": The End of Compelled Indigent Representation—Mallard v. United States District Court*, 25 WAKE FOREST L. REV. 647 (1990).

5. 23 CONG. REC. 5199 (1892). Representative Culbertson stated:

Mr. Speaker, the effect of this bill, if it should become law, will be to open the courts of the United States to a class of persons who are now denied the right of bringing suits in the courts of the United States, that have no money or property by which to comply with the rules of the courts with respect to costs.

Id.

6. See, e.g., *Lavado*, 992 F.2d at 604 ("A district court has discretion to appoint counsel for an indigent civil litigant."); *Raves v. Johnson*, 969 F.2d 700, 702 (8th Cir.) (explaining that courts may exercise discretion to appoint counsel for indigent civil litigants), *cert. denied*, 113 S. Ct. 658 (1992); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (noting § 1915(d) gives district judge broad discretion to decide whether to appoint counsel); *Cookish v. Cunningham*, 787 F.2d 1, 2 (1st Cir. 1986) (noting that in appropriate circumstances district court has discretion to appoint counsel for indigent civil litigants under § 1915(d)); *McKeever v. Israel*, 689 F.2d 1315, 1318-20 (7th Cir. 1982) (stating district courts have broad discretion to appoint counsel for indigents under 28 U.S.C. § 1915(d)); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (stating that under § 1915(d) court has discretionary authority to appoint counsel for indigent civil litigants); *United States v. McQuade*, 579 F.2d 1180, 1181 (9th Cir. 1978) ("The court does have discretionary authority under 28 U.S.C. § 1915(d) to appoint counsel for an indigent to commence, prosecute, or defend a civil action.").

7. Eisenberg, *supra* note 1, at 451. According to Eisenberg, although the standards for requesting counsel for a civil litigant are similar in many circuits, some circuits are more likely than others to appoint counsel. *Id.*

The principle disagreement focuses on whether courts should exercise their discretion to appoint counsel for indigent civil litigants.⁸ A number of circuits have held that counsel should only be appointed in "exceptional circumstances."⁹ While never precisely defining "exceptional circumstances,"¹⁰ courts generally analyze a limited number of factors to determine whether exceptional circumstances are present.¹¹ In *Tabron v. Grace*,¹² the United States Court of Appeals for the Third Circuit addressed this issue and expressly rejected the "exceptional circumstances" standard in favor of a less stringent test.¹³ As a result, courts in the Third Circuit may be more likely to request counsel for indigent litigants in civil proceedings than courts in circuits espousing the "exceptional circumstances" standard.

This Comment addresses the appointment of counsel in civil proceedings under 28 U.S.C. § 1915(d) in the Third Circuit. Part II begins with a discussion of the evolution of the right to counsel and the nature of the authority conveyed by the statute.¹⁴ Part III then follows this issue's development in other circuits.¹⁵ Part IV closely examines the criteria employed to determine appointments of counsel for indigent civil litigants, which

8. For a discussion of the differing approaches among the circuit courts, see *infra* notes 74-138 and accompanying text.

9. See, e.g., *Lavado*, 992 F.2d at 601; *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990); *Cookish*, 787 F.2d at 2; *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975); *Branch v. Cole*, 686 F.2d 264, 265 (5th Cir. 1982). In short, the First, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits have all held that counsel for indigent litigants should only be appointed in exceptional circumstances.

10. *Branch*, 686 F.2d at 266. According to the Fifth Circuit, a complete definition of exceptional circumstances is not practical. *Id.* Rather, the existence of exceptional circumstances in this circuit turns on two basic factors that will vary among cases: (1) the complexity and type of the case; and (2) the indigent plaintiff's abilities. *Id.* Further, the trial court retains discretion to make these determinations. *Id.*

11. *Id.* These factors generally include the abilities of the litigant bringing the case, as well as the complexity and type of case. *Id.* Other factors that courts have used to determine whether exceptional circumstances exist are the indigent's ability to conduct the necessary factual investigation, as well as whether the evidence will consist in large part of conflicting testimony. *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982). For a more complete discussion of the factors applied by courts using the exceptional circumstances approach, see *infra* notes 76-111 and accompanying text.

12. 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994).

13. *Id.* at 155. For a more detailed discussion of the Third Circuit's analysis in *Tabron*, see *infra* notes 170-89 and accompanying text.

14. For a discussion of the development of a constitutional right to counsel, see *infra* notes 17-37 and accompanying text. For an overview of the federal courts' position on the nature of the authority conveyed by § 1915(d), see *infra* notes 43-60 and accompanying text.

15. For an examination of the exceptional circumstances approach, see *infra* notes 76-111 and accompanying text. For a discussion of a less stringent approach to the appointment of counsel in civil cases, see *infra* notes 112-38 and accompanying text.

were most recently announced by the Third Circuit in *Tabron*.¹⁶ Finally, this Comment concludes by suggesting that this new standard may increase appointments of counsel for indigent civil litigants.

II. HISTORICAL BACKDROP

A. *Development of a Constitutional Right to Counsel*

The Sixth Amendment guarantees a criminal defendant the right to counsel.¹⁷ The United States Supreme Court first applied this right to an indigent criminal defendant in *Powell v. Alabama*.¹⁸ In *Powell*, seven African-American defendants were charged with the rapes of two white girls. Tried and convicted, the defendants were never asked whether they could employ counsel themselves or whether they wanted court-appointed counsel.¹⁹ On appeal, the defendants argued this error denied them their Sixth Amendment right to counsel, along with the customary opportunity for trial preparation.²⁰ The Court held that the Sixth Amendment requires the federal courts to appoint counsel to represent indigent defendants accused of capital crimes.²¹

The Court applied this right to the states through the Due Process Clause of the Fourteenth Amendment in *Gideon v. Wainwright*.²² In *Gideon*, the defendant was charged with a misdemeanor in Florida state

16. For a detailed look at the Third Circuit's approach to the appointment of counsel under § 1915(d), see *infra* notes 139-89 and accompanying text.

17. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

18. 287 U.S. 45 (1932).

19. *Id.* at 52. The Supreme Court noted that, given a reasonable opportunity, there was a good chance that the defendants would have been represented by able counsel. *Id.* In fact, shortly after defendants' conviction, counsel appeared on their behalf. *Id.* Of particular importance was the fact that the defendants were not Alabama residents and were given very little time or opportunity to contact family or friends in surrounding states. *Id.* at 52-53.

20. *Id.* at 50. The defendants argued three specific Fourteenth Amendment equal protection and due process violations. *Id.* First, the defendants argued they did not receive a fair, deliberate and impartial trial. *Id.* Second, they argued the court denied them the right to counsel, complete with the opportunity of trial preparation and consultation. *Id.* Finally, the defendants argued that members of their own race had been systematically excluded from the juries before which they were tried. *Id.* The Supreme Court, however, only considered the second issue of denial of counsel. *Id.*

21. *Id.* at 66. The Court reasoned that the provision of notice and hearing is essential to due process. *Id.* at 68. The right to be heard, however, would have little meaning if the right to be heard by counsel was not included. *Id.* at 69. Even an intelligent and educated person, the Court reasoned, lacks the skill and knowledge to present his own defense. *Id.* Moreover, in the case of one who is ignorant, illiterate or otherwise unable to defend himself, the Court held that due process requires the court to assign counsel, whether requested or not. *Id.* at 71. For further discussion of the Court's holding in *Powell*, see MacFarlane, *supra* note 1, at 924.

22. 372 U.S. 335 (1963).

court and was refused his request for court-appointed counsel.²³ Tried and convicted without counsel, the defendant filed a petition for *habeas corpus*, alleging denial of his constitutional rights.²⁴ After granting certiorari, the United States Supreme Court held that the Sixth Amendment's guarantee of counsel for criminal defendants constitutes a fundamental right imposed upon the states by the Fourteenth Amendment.²⁵

The scope of these cases, however, remains unclear when indigent litigants require court-appointed counsel in *civil* proceedings.²⁶ Having never directly addressed the issue,²⁷ the Supreme Court in *Lassiter v. Department of Social Services*,²⁸ stated the general proposition that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."²⁹ The federal circuit courts of appeal

23. *Id.* at 336. The defendant was charged with breaking and entering with intent to commit a misdemeanor. *Id.* This offense constituted a felony under Florida law. *Id.* at 336-37. The trial court refused to appoint counsel on the grounds that counsel could only be appointed when a defendant is charged with a capital crime. *Id.* at 337.

24. *Id.* Defendant filed this *habeas corpus* petition in the Florida Supreme Court, arguing that the trial court's refusal to appoint counsel constituted a denial of his constitutional rights. *Id.* The Florida Supreme Court denied the petition without issuing an opinion. *Id.*

25. *Id.* at 342. The Court stated:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344. Therefore, the Court held that an indigent criminal defendant has a fundamental right to assistance of counsel and that the denial thereof constitutes a violation of the Fourteenth Amendment. *Id.*; see also WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27-79 (1955) (providing lengthy discussion of early development of Sixth Amendment right to counsel); ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 3-14 (1992) (reviewing historical development of Sixth Amendment right to counsel in criminal cases); SHELDON KRANTZ ET AL., *RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin** 19-23 (1976) (explaining historical background of constitutional right to counsel in criminal cases).

26. MacFarlane, *supra* note 1, at 925.

27. *Id.*

28. 452 U.S. 18 (1981).

29. *Id.* at 26-27. *Lassiter* involved a child custody suit. Following the petitioner's conviction for second degree murder, the North Carolina Department of Social Services requested termination of her parental rights. *Id.* at 21. At the hearing, petitioner lacked representation by legal counsel. The court did not appoint counsel, nor did petitioner claim that she was indigent. *Id.* at 22. The court proceeded with the hearing, finding that the petitioner had ample time and opportunity to retain counsel. *Id.* After the court determined that termination of parental rights would be in the best interest of the child, the petitioner appealed, arguing that the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel. *Id.* at 24. The Supreme Court held that the Constitution does not require the appointment of counsel for indigent litigants in every parental status termination proceeding. *Id.* at 31. Rather, the Court stated that an indi-

have also consistently held that indigent litigants have no constitutional right to counsel in proceedings.³⁰

In *United States v. 30.64 Acres of Land*,³¹ for example, the United States Court of Appeals for the Ninth Circuit noted that the constitutional requirements for appointment of counsel in criminal proceedings differ greatly from those in civil proceedings.³² That case involved a complaint filed by the United States to establish just compensation for land taken by the government.³³ Appearing pro se, the defendant prevailed at the first trial and received a large cash award from the jury.³⁴ After the award was overturned on appeal, the defendant moved for appointment of counsel.³⁵ The court denied this motion without explanation and without articulating the requirements of 28 U.S.C. § 1915.³⁶ Remanding the case for a determination of the defendant's indigence, the court stated that "[f]ederal criminal defendants facing imprisonment are entitled to representation of counsel, and the power of courts to appoint counsel for such defendants is thus necessary to preserve their constitutional rights. There is normally, however, no constitutional right to counsel in a civil case."³⁷

gent litigant has the right to counsel only when a loss may result in a deprivation of physical liberty. *Id.* at 27. As a result, because the loss of physical liberty was not a threat in this case, the litigant was not entitled to have counsel appointed on her behalf. *Id.* According to the Court, in cases where a litigant cannot be deprived of his or her physical liberty, a presumption exists against the appointment of counsel. *Id.* See generally William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989). The author advocates dispensing with the *Lassiter* presumption in cases where "the interests of the indigent litigant, although not involving his personal liberty, are fundamental and compelling." *Id.* at 628. Fundamental fairness and due process cases demand a presumption in favor of appointing counsel in such cases. *Id.* For further discussion of *Lassiter*, see Eric Buermann, Note, *Lassiter v. Department of Social Services: The Right to Counsel in Parental Termination Proceedings*, 36 U. MIAMI L. REV. 337 (1982); Kevin W. Shaughnessy, Note, *Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants*, 32 CATH. U. L. REV. 261 (1982); Peter E. Van Runkle, Comment, *Lassiter v. Department of Social Services: What it Means for the Indigent Divorce Litigant*, 43 OHIO ST. L.J. 969 (1982).

30. For a list of these cases, see *supra* note 3.

31. 795 F.2d 796, 801 (9th Cir. 1986).

32. *Id.* The Constitution requires appointment of counsel for criminal defendants facing trial, whereas no analogous constitutional right to counsel exists in civil cases. *Id.*

33. *Id.* at 797.

34. *Id.*

35. *Id.*

36. *Id.* at 797-98.

37. *Id.* at 801. For a list of circuit court cases rejecting the notion of a constitutional right to counsel in civil cases, see *supra* note 3. For a discussion of the development of the right to appointed counsel in criminal cases and the attempt to establish this right in civil cases, see Dick, *supra* note 29, at 628-60.

B. *Enactment and Effect of 28 U.S.C. § 1915.*

Despite the lack of a constitutional right to counsel in a civil proceeding, 28 U.S.C. § 1915 grants the federal courts authority to appoint counsel for indigent civil litigants.³⁸ Enacted in 1892, the statute enables indigents to initiate actions in federal courts.³⁹ The statute also allows indigents to file federal civil actions without paying a filing fee.⁴⁰ Congress passed this first *in forma pauperis*⁴¹ statute with the admirable motive of opening the courts to all citizens.⁴²

Despite these lofty ideals, the *in forma pauperis* statute has not resulted in a federal statutory right to counsel in civil cases.⁴³ Rather, the circuit courts of appeals generally agree that while the statute gives a court the power to request counsel for indigent civil litigants, that power remains discretionary.⁴⁴ A case widely cited for this proposition is *Peterson v. Nad-*

38. 28 U.S.C. § 1915(d) (1988). For the text of the statute, see *supra* note 4. The statute basically provides that any suit, civil or criminal, may be brought without the payment of fees and costs by any person unable to pay and that a court may appoint counsel to represent an indigent person. The idea that the poor should also be afforded access to the courts is not new. Instead, this idea can be traced well into the past, as far back as Magna Carta. Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 414, 414 (1985). The relevant section of Magna Carta reads: "To no one will We sell, to none will We deny or delay, right or justice." Magna Carta ch. 40, reprinted in A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (1964). According to the author of the commentary, chapter 40 requires that justice must be available on unbiased terms to all classes of persons. *Id.* In stating that the courts should be open to both the rich and poor, this section certainly applies in modern times. *Id.*

39. Ward, *supra* note 4, at 237 (stating that "[§]1915(d) was designed to enable persons unable to afford legal representation to avail themselves of the courts").

40. *Id.* at 236. For the text of the statute, see *supra* note 4.

41. According to Black's Law Dictionary, *in forma pauperis* is defined as: In the character or manner of a pauper. Describes permission given to a poor person (i.e. indigent) to proceed without liability for court fees or costs. An indigent will not be deprived of his rights to litigate and appeal; if the court is satisfied as to his indigence he may proceed without incurring costs or fees of court.

BLACK'S LAW DICTIONARY 779 (6th ed. 1990). For the procedure by which a party may proceed *in forma pauperis*, see rule 24 of the Federal Rules of Appellate Procedure.

42. H.R. REP. NO. 1079, 52d Cong., 1st Sess. 2 (1892). "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" *Id.* For another insight into the motive of the legislature, see *supra* note 5 and accompanying text.

43. Eisenberg, *supra* note 1, at 448. Eisenberg noted that prisoners do not have a federal statutory right to appointed counsel in civil cases. *Id.*

44. *Raves v. Johnson*, 969 F.2d 700, 702 (8th Cir.) ("Although a civil litigant has no constitutional or statutory right to a court appointed attorney, the district court may make such an appointment at its discretion."), *cert. denied*, 113 S. Ct. 658 (1992); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (allowing district court judge broad discretion in deciding whether to appoint counsel under 28

ler.⁴⁵ This case involved a federal prisoner's claim that his former attorney wrongfully sold his automobile after the plaintiff went to prison.⁴⁶ The district court denied the plaintiff's request for appointment of counsel.⁴⁷ The United States Court of Appeals for the Eighth Circuit reversed the district court, holding that the circumstances justified the appointment of counsel.⁴⁸ The Eighth Circuit went on to note that the district court overlooked the express provisions of 28 U.S.C. § 1915 when it denied the plaintiff's request for counsel.⁴⁹ According to the Eighth Circuit, federal courts possess the statutory power to appoint counsel for indigent civil litigants if, in their discretion, the circumstances so warrant.⁵⁰ This power exists even though indigents possess no express statutory or constitutional right to appointed counsel in a civil case.⁵¹

The United States Court of Appeals for the Seventh Circuit reiterated this reasoning in *McKeever v. Israel*.⁵² In *McKeever*, an indigent prisoner sued a correctional officer and warden on the grounds that the prison's policy of limiting the amount of inmate mail violated his constitutional

U.S.C. § 1915(d)); *Cookish v. Cunningham*, 787 F.2d 1, 2 (1st Cir. 1986) (explaining that 28 U.S.C. § 1915(d) gives district court discretion to appoint counsel for indigent civil litigants); *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985) (emphasizing that under § 1915(d) district court has considerable discretion over appointment of counsel); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984) (emphasizing that power to appoint counsel under 28 U.S.C. § 1915(d) is discretionary); *McKeever v. Israel*, 689 F.2d 1315, 1318 (7th Cir. 1982) (stating that there is no question but that under 28 U.S.C. § 1915(d) district courts have broad discretion to appoint counsel for indigents); *Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1981) (holding that district court has broad discretion to appoint counsel for indigents under 28 U.S.C. § 1915(d)); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (noting that § 1915(d) grants district court discretion to appoint counsel).

45. 452 F.2d 754 (8th Cir. 1971).

46. *Id.* at 755.

47. *Id.* The plaintiff, who was serving a federal prison term at Leavenworth Penitentiary, proceeded *in forma pauperis*, seeking \$6,035 in compensatory damages and \$5,000 in punitive damages. *Id.* Citing his incarcerated status and poverty, the plaintiff requested that the district court appoint an attorney to represent him. *Id.* at 756. The district court denied this request, stating that it had no power to appoint counsel in a civil case. *Id.*

48. *Id.*

49. *Id.* at 757. The court went on to point out that along with other courts of appeals, it regularly makes such appointments in habeas corpus and civil rights cases. *Id.*

50. *Id.*

51. *Id.* The court found that the case's particular circumstances required the court to appoint counsel. *Id.* Because the plaintiff was indigent and incarcerated, he could not properly investigate the facts of the case. *Id.* at 758. Further, the plaintiff's incarcerated status precluded any possibility of obtaining evidence. *Id.* The appearance of counsel at all proceedings, however, would have aided the plaintiff and the court. *Id.* As a result, the court held that the district court's failure to appoint counsel constituted an abuse of its discretion under 28 U.S.C. § 1915(d). *Id.*

52. 689 F.2d 1315 (7th Cir. 1982).

rights.⁵³ While the plaintiff was granted *in forma pauperis* status, the district court denied his request for counsel.⁵⁴ On appeal, the Seventh Circuit held that the trial court's failure to recognize its discretionary power under § 1915 constituted an abuse of that discretion.⁵⁵ After citing the statutory language, the appellate court concluded that § 1915(d) clearly gives a district court broad discretion to appoint counsel for indigent litigants.⁵⁶

The Ninth Circuit has also followed this line of reasoning. In *United States v. McQuade*,⁵⁷ the government brought an action to foreclose tax liens on real property. The district court denied defendants' request for counsel representation at the oral hearing on the government's motion for summary judgment.⁵⁸ The district court judge refused to appoint counsel, stating the court had no authority to appoint counsel in a civil proceeding.⁵⁹ Citing § 1915, the Ninth Circuit held that this ruling constituted an error of law: "The court does have discretionary authority under 28 U.S.C. § 1915(d) to appoint counsel for an indigent to commence, prosecute, or defend a civil action."⁶⁰

53. *Id.* at 1316. Specifically, the prisoner alleged that a prison policy that prohibited any prisoner from taking more than twelve pieces of social or legal mail with him when he left the prison violated his First, Fourth and Fourteenth Amendment rights. *Id.* Additionally, the prisoner alleged that his property had been lost, destroyed or stolen in violation of his Fourth, Eighth and Fourteenth Amendment rights. *Id.* The prisoner sought a declaratory judgment that these actions violated his constitutional rights and asked the court to enjoin the property and mail policies. *Id.*

54. *Id.*

55. *Id.* at 1320.

56. *Id.* at 1318. The trial court in *McKeever* failed to appoint counsel on four separate occasions. *Id.* On one of these occasions, the trial court judge stated, "[w]ith respect to plaintiff's request for appointment of counsel, the Court wishes to advise plaintiff that it has no authority to provide compensation for counsel in civil cases. Therefore, the Court declines plaintiff's request to appoint counsel in this action." *Id.* On another occasion, the district court judge stated that the court lacked authority to appoint counsel in a civil action such as the case at bar. *Id.* at 1319. According to the court of appeals, the district court failed entirely to exercise its discretion under § 1915 because it did not recognize its authority to appoint counsel. *Id.* The trial court's failure to exercise its discretion constituted an abuse of discretion. *Id.* at 1320.

57. 579 F.2d 1180 (9th Cir. 1978).

58. *Id.* at 1180-81.

59. *Id.* at 1180. When the government filed this action to foreclose tax liens, defendants filed an answer and requested that counsel be appointed to assist them. Without making any specific allegations of poverty, defendants alleged that they were not able to retain counsel. *Id.* At the oral hearing on the government's motion for summary judgment, the defendants again requested the appointment of counsel. *Id.* The district court judge stated: "I do not have the authority to [appoint counsel]. This is a civil action." *Id.*

60. *Id.* at 1181. The court went on to state, however, that motions for appointment of counsel are only granted in exceptional circumstances. *Id.* Because the trial court failed to recognize its authority to appoint counsel under § 1915(d), the trial court did not base its refusal on any finding that exceptional circumstances did not exist. *Id.* Accordingly, the appeals court remanded the case for a

III. ISSUES INVOLVED IN THE APPLICATION OF 28 U.S.C. § 1915(d)

A. *Appealability*

While § 1915(d) grants courts discretionary authority to appoint counsel for indigent civil litigants, courts do not always exercise that discretion, as evidenced by the cases discussed above. This situation raises the issue of the appealability of a court's denial of a request for counsel. Because no statute formally provides for appeal of a denial of appointment of counsel, review of such denials must satisfy the requirements of 28 U.S.C. § 1291 (hereinafter "final judgment rule").⁶¹

The final judgment rule creates federal appellate court jurisdiction over final decisions of the district courts.⁶² The United States Supreme Court defines a final decision as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."⁶³ Nevertheless, certain exceptions to the final judgment rule arise, such as the writ of mandamus⁶⁴ and the interlocutory order.⁶⁵ Another exception, the collateral order doctrine, provides another avenue for immediate appeal of orders. The doctrine only applies in claims of right. Additionally, in order to invoke the doctrine, the claims must be sufficiently independ-

determination of whether exceptional circumstances existed and for an opportunity for the trial court to exercise its statutory discretion. *Id.*

61. Jeffrey D. Hanslick, *Decisions Denying the Appointment of Counsel and the Final Judgment Rule in Civil Rights Litigation*, 86 Nw. U. L. Rev. 782, 783 (1992). The statute provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1988).

62. Hanslick, *supra* note 61, at 783.

63. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *see also* Hanslick, *supra* note 61, at 784.

64. 28 U.S.C. § 1651(a), (b) (1988). The statute provides in pertinent part:

(a) The Supreme Court and all courts established by Acts of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or *rule nisi* may be issued by a justice or judge of a court which has jurisdiction.

Id.

65. 28 U.S.C. § 1292(b) (1988) provides for the interlocutory order exception: 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 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 the 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 so order.

Id.

ent of the case such that appellate consideration need not be delayed until the entire case is adjudicated.⁶⁶

In *Flanagan v. United States*,⁶⁷ the Supreme Court addressed the collateral order doctrine with respect to an order disqualifying counsel. In *Flanagan*, four police officers were indicted by a federal grand jury for committing civil rights offenses and for conspiracy to deprive citizens of their civil rights.⁶⁸ The officers retained joint counsel even though the indictment did not charge all of the officers with the same offenses.⁶⁹ Three of the officers moved to sever their cases from the fourth and moved to dismiss the conspiracy count. The government then moved to dismiss counsel from joint representation.⁷⁰ The district court granted the motion to disqualify and the United States Court of Appeals for the Third Circuit affirmed, noting that the disqualification order was a collateral order and therefore appealable before trial.⁷¹ Holding that the order disqualifying counsel did not meet the requirements of the collateral order doctrine, the Supreme Court reversed.⁷²

The denial of a request for counsel implicates a closely related issue. The federal courts of appeals do not agree that a denial of a request for counsel can be immediately appealed under the collateral order doctrine.⁷³ The Federal, Fifth, Eighth and Ninth Circuit Courts of Appeals allow immediate appeals from decisions denying the appointment of counsel under the collateral order doctrine.⁷⁴ By contrast, the First,

66. Hanslick, *supra* note 61, at 786. The collateral order doctrine was announced by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, an action was brought against the managers and directors of a corporation, alleging a conspiracy to enrich themselves at the corporation's expense. *Id.* at 543. The district court failed to apply a newly-enacted statute which would have made the plaintiff liable for reasonable expenses and attorneys' fees if he failed to prove his complaint. *Id.* at 544-45. The Third Circuit reversed on an immediate appeal. *Id.* at 545. The Supreme Court affirmed and found that the district court's order refusing to apply the statute was appealable. *Id.* According to the Supreme Court, a collateral order is "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." *Id.* at 546.

67. 465 U.S. 259 (1984).

68. *Id.* at 260-61. According to the indictment, the police officers conspired to make arrests without probable cause and had abused and unlawfully arrested eight people. *Id.* at 261.

69. *Id.*

70. *Id.* at 261-62.

71. *Id.* at 262.

72. *Id.* at 263.

73. Hanslick, *supra* note 61, at 787.

74. *See, e.g., Lariscey v. United States*, 861 F.2d 1267, 1270 (D.C. Cir. 1988) (holding denial of request for appointment of counsel under § 1915(d) is immediately reviewable), *cert. denied*, 113 S. Ct. 2997 (1993); *Jackson v. Dallas Police Dep't*, 811 F.2d 260, 261 (5th Cir. 1986) (stating denial of motion for appointment of counsel is appealable as final order); *Bradshaw v. Zoological Soc'y of San Diego*,

Third, Fourth, Sixth, Seventh, Tenth and Eleventh Circuit Courts of Appeals have held that denials of appointment of counsel do not fulfill the requirements of the collateral order doctrine and are not immediately appealable.⁷⁵

B. *Exceptional Circumstances*

The circuit courts lack consistency as to the circumstances under which counsel should be appointed. Several circuits have clearly stated that counsel should only be appointed in "exceptional circumstances."⁷⁶

662 F.2d 1301, 1305 (9th Cir. 1981) (stating orders denying appointment of counsel are appealable as collateral order).

75. See, e.g., *Appleby v. Meachum*, 696 F.2d 145, 146 (1st Cir. 1983) (holding denial of motion for appointment of counsel is not appealable as collateral order); *Smith-Bey v. Petsock*, 741 F.2d 22, 24 (3d Cir. 1984) (stating order denying appointment of counsel does not meet requirements of *Cohen* collateral order test); *Miller v. Simmons*, 814 F.2d 962, 967 (4th Cir.) (holding order denying appointment of counsel not immediately appealable), *cert. denied*, *Welch v. Smith*, 484 U.S. 903 (1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761 (6th Cir.) (emphasizing district court orders denying appointment of counsel do not fit into "collateral order" exception), *cert. denied*, 474 U.S. 1036 (1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1067 (7th Cir. 1981) (holding order denying appointment of counsel appealable only from final judgment); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (finding order denying appointment of counsel not immediately appealable because order would not cause crucial collateral claims to be lost and such order would be fully reviewable after final judgment); *Hodges v. Department of Corrections*, 895 F.2d 1360, 1361 (11th Cir. 1990) (stating denial of motion for appointment of counsel did not fall within exception to *Cohen* requirements and therefore was not immediately appealable). For a complete discussion of the collateral order doctrine and § 1915(d), see Hanslick, *supra* note 61, at 782-91 (explaining generally collateral order doctrine and its relationship to motions for appointment of counsel under § 1915(d)); Nicholas Swerdloff, Note, *Denial of a Pro Se Litigant's Motion to Appoint Counsel: The Preclusive Effect of Immediate Review*, 50 FORDHAM L. REV. 1399, 1400 (1982) (suggesting that refusing review of indigent's motion for appointed counsel thwarts intent behind § 1915(d) to provide equal access to judicial system); James P. Weygandt, Note, *Motions for Appointment of Counsel and the Collateral Order Doctrine*, 83 MICH. L. REV. 1547, 1569 (1985) (suggesting that immediate review is justified to prevent hardship imposed when indigent litigants are denied appointed counsel).

76. See, e.g., *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993) (justifying appointment of counsel only in exceptional circumstances); *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990) (requiring exceptional circumstances for appointment of counsel in civil action); *Cookish v. Cunningham*, 787 F.2d 1, 2 (1st Cir. 1986) (requiring demonstration of exceptional circumstances to justify appointment of counsel); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984) (finding that refusal to appoint counsel is abuse of discretion when exceptional circumstances exist); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) (noting that appointment of counsel is appropriate when exceptional circumstances exist); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (stating that appointment of counsel is justified only when exceptional circumstances are present); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (limiting court's power to appoint counsel in civil cases to exceptional circumstances); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (agreeing with other circuit decisions that counsel should only be appointed in exceptional circumstances); *United States v. Madden*, 352 F.2d 792, 794 (9th Cir. 1965) ("In civil actions for damages, appointment of counsel

The United States Court of Appeals for the Fourth Circuit followed this approach in *Cook v. Bounds*.⁷⁷ The *Cook* court held that the plaintiff failed to show the existence of exceptional circumstances, and thus upheld the district court's order denying the appointment of counsel.⁷⁸ The plaintiff, a life-term prisoner, was involved in a jail break with twelve other prisoners.⁷⁹ After his recapture, he filed a civil rights action regarding the conditions of his confinement.⁸⁰ Prior to trial, the prisoner plaintiff moved for the appointment of counsel.⁸¹ The court denied the motion, holding that no exceptional circumstances existed to justify such an appointment.⁸² The court, however, gave no guidance as to what constituted exceptional circumstances.⁸³

Likewise, the United States Court of Appeals for the Fifth Circuit in *Branch v. Cole*,⁸⁴ stated that "[n]o comprehensive definition of exceptional circumstances is practical."⁸⁵ Instead, the *Branch* court stated that two factors should determine the existence of exceptional circumstances: (1) the ability of the individual bringing the case; and (2) the type and complexity of the case.⁸⁶ *Branch* involved an alleged civil rights violation where the prisoner claimed that the correctional officers used excessive force.⁸⁷ The court, however, never examined whether exceptional circumstances were present under the announced factors.⁸⁸ Instead, the court noted that the

should be allowed only in exceptional cases."); see also Eisenberg, *supra* note 1, at 451. According to Eisenberg, the underlying suggestion of the cases in these circuits is that counsel should not be appointed in an unexceptional prisoner case. *Id.* As a result of this reluctance, several circuits never assign counsel in civil cases. *Id.* at 452.

77. 518 F.2d 779 (4th Cir. 1975).

78. *Id.* at 780 ("[W]e agree with the district judge that in this case no such [exceptional] circumstances are present.").

79. *Id.*

80. *Id.* Specifically, the plaintiff alleged: "(1) lack of adequate medical treatment, (2) interference with his right of access to the courts, (3) improper food and living conditions, and (4) the taking of his property (\$7.20) without due process of law." *Id.*

81. *Id.*

82. *Id.* The court stated that "it is well-settled that in civil actions the appointment of counsel should be allowed only in exceptional cases." *Id.* (citing *United States v. Madden*, 352 F.2d 792 (9th Cir. 1965)). The court went on to agree with the district court's determination that no exceptional circumstances existed without analyzing or applying the facts of the case to the standard of exceptional circumstances. *Id.*

83. *Id.*

84. 686 F.2d 264 (5th Cir. 1982).

85. *Id.* at 266.

86. *Id.*

87. *Id.* at 265. Specifically, the plaintiff alleged that the officers handcuffed his wrists unnecessarily and too tightly. *Id.* Further, the plaintiff alleged he was grabbed by the neck and his handcuffed arms were pulled up far behind his neck. *Id.* Plaintiff claimed that this use of force resulted in injury to his hands, wrists and back, for which he did not receive proper medical attention. *Id.*

88. *Id.*

discretion to determine the appointment of counsel is fixed at the trial court level.⁸⁹ Nevertheless, because the trial court denied the prisoner's request for counsel due to a lack of attorneys willing to take uncompensated appointments, the court of appeals remanded for reconsideration of the appointment of counsel under the exceptional circumstances standard.⁹⁰

Similarly, in *Aldabe v. Aldabe*,⁹¹ the Ninth Circuit refused to appoint counsel for a plaintiff who alleged a deprivation of her civil rights in a divorce proceeding, finding no exceptional circumstances present to justify such appointment.⁹² Likewise, the Sixth Circuit in *Lavado v. Keohane*⁹³ upheld the denial of counsel to a former federal prisoner who alleged violation of his constitutional rights when prison officials opened his mail.⁹⁴ The circuit court concluded that the district court was correct in finding a lack of exceptional circumstances warranting the appointment of counsel.⁹⁵ This time, however, the Sixth Circuit gave additional guidance as to the meaning of "exceptional circumstances." The *Lavado* court stated that the inquiry will usually include an examination of the type of case, a determination of the plaintiff's ability to represent himself and an analysis of the level of complexity of the legal and factual issues involved.⁹⁶

Likewise, the United States Court of Appeals for the First Circuit, in *Cookish v. Cunningham*,⁹⁷ followed the exceptional circumstances approach and outlined a list of the factors to be considered in a case-by-case analysis.⁹⁸ According to the *Cookish* court, factors to be weighed in the

89. *Id.*, at 266. The prisoner was granted leave to proceed *in forma pauperis*, and twice moved to have counsel appointed to assist him. *Id.* at 265. The magistrate denied the plaintiff's motions for appointment of counsel, citing the difficulty of finding lawyers to accept such assignments and the lack of entitlement to such an appointment. *Id.* at 265-66.

90. *Id.*

91. 616 F.2d 1089 (9th Cir. 1980).

92. *Id.* at 1093; *see also* United States v. Madden, 352 F.2d 792 (9th Cir. 1965). In *Madden*, a prisoner filed an action alleging infringement of his federal civil rights. *Madden*, 352 F.2d at 793. The district court dismissed the plaintiff's motion for appointment of an attorney, reasoning that it had no authority to appoint counsel in a civil action. *Id.* The appeals court disagreed, finding such authority in 28 U.S.C. § 1915. *Id.* Nevertheless, the court remanded the case for clarification, noting that "[i]n civil actions for damages, appointment of counsel should be allowed only in exceptional cases." *Id.* at 794.

93. 992 F.2d 601 (6th Cir. 1993).

94. *Id.* at 604. The plaintiff alleged that numerous letters and packages marked "special mail" were opened outside his presence in violation of his First, Fourth, Fifth and Sixth Amendment rights. *Id.*

95. *Id.* at 606.

96. *Id.* Additionally, the court noted that appointment of counsel remains inappropriate where the litigant's claims are frivolous or when the chance of success is extremely slim. *Id.* (quoting Mars v. Hansberry, 752 F.2d 254, 256 (6th Cir. 1985)).

97. 787 F.2d 1 (1st Cir. 1986).

98. *Id.* at 3.

determination include: (1) the indigent's ability to conduct an investigation; (2) the indigent's capability of presenting the case; and (3) the relative complexity of the issues involved.⁹⁹ Applying those factors, the court in *Cookish* found that no exceptional circumstances existed to justify the appointment of counsel.¹⁰⁰

Occasionally, the application of these factors has resulted in a finding of exceptional circumstances.¹⁰¹ For example, in *Whisenant v. Yuam*,¹⁰² the Fourth Circuit found that exceptional circumstances existed where a prisoner was denied appointment of counsel in his civil rights action for denial of adequate medical care.¹⁰³ The court relied specifically on the plaintiff's lack of education in legal matters, his incarcerated status preventing contact with witnesses, the sharp conflict in testimony and the plaintiff's lack of training in cross-examination.¹⁰⁴ The combination of these factors convinced the court that exceptional circumstances justified the appointment of counsel.¹⁰⁵

99. *Id.* In support of the factors determining exceptional circumstances, the *Cookish* court cites *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1981), *Maclin v. Freake*, 650 F.2d 885, 888 (7th Cir. 1981) and *Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1971).

100. *Cookish*, 787 F.2d at 3. The prison inmate in *Cookish* alleged that he had been denied adequate medical care and access to the law library. *Id.* at 2. He also alleged that the law library was inadequate. *Id.* Applying the above-cited factors, the court found a number of reasons to deny the plaintiff's request for counsel. First, the facts relating to each claim were straightforward. *Id.* at 3. Second, no factual dispute arose as to the restrictions placed on the plaintiff's access to the library. *Id.* Further, no dispute existed as to the contents of the library. *Id.* Finally, the claim did not present any complex factual issues or legal analysis, and the plaintiff did not demonstrate any functional disability hindering his ability to present his case. The court thus found that no exceptional circumstances existed that would justify the appointment of counsel. *Id.* at 4.

101. *See, e.g.*, *Moore v. Mabus*, 976 F.2d 268 (5th Cir. 1992); *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984).

102. 739 F.2d 160 (4th Cir. 1984).

103. *Id.* at 163. In *Whisenant*, the plaintiff asserted that lack of attention to serious medical needs deprived him of his Fourteenth Amendment rights. *Id.* at 162. The plaintiff was arrested for murder in a hospital emergency room where he was seeking treatment for injuries sustained in a motorcycle accident three days earlier. *Id.* After being taken to jail, the plaintiff complained of internal bleeding, but was not given medical attention for nearly twenty-four hours. *Id.* After examination by the prison doctor, the plaintiff was taken to the hospital where he received eleven units of blood and remained in intensive care for eight days. *Id.* After filing suit for violation of his civil rights, the plaintiff made repeated requests for appointment of counsel. *Id.* The trial court denied these requests on the grounds that federal funds were not available to compensate appointed counsel. *Id.* at 163. The court of appeals concluded that the district court's refusal to appoint counsel constituted an abuse of discretion, notwithstanding the lack of federal funds. *Id.*

104. *Id.*

105. *Id.* Specifically, the court pointed out that, in addition to the fact that the plaintiff lacked experience with legal procedures, he was barely able to read and write. *Id.* Additionally, his incarcerated status made it impossible for him to leave the prison to interview witnesses. *Id.* Because of the sharply conflicting testi-

Similarly, in *Moore v. Mabus*,¹⁰⁶ the Fifth Circuit found exceptional circumstances existed where a prisoner alleged mistreatment after testing positive for the HIV virus.¹⁰⁷ The court found the complex nature of the issues required professional assistance.¹⁰⁸ Further, the difficult subject of AIDS control in a correctional setting exceeded the prisoner's ability to investigate.¹⁰⁹ Finally, the scope of the legal issues and the necessity of developing expert testimony both required professional trial skills.¹¹⁰ As a result of these factors, the court found that exceptional circumstances existed and directed the district court to appoint counsel.¹¹¹

C. *Less Stringent Standards for Appointment of Counsel*

Other circuits have taken a decidedly different approach to the appointment of counsel for an indigent civil litigant.¹¹² Generally, these courts take the position that a court should consider a greater number of factors without reference to the stringent exceptional circumstances standard. The Seventh Circuit, in *Maclin v. Freake*,¹¹³ articulated several fac-

mony, the outcome of the case would depend on cross-examination. *Id.* Therefore, the plaintiff's lack of training in cross-examination put him at a serious disadvantage. *Id.*

106. 976 F.2d 268 (5th Cir. 1992).

107. *Id.* at 272. The prisoner in *Moore* made a number of specific allegations: (1) deliberate inattention to his medical needs in violation of the Eighth Amendment; (2) confinement conditions at the prison in violation of the Eighth Amendment; (3) violation of the prisoner's right to privacy under the Fourteenth Amendment; (4) loss of certain privileges in violation of the Fourteenth Amendment; and (5) denial of rights guaranteed by state law. *Id.* at 269.

108. *Id.* at 272.

109. *Id.*

110. *Id.*

111. *Id.* On a similar note, the Eleventh Circuit, also following the standard of exceptional circumstances, has explained the standard as justifying the appointment of counsel "where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990).

112. See, e.g., *Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993) (rejecting conclusion that appointment of counsel is only warranted in exceptional circumstances), *cert. denied*, 114 S. Ct. 1306 (1994); *Raves v. Johnson*, 969 F.2d 700, 703 (8th Cir.) (providing list of non-exhaustive factors for consideration of appointment of counsel), *cert. denied*, 113 S. Ct. 658 (1992); *Long v. Schillinger*, 927 F.2d 525, 527 (10th Cir. 1991) (noting that district court should consider variety of factors when appointing counsel); *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986) (adopting broader set of factors for appointment of counsel); *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985) (embracing broad set of factors for application under § 1915(d)); *McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982) (adopting broader *Maclin* factors for appointing counsel); *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) (noting lack of clear cut standards for appointment of counsel); *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) (finding appointment of counsel appropriate where question of witness credibility exists and where allegations of fact are not frivolous); *Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1971) (holding appointment of counsel justified in case where indigent plaintiff could not investigate case).

113. 650 F.2d 885 (7th Cir. 1981).

tors to be considered in deciding whether counsel should be appointed.¹¹⁴ Using these factors, the court of appeals determined that the district court's denial of the plaintiff's § 1915(d) request for appointed counsel constituted an abuse of discretion.¹¹⁵

In *Maclin*, a paraplegic prisoner sued the prison medical director, alleging that intentional disregard of his medical needs violated his Eighth Amendment rights.¹¹⁶ The district court denied the plaintiff's request for counsel.¹¹⁷ In reviewing this decision, the court of appeals set forth the factors to be considered. First, the court should consider the merits of the litigant's claim.¹¹⁸ If the indigent's chances of prevailing on the merits are extremely slim, the appointment of counsel may be unwarranted.¹¹⁹ Next, the court should consider the nature of the factual issues raised, appointing counsel if the indigent is not in a position to undertake an investigation.¹²⁰ Further, if the only evidence consists of conflicting testimony, the court should appoint counsel.¹²¹ Finally, the court should consider not only the capability of the indigent to present the claim, but also the complexity of the legal issues presented by the claim.¹²² The Seventh Circuit went on to note, however, that this list of factors is by no means exhaustive and that other elements could also be found significant and possibly controlling.¹²³

114. *Id.* at 887-89. For a complete discussion of the *Maclin* factors, see *infra* notes 115-23 and accompanying text.

115. *Maclin*, 650 F.2d at 886.

116. *Id.*

117. *Id.*

118. *Id.* at 887.

119. *Id.*

120. *Id.*

121. *Id.* at 888. The court reasoned that where the only evidence presented to the fact-finder consists of conflicting testimony, the truth will be more likely disclosed where both sides are represented by professionals trained in cross-examination and presentation of evidence. *Id.*; see also *Manning v. Lockhart*, 623 F.2d 536 (8th Cir. 1980). In *Manning*, a prisoner accused the warden of beating him. *Manning*, 623 F.2d at 538. The prisoner proceeded *pro se* as his request for appointment of counsel was denied. *Id.* At trial, the sole evidence was the conflicting testimony of the warden and the prisoner. *Id.* The defendant prevailed at trial, and the Eighth Circuit reversed. *Id.* at 540. The Eighth Circuit stated that where a question of credibility of witnesses exists and where the case presents serious allegations of fact that are meritorious, denial of a request for appointed counsel constitutes an abuse of discretion. *Id.*

122. *Maclin*, 650 F.2d at 888-89. In *Maclin*, a paraplegic alleged he received no physical therapy for his condition while in prison. *Id.* at 889. Confined to a wheelchair, the plaintiff was in no position to investigate the facts of the case. *Id.* Additionally, the plaintiff had not demonstrated any working knowledge of the legal system. *Id.*

123. *Id.* at 889. The court did not specifically identify any additional factors because the factors listed provided an adequate foundation for consideration of the plaintiff's request for appointed counsel. *Id.* For further discussion of the *Maclin* factors, see Dick, *supra* note 29, at 651. According to Dick, the court's analysis in *Maclin* was entirely reasonable because appointed counsel is not necessary when the indigent plaintiff's claim is weak, the issues are not complex or the plain-

Both the Second and the Eighth Circuits have followed the *Maclin* approach.¹²⁴ The United States Court of Appeals for the Second Circuit specifically cited the *Maclin* factors in *Hodge v. Police Officers*.¹²⁵ In *Hodge*, two police officers were charged with civil rights violations in using excessive force during an arrest.¹²⁶ The district court denied the plaintiff's request for counsel, stating that appointment of counsel remains reserved for cases so complex that they cannot be adequately tried without an attorney.¹²⁷ On appeal, the Second Circuit held that in declining to appoint counsel, the trial judge failed to apply the correct criteria in exercising her discretion under 28 U.S.C. § 1915(d).¹²⁸ The factors that should have been applied, according to the Second Circuit, were those cited by the Seventh Circuit in *Maclin*.¹²⁹ The *Hodge* court also added another potential factor to consider in determining the appropriate appointment of counsel for indigent civil litigants under § 1915(d). The court found that the statutory language requires a preliminary determination of the indigent's inability to obtain counsel before an appointment will be considered.¹³⁰

The Eighth Circuit has also followed this less stringent approach of enumerating a number of standards for the court to consider.¹³¹ In *Rayes v. Johnson*,¹³² the plaintiff, a prisoner at a Nebraska state prison, alleged that state prison employees intentionally injured him and denied him

tiff has the capability to present the case. *Id.* at 654. When the *Maclin* factors are not present, however, courts should be willing to appoint counsel where doing so will assist the determination of the plaintiff's claim. *Id.*

124. *See, e.g.*, *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986) (noting that *Maclin* factors find appropriate middle ground between more and less demanding standards); *Rayes v. Johnson*, 969 F.2d 700, 703 (8th Cir.) (adopting similar list of factors to apply in appointing counsel), *cert. denied*, 113 S. Ct. 658 (1992).

125. 802 F.2d 58 (2d Cir. 1986).

126. *Id.* at 59.

127. *Id.* The court went on to note that this case was relatively straightforward and would largely turn on the trier of fact's belief in the officer's and the plaintiff's credibility. *Id.*

128. *Id.* at 59-60.

129. *Id.* at 60-61 (citing *Maclin v. Freake*, 650 F.2d 885, 887-89 (7th Cir. 1981)). The decision on whether to appoint counsel should include consideration of the nature of the factual issues presented by the case, the level of investigation required, the plaintiff's ability to present the case without the assistance of counsel and the level of complexity of the legal issues involved. *Id.* Because the trial court did not apply the proper factors in denying the plaintiff's request for counsel, the court remanded the case for a proper consideration of the relevant factors. *Id.* at 62.

130. *Id.* at 61. The court also stated that an indigent's efforts to obtain counsel should be considered. *Id.*

131. *See, e.g.*, *Rayes v. Johnson*, 969 F.2d 700, 703 (8th Cir.) (providing non-exclusive checklist of factors to be considered in appointment of counsel), *cert. denied*, 113 S. Ct. 658 (1992); *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) (finding appointment of counsel warranted when case presents serious allegations of fact and question of witness credibility exists).

132. 969 F.2d 700 (8th Cir.), *cert. denied*, 113 S. Ct. 658 (1992).

medical care.¹³³ The district court granted the plaintiff's original request for appointed counsel, but the attorney subsequently withdrew from the case.¹³⁴ On appeal, the plaintiff argued that the court inappropriately denied him replacement counsel.¹³⁵

Finding the trial court abused its discretion by declining to appoint substitute counsel, the Eighth Circuit also enunciated the factors to be considered for the appointment of counsel.¹³⁶ Resembling those cited by the court in *Maclin*, the important factors include: (1) the plaintiff's need for an attorney; (2) the plaintiff's ability to retain his own counsel; (3) the likelihood that the court will benefit from the assistance of counsel; (4) the factual complexity of the case; (5) the plaintiff's ability to investigate and present his claim; and (6) the presence of conflicting testimony.¹³⁷ Applying the factors to the case, the Eighth Circuit concluded that the district court's failure to appoint replacement counsel constituted an abuse of discretion.¹³⁸

IV. ANALYSIS

The United States Court of Appeals for the Third Circuit has only addressed the issue of appointment of counsel under 28 U.S.C. § 1915(d) on three occasions.¹³⁹ On each occasion, however, the court addressed

133. *Id.* at 701. The inmate alleged that prison guards slammed a steel door on his hand, resulting in a broken finger that medical personnel later refused to treat. *Id.* The inmate further alleged that prison guards confiscated his finger splints on three occasions, thereby interfering with his medical treatment and causing additional pain. *Id.*

134. *Id.* at 702. Along with his motion to withdraw, the attorney filed an affidavit that stated that the differences between himself and his client resulted in a deterioration of the attorney-client relationship to the point where withdrawal was proper and necessary. *Id.*

135. *Id.* at 702. After withdrawal of the plaintiff's attorney, the magistrate judge granted the plaintiff sixty days in which to retain another attorney or to inform the court that he would represent himself. *Id.* The plaintiff made three unsuccessful attempts to retain counsel, after which he informed the court that he would proceed without counsel. *Id.* Although on two occasions before trial the plaintiff requested that substitute counsel be appointed, both requests were denied. *Id.*

136. *Id.* at 702-03.

137. *Id.* at 703.

138. *Id.* Specifically, the court noted that the assistance of counsel was essential to both the plaintiff's effort to press his claim and the jury's and court's ability to make a determination on the claim. *Id.* The plaintiff's particular status as an inmate hampered his ability to press his claims because of his restricted access to a typewriter, computer, telephone and law library. *Id.* Finally, the plaintiff had very little legal knowledge and the facts and legal issues were sufficiently complex to warrant the appointment of counsel. *Id.* at 704.

139. *Tabron v. Grace*, 6 F.3d 147, 154 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994). In *Tabron*, the court recognized the Third Circuit's lack of guidance as to what criteria the court should use in deciding to appoint counsel for an indigent civil litigant. *Id.* at 154. The court noted that the Third Circuit has only addressed this issue on two other occasions. The first opportunity arose in *Ray v.*

different questions within this issue. In *Ray v. Robinson*,¹⁴⁰ the court focused on the issue of the court's discretion without stating the specific factors to be considered when appointing counsel.¹⁴¹ The Third Circuit next addressed appointment of counsel issues in *Smith-Bey v. Petsock*.¹⁴² *Smith-Bey*, however, dealt exclusively with the issue of appealability of an order denying appointment of counsel. Nevertheless, the Third Circuit once again failed to guide the courts as to the correct circumstances for appointment of counsel.¹⁴³ Most recently in *Tabron v. Grace*,¹⁴⁴ the court again addressed the issue of appointment of counsel under § 1915(d), and used the opportunity to announce the appropriate standards.¹⁴⁵ Because each of these cases deals with a separate area of appointment of counsel under § 1915(d), each will be discussed and analyzed in turn.

A. Discretionary Authority

The Third Circuit has expressly and consistently stated that the district courts' authority under 28 U.S.C. § 1915(d) is discretionary.¹⁴⁶ The Third Circuit first addressed the issue of the appointment of counsel for indigent civil litigants in *Ray v. Robinson*.¹⁴⁷ In that case, prison inmates alleged that the confinement of inmates to cells of insufficient size and the prohibition on covering of doors and windows, violated the prisoners' constitutional rights.¹⁴⁸ The district court granted permission for the plaintiffs to proceed *in forma pauperis*, after which one of the inmates moved for appointment of counsel.¹⁴⁹ Both the assigned magistrate and the district court denied the plaintiff's motion for appointment of counsel.¹⁵⁰

Robinson, 640 F.2d 474 (3d Cir. 1981). For a discussion of the facts and holding of *Ray*, see *infra* notes 140-41, 147-56 and accompanying text. The second chance occurred in *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984). For a discussion of the facts and holding in *Smith-Bey*, see *infra* notes 161-66 and accompanying text.

140. 640 F.2d 474 (3d Cir. 1981).

141. *Id.* at 478. The court stated: "Because of the diverse nature of the cases in which motions to appoint counsel are made, we deem it inadvisable to establish any general standard as to when counsel should be appointed." *Id.*

142. 741 F.2d 22 (3d Cir. 1984).

143. *Id.* at 26. The court simply stated that appointment of counsel is "usually only granted upon a showing of special circumstances indicating the likelihood of substantial prejudice." *Id.*

144. 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994).

145. *Id.* at 150. For a discussion of the standards set forth by the *Tabron* court, see *infra* notes 174-86 and accompanying text.

146. See, e.g., *Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994); *Smith-Bey v. Petsock*, 741 F.2d 22 (3d Cir. 1984); *Ray v. Robinson*, 640 F.2d 474 (3d Cir. 1981).

147. 640 F.2d 474 (3d Cir. 1981).

148. *Id.* at 475. Plaintiffs sought a declaratory judgment that the prison conditions in question constituted infringement of their Eighth Amendment rights against cruel and unusual punishment. *Id.*

149. *Id.*

150. *Id.* at 475-76. In denying the request, the magistrate stated that because the Criminal Justice Act does not provide funds for the appointment of counsel to

In reviewing that denial, the Third Circuit concluded that both rulings overlooked the provisions of § 1915 that provide the court discretionary authority to appoint counsel for an indigent in just such cases.¹⁵¹ The *Ray* court cited *Peterson v. Nadler*¹⁵² and *United States v. McQuade*¹⁵³ in support of this proposition.¹⁵⁴ Setting the stage for the court's exercise of discretion under § 1915(d), the *Ray* decision gave no guidance as to when this discretion should be exercised. The court stated that "[b]ecause of the diverse nature of the cases in which motions to appoint counsel are made, we deem it inadvisable to establish any general standard as to when counsel should be appointed."¹⁵⁵ Instead, the court referred to factors noted in other decisions and expressed no opinion as to whether counsel should have been appointed in the case at bar.¹⁵⁶

The Third Circuit has consistently followed the approach in *Ray*, which stated that the power to appoint counsel under § 1915(d) is discretionary.¹⁵⁷ In *Smith-Bey*, the court implied this power's discretionary nature by noting that on appeal the plaintiff must show that a denial of appointment of counsel so prejudiced him as to constitute an abuse of discretion.¹⁵⁸ Likewise, in *Tabron*, the court stated that § 1915(d) grants district courts broad discretion to appoint an attorney for indigent civil

prosecute civil rights actions, the plaintiff's motion for the appointment of counsel should be denied. *Id.* at 476. According to the district court, "[b]ecause there are no provisions in law for the appointment of counsel at the expense of the Government to prosecute prisoner civil rights actions, the plaintiffs' motion for reconsideration must also be denied." *Id.*

151. *Id.* at 477. The circuits generally agree as to this approach. See *Rayes v. Johnson*, 969 F.2d 700, 702 (8th Cir.) (explaining that despite lack of constitutional or statutory right to appointed counsel for civil litigants, district court has discretion to make such appointment), *cert. denied*, 113 S. Ct. 658 (1992); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (stating that district court judge has broad discretion to decide whether to appoint counsel under 28 U.S.C. § 1915(d)); *Cookish v. Cunningham*, 787 F.2d 1, 2 (1st Cir. 1986) (giving district court discretion to appoint counsel for indigent civil litigant under § 1915(d)); *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985) (emphasizing that district court is vested with considerable discretion regarding appointment of counsel under § 1915(d)); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984) (stating that power to appoint counsel under § 1915(d) is discretionary one); *McKeever v. Israel*, 689 F.2d 1315, 1318 (7th Cir. 1982) (expressing view that 28 U.S.C. § 1915(d) clearly grants district courts broad discretion to appoint counsel for indigents); *Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1981) (granting district court broad discretion to appoint counsel for indigents under 28 U.S.C. § 1915(d)); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (noting that § 1915(d) gives the district court discretion to appoint counsel).

152. 452 F.2d 754 (8th Cir. 1971). For further discussion of *Peterson*, see *supra* notes 45-51 and accompanying text.

153. 579 F.2d 1180, 1181 (9th Cir. 1978). For further discussion of *McQuade*, see *supra* notes 57-60 and accompanying text.

154. *Ray*, 640 F.2d at 477-78.

155. *Id.* at 478.

156. *Id.* (citing *Peterson v. Nadler*, 452 F.2d 754, 757-58 (8th Cir. 1971)).

157. *Id.* at 477.

158. *Smith-Bey v. Petsock*, 741 F.2d 22, 25 (3d Cir. 1984).

litigants.¹⁵⁹ Thus, the Third Circuit has maintained the firm position that the power to appoint counsel under § 1915(d) remains discretionary.

B. *Appealability*

The *Ray* court also addressed the issue of appealability; finding that an order denying counsel constituted a collateral order, and therefore was immediately appealable.¹⁶⁰ Nevertheless, the Third Circuit overruled this part of the decision three years later when it decided *Smith-Bey*.¹⁶¹ *Smith-Bey* involved a civil rights action filed in district court against numerous prison employees and officers.¹⁶² The district court granted the plaintiff *in forma pauperis* status, but denied his request for counsel sought under 28 U.S.C. § 1915(d).¹⁶³ Relying on the Supreme Court's decision in *Flanagan v. United States*,¹⁶⁴ the court concluded that decision effectively overruled the Third Circuit's prior position on the same issue in *Ray*.¹⁶⁵ As a result, the Third Circuit reversed its position in *Ray* and held that an order deny-

159. *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994).

160. *Ray*, 640 F.2d at 476. The *Ray* court reached this conclusion by applying the factors enumerated by the United States Supreme Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the Supreme Court held that a district court's order refusing to disqualify counsel is not appealable prior to final judgment in the litigation. *Id.* at 379. Such an order could not qualify as a collateral order to avoid the dictates of the final judgment rule. *Id.* at 376. The Court defined a collateral order as one that conclusively decides the question in dispute, settles an important issue separately from the merits and is effectively unreviewable on appeal. *Id.* at 375 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The *Ray* court concluded that the *Firestone* test is satisfied by an order denying counsel. *Id.* at 476. The first part meets the collateral order test because the sole issue involves the district court's authority to appoint counsel for civil litigants. *Id.* at 476-77. According to the *Ray* court, the question of appointment of counsel is separate from the merits of the case, thus satisfying the second part of the test. *Id.* at 477. Finally, the facts meet the third part of the test because no meaningful review of an order denying appointment of counsel could occur once the trial had concluded. *Id.* The *Ray* court reasoned that a determination of an appellant's need for an attorney would have to be made before trial to have any useful impact. *Id.* As a result, the Third Circuit in *Ray* held that denial of counsel constitutes an appealable collateral order. *Id.*

161. *Smith-Bey*, 741 F.2d at 26.

162. *Id.* at 22. The complaint charged that the defendants violated the plaintiff's rights by failing to follow his instructions to send by certified mail an envelope containing legal papers. *Id.* Additionally, an amount attributed to the cost of the certified mail was deducted from his inmate account. *Id.* The plaintiff sought a declaratory judgment that these acts violated his constitutional right of access to the courts. *Id.*

163. *Id.* at 22. According to the magistrate, to whom the case had been referred, appointment of counsel would not further the litigation. *Id.* The magistrate then stated the court's policy of limiting a plaintiff's request for appointed counsel to cases in which the plaintiff lacks the capacity to represent himself adequately. *Id.* at 23.

164. 465 U.S. 259 (1984). For further discussion of *Flanagan* and its holding, see *supra* notes 67-72 and accompanying text.

165. *Smith-Bey*, 741 F.2d at 23-25.

ing appointment of counsel fails to meet the requirements of the collateral order doctrine and therefore is not immediately appealable.¹⁶⁶

C. *Criteria for the Appointment of Counsel*

The *Smith-Bey* decision almost exclusively concerned the issue of appealability. As in *Ray*, the court gave little guidance as to the factors to be considered in determining whether to appoint counsel for an indigent civil litigant. The court merely stated that the appointment of counsel under § 1915(d) is usually granted only upon a showing of special circumstances.¹⁶⁷ Such special circumstances would indicate the probability of substantial prejudice to the indigent.¹⁶⁸ Prejudice could result, for example, from the indigent's inability to present the facts and legal issues to the court in a complex case without assistance of counsel.¹⁶⁹

In 1993, the Third Circuit finally announced the factors to be considered for the appointment of counsel under § 1915(d) in *Tabron v. Grace*.¹⁷⁰ In *Tabron*, a prisoner brought suit against eight prison officials, claiming a violation of constitutional rights.¹⁷¹ The trial court denied the plaintiff's request for counsel, stating that counsel may only be appointed to represent indigent civil litigants in exceptional circumstances.¹⁷² The Third Circuit disagreed, finding that § 1915(d) does not limit the appointment of counsel to exceptional circumstances.¹⁷³

166. *Id.* at 26.

167. *Id.*

168. *Id.*

169. *Id.* Noting the difference between criminal and civil cases, the court pointed out that the Sixth Amendment requires appointment of counsel only for an indigent *criminal* defendant. *Id.* The court further stated that with respect to appealability, civil and criminal cases remain identical. *Id.*

170. 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994).

171. *Id.* at 150. Specifically, the plaintiff charged that the officials had violated his civil rights by failing to protect him from an assault by another prisoner. *Id.*

172. *Id.* at 151. The case was assigned to a magistrate judge for pretrial proceedings. *Id.* The plaintiff filed a motion for appointment of counsel on the grounds that he lacked the necessary legal education and experience to present the case properly. *Id.* The plaintiff further argued that an attorney was needed to assist him with discovery. *Id.* Finding no exceptional circumstances existed to justify the appointment of counsel, the magistrate denied the motion. *Id.*

173. *Id.* at 155. The court stated: "Section 1915(d) provides that '[t]he court may request an attorney to represent any such person unable to employ counsel.' Nothing in this clear language suggests that appointment is permissible only in some limited set of circumstances." *Id.* (quoting 28 U.S.C. § 1915(d) (1988)). The *Tabron* court rejected the defendants' contention that the reference to "special circumstances" in *Smith-Bey* indicated that the magistrate was correct in applying the exceptional circumstances standard. *Id.* at 154. Instead, the court concluded that *Smith-Bey* merely stated in *dicta* that the power to appoint counsel under § 1915(d) is discretionary and that appointment is "usually only granted upon a showing of special circumstances." *Id.* (quoting *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984)).

Perhaps more importantly, the *Tabron* court announced factors appropriate in deciding whether to appoint counsel under section 1915(d) in the Third Circuit.¹⁷⁴ In setting forth these factors, the *Tabron* court expressly rejected the exceptional circumstances approach of the First, Fourth, Sixth, Ninth and Eleventh Circuits.¹⁷⁵ The court noted the language of the statute and concluded that "[n]othing in [the] clear language suggests that appointment is permissible only in some limited set of circumstances."¹⁷⁶

The Third Circuit relied heavily on the general standards set forth by the Second and Seventh Circuits, expressly adopting these standards in *Tabron*.¹⁷⁷ As a threshold matter, a court must consider the merits of the plaintiff's claim.¹⁷⁸ Once the district court determines the claim's merit, the court should consider the plaintiff's ability to present his or her case.¹⁷⁹ The Third Circuit also noted that if an indigent plaintiff is found to be incapable of presenting a meritorious claim, the court should seriously consider appointing counsel.¹⁸⁰

174. *Id.* The district court specifically referred to the lack of guidance in the Third Circuit and noted that in the *Ray* decision the Third Circuit did not elaborate on the particular standards the courts should apply when exercising discretion under § 1915(d). *Id.* at 154. The court stated that this case offered an opportunity to explain the appropriate standards for appointment under § 1915(d). *Id.* at 150.

175. *Id.* at 155. The court based this rejection on the grounds that the exceptional circumstances approach imposes a substantive limitation on the district courts' discretion to appoint counsel. *Id.* Cases specifically relied upon by the defendants and rejected by the Third Circuit included: *Lavado v. Keohane*, 992 F.2d 601 (6th Cir. 1993); *Fowler v. Jones*, 899 F.2d 1088 (11th Cir. 1990); *Cookish v. Cunningham*, 787 F.2d 1 (1st Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980); *Cook v. Bounds*, 518 F.2d 779 (4th Cir. 1975). *Tabron*, 6 F.3d at 155. For a discussion of the holdings and the standards applied in these cases, see *supra* notes 76-100 and accompanying text.

176. *Tabron*, 6 F.3d at 155.

177. *Id.* Specifically, the court relied heavily upon *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986) and *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981). In so doing, the court indicated that it was elaborating on the specific criteria to be considered under the 'special circumstances' approach previously announced in the Third Circuit. *Id.*; see also *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984). For a discussion of the Second Circuit's approach to appointment of counsel, see *supra* also notes 125-30 and accompanying text. For an examination of the Seventh Circuit's approach to the same issue, see *supra* notes 113-23 and accompanying text.

178. *Tabron*, 6 F.3d at 155. The court cited *Maclin* for the proposition that a court is justified in appointing counsel only if it first appears that the litigant's claim has some merit in fact or law. *Id.*

179. *Id.* at 156. In determining a plaintiff's ability, a number of factors are considered, namely the plaintiff's education, prior litigation experience and prior work experience. *Id.* The plaintiff's ability to present his or her case may also depend on such factors as the ability to speak English and the restraints placed on the plaintiff if he or she is a prisoner. *Id.* (citing *Castillo v. Cook County Mail Room Department*, 990 F.2d 304 (7th Cir. 1993) and *Rayes v. Johnson*, 969 F.2d 700 (8th Cir.), *cert. denied*, 113 S. Ct. 658 (1992)). For a discussion of *Rayes*, see *supra* notes 132-38 and accompanying text.

180. *Tabron*, 6 F.3d at 156.

The court went on to note a number of other key factors. The difficulty of the particular legal issues and the level of factual investigation that will be required should be considered.¹⁸¹ Problems faced by confined prisoners in pursuing their claims may also be evaluated.¹⁸² Appointment of counsel may be warranted in a case likely to require extensive discovery or compliance with complicated discovery rules.¹⁸³ Finally, if a case likely turns on credibility determinations, appointment of counsel may also be justified.¹⁸⁴ The Third Circuit concluded by noting that the appointment of counsel could be made at any point in the litigation and could be made by the district court *sua sponte*.¹⁸⁵ As a final note, the court pointed out that the list was not meant to be exhaustive. The court emphasized that appointment of counsel under § 1915(d) remains a matter within the trial court's sound discretion.¹⁸⁶

Concluding its discussion of the issue of appointment of counsel under § 1915(d), the court noted the ever-increasing number of prisoner civil rights actions filed each year, the shortage of funds to compensate appointed counsel and the lack of competent attorneys willing to undertake such representation.¹⁸⁷ In light of these concerns, a more stringent

181. *Id.* According to the court, the more complex the legal issues, the more inclined a court should be to appoint counsel. *Id.* The rationale for this position implies that justice is best served when both sides of a complex legal issue are represented by trained lawyers. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* The court reasoned that "when witness credibility is a key issue, 'it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination.'" *Id.* (quoting *Maclin v. Freake*, 650 F.2d 885, 888 (7th Cir. 1981)).

185. *Id.* As a result, even if the indigent plaintiff's incapacity to present the case did not appear until trial, the court should nevertheless consider appointing counsel at that point. *Id.* at 157. The Third Circuit cautioned, however, that the courts must always consider whether an indigent plaintiff could retain counsel on his own behalf. *Id.* at 157 n.5. If the plaintiff could easily attain or afford counsel, but has simply made no effort to do so, the court should not appoint counsel. *Id.*

186. *Id.* at 157. As a result, a district court's refusal to appoint counsel under § 1915(d) is reviewable by an appeals court for abuse of discretion. *Id.* at 158. Additionally, where the district court has failed to articulate the reasons for such refusal, remanding the case may be necessary to determine whether the district court applied the appropriate standard. *Id.* Because the magistrate judge in *Tabron* applied the incorrect standard and offered no reasons for denying the plaintiff's request for counsel, the case was remanded for consideration of the issue of appointment of counsel under the appropriate standards. *Id.* Applying the newly-announced factors to the case at bar, however, the court suggested that a number of factors would be relevant on remand. First, the plaintiff in *Tabron* would be forced to deal with complex discovery rules, and would be at a distinct disadvantage due to his lack of legal experience. *Id.* The plaintiff's lack of legal experience was also important because there was controversy in the testimony of several witnesses and thus, the case would turn on credibility determinations. *Id.* Finally, the plaintiff's incarcerated status could have hampered his ability to investigate the facts. *Id.* The court also noted, however, that the plaintiff appeared capable and literate, and that the legal issues did not appear complex. *Id.*

187. *Id.* at 157.

approach, such as the exceptional circumstances approach rejected by the court, would seem more appropriate. The court, however, noted with optimism the growing number of attorneys willing to provide *pro bono* legal services for indigent litigants and encouraged more lawyers to volunteer for such service in order to address these concerns.¹⁸⁸ Instead of making a ruling based only on policy, the Third Circuit chose an approach consistent with that of various other circuits; the court found that the clear language of § 1915(d) does not impose a strict limitation of exceptional circumstances on the appointment of counsel for indigent civil litigants.¹⁸⁹

V. CONCLUSION

While no constitutional or statutory right to appointed counsel exists in a civil case, § 1915(d) gives federal courts the authority to appoint counsel for indigent civil litigants.¹⁹⁰ The Third Circuit in *Tabron v. Grace* expressly rejected the exceptional circumstances approach adopted by some circuits in favor of a less stringent set of factors to guide the court in appointing counsel. The Third Circuit's approach provides the court with more factors to consider when deciding whether to appoint counsel. Such appropriate consideration of all relevant factors is particularly important because an order denying appointment of counsel is not immediately appealable in the Third Circuit. Furthermore, by providing more factors for consideration, the Third Circuit's approach may increase the number of appointments of counsel for indigent civil litigants. Because appointment of counsel has been said to have the effect of actually expediting cases,¹⁹¹ this may help relieve the burden on the federal courts caused by the in-

188. *Id.*

189. *Id.* at 155. For a list of the cases following the same approach as the Third Circuit, see *supra* note 112.

190. 28 U.S.C. § 1915(d) (1988).

191. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1309 n.20 (9th Cir. 1981). In *Bradshaw*, the Ninth Circuit stated that representation conducted by counsel is "more orderly, rational and reasonable." *Id.*; see also Eisenberg, *supra* note 1, at 475. According to Eisenberg, counsel should be appointed in every case that has survived *sua sponte* dismissal and jurisdictional problems. Eisenberg noted that beyond this point, no *pro se* plaintiff has the ability to represent himself against experienced counsel. *Id.* Removing the unmeritorious and frivolous claims as soon as possible constitutes the key to providing counsel in the appropriate cases. *Id.* According to the author, roughly 10%-20% of prisoner civil rights cases would be able to withstand this inquiry and require counsel. *Id.*; see also Weygandt, *supra* note 75, at 1569. According to Weygandt, the efficiency issue directly relates to the appealability of § 1915(d) denials. Immediate review of orders denying appointment of counsel will promote efficiency. *Id.* An indigent plaintiff's successful interlocutory appeal avoids a new trial, while the remainder of the action is carried out more efficiently with the assistance of counsel. *Id.* For a discussion of the disadvantages faced by *pro se* litigants and the resulting delays in the litigation process, see Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 202-05 (1972).

creasing number of civil actions filed each year.¹⁹² Most importantly, the Third Circuit's flexible approach will more adequately fulfill the vision of the drafters of § 1915(d), that of providing equal access to the courts for all citizens.

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192. Eisenberg, *supra* note 1, at 435, 466. Eisenberg notes that between 1972 and 1991, the number of prisoner civil rights cases has grown from 3,000 to 26,000. *Id.* at 435. Additionally, in the last twenty-five years, the overall civil caseload in district courts has tripled. *Id.* at 466. Specifically, the total number of civil filings in U.S. district courts in 1991 was 207,610. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 2 (1993). In 1992, this figure rose 8% to reach 224,747. *Id.* In 1993, civil filings increased an additional 2% to reach 228,162. *Id.* The key contributing factors in the overall increase in 1993 civil filings included: prisoner petitions (up 16%), civil rights (up 14%), personal injury product liability (up 34%) and Social Security cases (up 22%). *Id.* at 3.

