REPORT OF THE SPECIAL COMMITTEE ON LAWYERS' PUBLIC SERVICE RESPONSIBILITY, THE YOUNG LAWYERS DIVISION, AND THE FEDERAL BAR ASSOCIATION

RECOMMENDATION*

Resolved, That the American Bar Association, consistent with its policy of promoting the maximum feasible participation by all attorneys in pro bono programs, urges that government employed attorneys should not be prohibited or discouraged from representing pro bono clients in general or in actions against the government so long as such representation does not present a conflict of interest, is consistent with all other applicable rules of professional responsibility and is not undertaken on government time or at government expense; and

Resolved Further, That, in accordance with this principle, the American Bar Association urges the amendment of 18 U.S.C. Section 205, which subjects attorneys employed by the federal or District of Columbia governments to criminal prosecution if they represent an individual without compensation in any matter in which the United States has an interest (other than administrative hearings on personnel matters), to permit such pro bono representation, consistent with the applicable rules of professional responsibility.

REPORT

The longstanding tradition and commitment of attorneys to provide pro bono representation to those unable to afford legal counsel has been formally recognized by the American Bar Association through resolution (House of Delegates, August, 1973) and its statements on the ethical obligation of lawyers (Code of Professional Responsibility, E.C, 2-25; Model Rules of Professional Conduct, Rule 6.1, 1983). At a time when the combination of substantial reduction in federal funding for legal services and difficulties in the economy has increased the need for free representation, the participation of all attorneys in pro bono efforts is even more critical. The thousands of attorneys employed by government bodies are an underused resource for increased pro bono services, frequently because unnecessary barriers have been raised to their participation.

The purpose of the first resolved clause is to reaffirm that government employed attorneys share the same ethical obligation

*The recommendation was approved. See page 606.
to provide representation for the poor as other members of the bar. It acknowledges that, as with any other attorney, pro bono representation cannot be undertaken by a government-employed attorney if a conflict of interest would be presented or if there would be a violation of other rules of professional responsibility. Often, the absence of agency policies and procedures for determining appropriate non-conflict cases has served as an obstacle to participation.

It is important to note that this resolution does not raise the question of government-employed attorneys performing pro bono work on government time or at government expense. Instead, it addresses the less controversial situation when government-employed attorneys desire to undertake pro bono representation during off-duty hours or while on leave. In these instances, we believe that government bodies should not erect unnecessary barriers to representation, so long as it will not interfere with the proper and effective performance of the attorney’s official duties.

The second resolved clause advocates one particular step which should be taken in implementation of the aforementioned principles, the amendment of a federal criminal statute, 18 U.S.C. Section 205. This section, frequently referred to as the “anti-bribery” statute, was adopted to prevent a government employee from wrongfully using public office and the influence derived therefrom. It provides:

Section 205. Activities of officers and employees in claims against and other matters affecting the Government

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the discharge of his official duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or states or receives any gratuity, or any share of interest in any such claim in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

... Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty or other personnel administration proceedings in connection with those proceedings.

Obviously, the language of Section 205 is broader than is necessary to achieve its purpose. It makes it a criminal act for attorneys employed in any branch or agency of the federal or District of Columbia governments to represent any person, even though without fee, in any action where the United States is an opposing party or has a substantial interest in the matter, regardless of whether there is a conflict.

The exemption permitting pro bono representation in personnel proceedings has been narrowly construed by the U.S. District Court for the District of Columbia in Bachman v. Pertschuk, 437 F. Supp. 973 (1977). Although the Attorney General had interpreted this exception to permit representation in administrative and related judicial proceedings, the court held that only administrative appearances were authorized.

The result of the overbreadth of Section 205 is to preclude federal and District of Columbia attorneys from participating on a pro bono basis in any matters involving the United States, even when there is no conflict of interest, real or apparent. For example, an attorney employed by the Interior Department cannot represent a claimant in a social security disability proceeding despite the lack of a conflict between Interior and the social security claimant. Similarly, an attorney employed by the State Department could not represent a low income public housing tenant in an eviction proceeding if title to the property was vested in the Department of Housing and Urban Development. Although the District of Columbia is now treated as a state for various purposes, Section 205 prevents attorneys employed by the District from providing representation that attorneys employed by the various states are free to give.

The intent of the second resolved clause...
is, by statutory amendment, to remove these unnecessary restrictions and to permit government attorneys to render pro bono services in actions involving the United States when not inconsistent with their duties. The amendment of Section 205 would place government attorneys in the same position as other attorneys regarding conflicts of interest.

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