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by Robert M. Elardo

Lawyers and law students alike should become aware that a mandatory pro bono obligation is much closer to existence than the casual observer would believe. Two recent reports, in particular, point out just how close a mandatory obligation may be. The first of these reports was released in late 1979 by the Association of the Bar of the City of New York's Special Committe on the Lawyer's Pro Bono Obligations. It was entitled, "Toward a Mandatory Contribution of Public Service Practice by Every Lawyer" (hereinafter: N.Y.C. Report).

The second and possibly more significant report was released in February of this year, by the American Bar Association's Commission on Evaluation of Professional Standards. This report took the form of a discussion draft of new "Model Rules of Professional Conduct' (hereinafter: Proposed Model Rules) which were proposed as a replacement for the current A.B.A. Code of Professional Responsibility.

Both reports call for the imposition by the respective bar associations of mandatory pro bono publico service obligations which are to be monitored through self-reporting by individual lawyers.

Despite the similarities, there are several differences between the approaches taken by the two reports. The most notable difference is that the N.Y.C. Report calls for a quantitatively set minimum number of hours, while the Proposed Model Rules do not attempt to set any minimum. The A.B.A. approach is to merely require some contribution of service, but to leave decisions as to quantity of service up to individual lawyers.

The N.Y.C. Report suggests that initially the hourly requirement be between 30 and 50 hours per year per lawyer. This, they say, is equivalent to 2% — 3% of the total annual billable hours for most attorneys. The N.Y.C. Report goes on to recommend that the requirement be eventually raised to 40 to 60 or 50 to 70 hours per year.

A second difference in the two reports' approaches stems from a mutual dissatisfaction with using the term "pro bono publico" to describe the type of service that they would each require. *Black's Law Dictionary* (Revised 4th ed.) defines pro bono publico as "For the public good; for the welfare of the whole." Both reports seem to find this definition to be too general and, although each uses the term "pro bono" or "pro bono publico" several times in their reports, when it comes to the actual text of their proposed rules, each report uses a different term to describe the type of obligation they would call for.

Rule 8.1 of the Proposed Model Rules states, "A lawyer shall render unpaid *public interest legal service.* A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations. A Lawyer shall make an annual report concerning such service to appropriate regulatory authority." [emphasis added]

The N.Y.C. proposal states, "Every lawyer shall devote a significant portion of his or her professional time each year to *public service practice.*" [emphasis added]

"Public service practice is defined by the N.Y.C. Report as "professional services provided without fee or at a substantially reduced fee, which fall into one or more of the following areas:

1. Activity, whether legal in nature or otherwise, which is designed to carry out or improve the administration of justice, including services as an arbitrator or in other quasi-judicial roles, and including efforts directed towards improving and simplifying the legal process and increasing the availability and quality of legal services.
2. Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
3. Legal services involving a right of an individual which society has a special interest in protecting.
4. Legal service involving an important right belonging to a significant segment of the public.
5. Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.
6. Activity, whether legal in nature or otherwise, which is designed to improve, or increase the availability of, legal services of the character described in paragraphs (2) through (5) above, including training of oneself or others to provide such services and membership on the governing board of any organization primarily engaged in providing such services."

As the texts of the two proposed rules reveal, the biggest difference between what type of services the N.Y.C. Report would allow and what Rule 8.1 of the Proposed Model Rules would allow centers around the question of whether "reduced fee" work should count for a lawyer towards meeting his obligation. The N.Y.C. Report allow "professional services provided without fee or at a *substantially reduced fee*" [emphasis added], while Rule 8.1 considers only "*unpaid*

public interest legal service" [emphasis added] to count towards meeting the pro bono obligation.

History of A.B.A. Commitment

The reports of the N.Y.C. Bar Committee and the A.B.A. Commission become more significant when an examination is made of other actions by bar associations. Such an examination indicates that these recent reports were not isolated actions. On the contrary, bar associations have been moving in the direction of a mandatory pro bono obligation since at least 1908. The A.B.A. has been the leader amongst bar associations in this respect.

In 1908, The Canons of Professional Ethics, which was the predecessor of the current Code of Professional Responsibility, was first adopted by the A.B.A. Canon number 4 of the 1908 Canons read in part, "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason." Even more on point was Canon 12, which discussed fees lawyers should charge. "In fixing fees . . . A client's ability to pay cannot justify a charge in excess of the value of the service, though his *poverty may require a less charge, or even none at all* . . . In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money getting trade." [emphasis added]

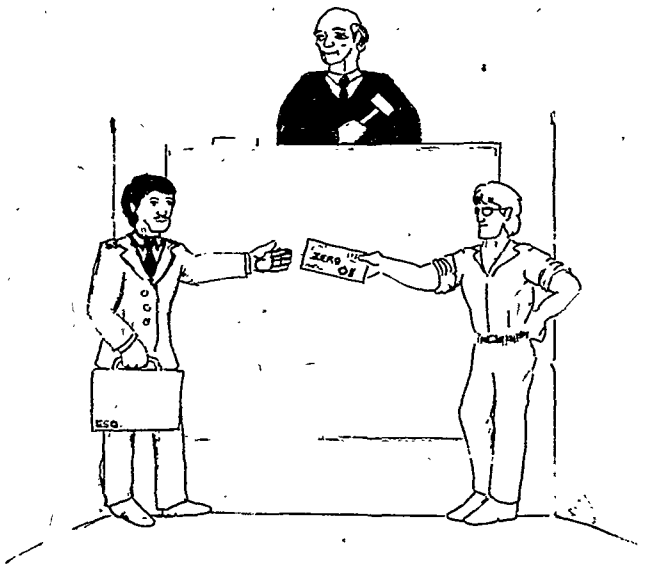
In 1952, the A.B.A. and the Association of American Law Schools established a Joint Conference on Professional Responsibility. In 1958, the Joint Conference published its findings, stating that, "one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate legal representation for those unable to pay the usual fees . . . It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself . . . The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel."

The Joint Conference also found that lawyers have a duty to serve in the "administration and development of the law," in "public service" and towards "legal reform."

With this background, the A.B.A. appointed a Special Committee to work on what became the current A.B.A. Code of Professional Responsibility. That Code was adopted in 1969. Both the N.Y.C. and A.B.A. Reports cited Canon 2 and Ethical Consideration (hereinafter EC) 2-25 of the 1969 Code.

Canon 2 states simply, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

EC 2-25 elaborates on this duty: "Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the



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life of a lawyer. *Every lawyer*, regardless of professional work load, *should find the time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer* . . . [emphasis added].

Other sections of the 1969 Code were also cited by the two reports. The Proposed Model Rules included a citation to EC 2-16, which says, in part, "persons unable to pay all or a portion of reasonable fees should be able to obtain necessary legal services and lawyers should support and participate in ethical activities designed to achieve that objective."

The N.Y.C. Report, while not citing EC 2-16, did cite Canon 8 ("A lawyer should assist in improving the legal system.") and EC 8-1, 8-2, and 8-3. The most important of these Ethical Considerations is EC 8-3 which states in part, "The fair administration of justice requires the availability of competent lawyers . . Those persons unable to pay for legal services should

be provided the needed services."

Two A.B.A. reports which were published in the 1970's were also relied on heavily by both the Proposed Model Rules and the N.Y.C. Report. The first of these was a very strong stand taken in the A.B.A. House of Delegates Resolution (August 1975):

"RESOLVED, That it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services:

FURTHER RESOLVED, That public interest legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. Poverty Law: Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.

2. Civil Rights Law: Legal representation involving a right of an individual which society has a special interest in protecting.

3. Public Rights Law: Legal representation involving an important right belonging to a significant segment of the public.

4. Charitable Organization Representation: Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

5. Administration of Justice: Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

FURTHER RESOLVED, That public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct:

FURTHER RESOLVED, That so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

FURTHER RESOLVED, That the appropriate officials, committees or sections of the American Bar Association are instructed to proceed with the development of proposals to carry out the interest and purpose of the foregoing resolutions."

Rule 8.1 of the Proposed Model Rules is actually an implementation of the final resolution, above. Another report which gained its impetus from this resolution was the 1977 report of the A.B.A.'s Special Committee on Public Interest Practice, which was entitled "Implementing the Lawyer's Public Interest Practice Obligation." This report can really be viewed as the stepping stone between the House of Delegates Resolution and Rule 8.1 of the Proposed Model Rules. It never questioned whether lawyers do or should have a public interest practice obligation. It started from the position that lawyers do have such an obligation, and then examined the various problems which may arise with efforts to implement this obligation. These problems are discussed briefly below.

In order to aid state and local bar associations in setting up and administering pro bono programs, the A.B.A. Board of Governors created a new staff position of Pro Bono Coordinator in 1979.

Examples Set By Local Bars

Some local bar associations have already made progress towards a mandatory pro bono obligation for their members. The most notable of these efforts is that of the Orange County Bar Association in Florida. The Orange County Bar is a voluntary Association, but included in its bylaws are provisions which mandate that any lawyer who becomes a member must handle 2 cases per year without fee for the local Legal Aid Society. Bar members are allowed to avoid this pro bono duty if they make a financial contribution of $250 to the Legal Aid Society, or if they do other public service work, or if working with the Legal Aid Society would cause a conflict of interest for them. Currently, a little less than 1,200 of the approximately 1,400 attorneys in Orange County are members of the Bar.

The Chicago Bar Association has taken a different approach. They have linked a pro bono obligation to their lawyer referral service. Any lawyer who wishes to become a member of the service must agree to handle one case per year without fee for the service. Currently, approximately 1000 of the 14,500 attorneys in Chicago are members of the service.

The New Hampshire State Bar and the San Francisco and the Washington, D.C. Bar Associations each operate voluntary pro bono programs. Over 750 of New Hampshire's approximately 1600 lawyers in private practice have become volunteers to the Pro Bono Referral System. In 1979, the New Hampshire program referred 987 persons to private attorneys.

The Volunteer Legal Services Program of the Bar Association of San Francisco currently has about 700 attorney volunteers. Although this program is voluntary, it, unlike the New Hampshire program, quantifies the number of hours its volunteers should donate. 40 hours per year is what is expected.

The Washington, D.C. Bar Association operates

several volunteer pro bono programs, including a Lawyer Referral Information Service which matches up indigent clients with lawyers who have volunteered to handle cases without fee. Their most interesting program, however, is one which is tied to their continuing legal education program. The D.C. Bar will not accept monetary payment from lawyers who take the courses. Instead, the lawyers must agree to handle one or more [depending on the course] pro bono cases in the field corresponding to the substantive course taken. The faculty of the continuing legal education program provide guidance in handling the cases.

The Erie County Bar Association in Western New York State is currently taking steps through its Public Interest Law Committee to set up a Public Interest Task Group. If implemented, this Task Group will act as a screening and referral mechanism for lawyers who have become voluntary members.

Lawyer's services will be performed without fee for persons whose incomes are at or below 125% of the poverty level established by the Federal Government. The Task Group volunteers will also serve the class of individuals whose income is above 125%, but below 200% of the federally set poverty guidelines. These people will be served by volunteers on a "reduced fee basis."

Although this type of "reduced fee" service has been discussed elsewhere (including the N.Y.C. Report), the Erie County Task Group will apparently represent one of the first practical implementations of such a program by a bar association. The D.C. Bar programs currently serve some persons on a reduced fee basis.

In a related area of interest, since 1975, 9 states have imposed mandatory obligations on their members to attend at least a minimum number of hours of continuing legal education. The minimums vary, but fall within the range of 10 to 15 hours per year. The states involved are: Colorado, Idaho, Iowa, Minnesota, North Dakota, South Carolina, Washington, Wisconsin, and Wyoming.

Case Law

Discussion of mandatory pro bono obligations always brings cries that it is a "taking." However, an examination of the case law reveals that if either the N.Y.C. Rules or Proposed Model Rule number 8.1 were challenged on the basis of a "taking without just compensation," that challenge would almost certainly fail.

In 1928, Judge Cardozo wrote, "The appellant was received into that ancient fellowship (the bar) for something more than private gain. He became an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice. His cooperation with the court was due whenever justice would be imperilled if cooperation was withheld." *People ex rel. Karlin v. Culkin*, 238 N.Y. 465 at 470-471 (N.Y. Ct. of Appeals, 1928).

Based on this type of reasoning, the U.S. Supreme Court stated in *Powell v. Alabama* that an attorney who is appointed as counsel by the court, may not refuse without good reason. 278 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

In England, as early as the 17th century, Chief Justice Hale had written, "if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison." Campbell, *Lives of the Chief Justice*, Vol. II.

Although in many state, statutes provide for compensation for assigned attorneys, other states have tried to assign attorneys without granting them compensation for their services.

It has almost universally been held that in such cases there is no common law right to compensation, and as officers of the court, attorneys are obligated to handle the assigned cases even without compensation. See e.g., *U.S. v. Dillon*, 346 F.2d 633 (9th Cir., 1965); *Jackson v. State*, 413 P.2d 488, S.Ct. (Alaska, 1966); *People ex. rel. Whedon v. Board of Supervisors*, 192 App.Div. 705, 183 N.Y.S. 438 (3rd. Dept. 1920); *Posey & Thompkins v. Mobil County*, 50 Ala. 6 (1873); *Arkansas County v. Freeman & Johnson*, 31 Ark. 266 (1876); *Rowe v. Yuba County*, 17 Cal. 61 (1860); *Weatherby v. Pittman*, 101 S.E. 131 (Ct.Ap.Geo. 1919); *Vise v. County of Hamilton*, 19 Ill. 78 (1857); *Johnson v. Lewis and Clark County*, 2 Mont. 159 (1874); *Washoe Co. v. Humboldt Co.*, 14 Nev. 123 (1879); *Wayne County v. Waller*, 90 Pa. 99 (1879); *Ruckenbrod v. Millins*, 102 Utah 548 (1943); *Presby v. Klickitat County*, S. Wash. 329 (1892).

In *Dillon*, an attorney had argued that he was entitled to just compensation for his services. The U.S. Circuit Court of Appeals refused to accept this argument and held that "there was no 'taking' in the constitutional sense, of appellee's services" because "representation of indigents under court order without fee is a traditional obligation of the bar and therefore a condition under which lawyers are licensed to practice as officers of the court." 346 F.2d at 636-7.

The U.S. Supreme Court approved of the *Dillon* reasoning in *Hurtado v. U.S.* There, incarceration of a material witness without compensatin was challenged as a taking. The Court said, "the Fifth Amendment does not require that the governnment pay for the performance of a public duty it is already owed . . . The detention of a material witness, in short, is simply not a taking under the Fifth Amendment." 410 U.S. 578 (1973).

In 1979, an important case, *Sparks v. Parker*, came

before the Alabama Supreme Court. A circuit court judge had issued an order calling for an indigent defense system to be established. Under this order, "the 'team systsem' [would] be utilized for indigent felony appointments. Fifty-two eligible Calhoun County attorneys were appointed to four teams, each team consisting of thirteen attorneys and each team being eligible for appointment during three months of each year. In misdemeanor and juvenile cases, the order provided that the attorneys would be appointed alphabetically." 368 So.2d 528 at 529.

Under Alabama law, appointed counsel is entitled to compensation of $10 per hour for out of court time and $20 per hour for time spent in court. An affected attorney and the County Bar Association brought the action in *Sparks*. The Alabama Supreme Court held that "While the furnishing of services without just compensation might not be demanded of a citizen who is not an officer of the court or who does not enjoy special privileges from the state or who is not otherwise required to fulfill a commitment to the state, members of the Alabama Bar are in a unique position and, for this reason, are obligated to render their services for limited compensation." 368 So.2d at 533.

The court also stated, "A Fifth Amendment taking of property does not occur when the state simply requires an individual to fulfill a commitment he has made." 368 So.2d at 532.

The U.S. Supreme Court granted certiorari, but dismissed the appeal in a summary action. 48 LW 3189.

Problem Areas

Stepping as close as the A.B.A. and N.Y.C. Bar have to a mandatory pro bono obligation for lawyers raises many questions about implementation of the programs. Many of these questions were examined in the 1977 report of the A.B.A.'s Special Committee on Public Interest Practice. Both Bars have also planned hearings on the new proposals. The A.B.A. planned 4 hearings to discuss all aspects of the Proposed Model Rules of Professional Conduct. Three hearings have already been held (Feb. 3rd in Chicago, March 3rd in Atlanta and April 7th in San Francisco). The 4th hearing will be in New York City on May 5th.

Comments and suggestions have also been invited from interested parties. They should be sent to the Reporter for the A.B.A. Commission on Evaluation of Professional Standards, Professor Geoffrey C. Hazard, Jr., Yale University Law School, New Haven, Connecticut, 06520.

Also, the N.Y.C. Bar held a meeting on April 22nd to discuss their Special Committee's Report.

Additionally, lawyers have begun to write about (*See e.g.*, A.B.A. Journal Nov. and Dec. 1979, Jan., Feb., and March 1980) and discuss mandatory pro bono and its problem areas.

In this article, I will not try to answer any of these problems. I will merely raise the questions in the hope of stimulating more discussion.

One of the most discussed questions is whether the obligation should be individual or whether a firm may assign one lawyer to fulfill each of its members' pro bono obligations? The A.B.A. Commission and the majority of the N.Y.C. Committee both thought the obligation should be individual, in spite of the increased efficiency of the collective fulfillment approach.

A second big question is whether or not attorneys should be able to make a cash contribution in lieu of a personal time donation, as they may in Orange County. There is much to be said for the need for cash to finance all of the full time Legal Services lawyers and employees who will still be needed. On the other hand, however, is the same philosophical argument which calls for making the obligation individual instead of collective. That is, there is something gained by having each lawyer roll up his sleeves and work first hand in this type of work.

The majority of the N.Y.C. Committee thought that the financial alternative should not be allowed. Besides the philosophical argument mentioned above, they also based their decision on the practical problem of the "difficulty of measuring the dollar value of services to be rendered in this program."

Neither Rule 8.1 nor the accompanying comments mention a financial alternative. Presumably this means that in its present form, the Proposed Model Rules do not allow such an alternative.

Other questions have also been raised: Will this lead to poor quality legal services for the poor, if lawyers with little attachment for or knowledge of the poor and their problems are suddenly handling their cases? Will the self-reporting lead to cheating by some lawyers and thus, add to public distrust for lawyers? Or, will even less than 100% success of a program like this be a step toward bridging the gap between the legal community and the rest of society?

What will the increased burden on Legal Service staff be with regard to coordinating the efforts of lawyers?

What about conflicts of interest for judges, government lawyers and corporate house counsel? May a financial contribution alternative be forced on them?

Over the next few months we can expect to read and hear a great deal more about these and other related issues. And, we can expect much of the discussion to be heated. These questions, including the question of whether or not the pro bono obligation should be mandatory, are serious ones and involve many ethical and practical problems. However, none of these problems, individually or collectively, appear to be so monumental that the approximately 465,000 lawyers in the country cannot work them out.