

# **How to Begin a Pro Bono Program in Your Bankruptcy Court**

## **A Starter Kit for Lawyers and Judges**

A Joint Project of

ABA Section of Litigation  
Bankruptcy and Insolvency Litigation Committee  
Subcommittee on Pro Bono

and

ABA Section of Business Law  
Business Bankruptcy Committee  
Subcommittee on Pro Bono Legal Services

Second Edition

Volume 1



Section of Business Law



Section of Litigation

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**American Bar Association**



Defending Liberty  
Pursuing Justice

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**Second Edition**

**Volume I**

**James L. Baillie, Editor**

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George Cauthen should be recognized not only for his contributions to this book but for his longstanding work. He was perhaps the first really to bring a major emphasis on public service to the bankruptcy bar. To this day, he continues to do so. As a result, South Carolina stands at the forefront as a model. I commend his outline, "A Model Bankruptcy Pro Bono Program," which is contained in Volume II, to all readers of this book.

The support of the leadership of the Litigation Section and the Business Law Section has been critical in bringing this project to fruition. Particularly worthy of recognition are the co-chairs of the Bankruptcy and Insolvency Committee in the Litigation Section, who first formed a Pro Bono Committee, Robert Millner, Sonnenschein, Nath & Rosenthal, Chicago, Illinois; and Heidi Feldstein, Paul, Hastings, Janofsky & Walker, Los Ange-

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This book uses as primary examples three of the earliest bankruptcy pro bono programs—those in Minnesota, Philadelphia, and South Carolina. That is, in part, because they have served as models for many of the others and in part because they are best known to the contributors to this book. We have attempted to describe, at least briefly, many of the other programs. No doubt some programs have been omitted by oversight. This book also does not focus on law school clinical programs partly because these programs usually do not have a significant volunteer lawyer component. Nor does this book focus on law school pro bono support programs. Student volunteers can be a significant component in pro bono programs generally. The subject of pro bono in the law schools is a big topic, too big for this book. This book also probably slights, unintentionally, some states or communities where existing legal services offices and pro bono programs may provide a significant amount of bankruptcy pro bono service without special bankruptcy components and without the sustained involvement of the bankruptcy judges and bankruptcy bar associations; these programs therefore have not been identified as specialized bankruptcy pro bono programs. To all of those groups whose contributions to the cause of providing pro bono representation in bankruptcy matters are significant and who are not mentioned in this book, my apologies. Please contact us and let us know how things are handled in your community so that we can share your techniques and achievements with others.

Finally, primary credit should go to the individual bankruptcy lawyers and judges all around the country who have contributed information about their pro bono programs and who stepped forward to see that there is justice for all who appear in the bankruptcy court system.

James L. Baillie  
Fredrikson & Byron, P.A.  
Minneapolis, Minnesota

## Introduction

*I've never gotten a hug from a corporate client . . .\**

Pro bono service in bankruptcy runs the gamut from filing a simple Chapter 7 for a mentally handicapped debtor, to helping a victim of family disintegration regain financial stability, to maintaining an elderly farmer's productivity, to retaining his home (the "one place where he could always come back to") for an HIV-positive young man overwhelmed by medical bills.

*Pro bono work helps lawyers keep connected to the reasons they went to law school in the first place. For bankruptcy lawyers, in particular, helping poor people reminds them of what is at the very core of the Bankruptcy Code—to give people a fresh start. This work helps hard-working, low-income people become self-reliant and independent.*

Some pro bono cases have challenged bankruptcy practitioners to devise creative solutions to problems they would not have faced in their regular practices. One lawyer successfully argued that a handicapped woman, in a Chapter 13 case, should be allowed to keep excess income so she could save to buy herself a wheelchair—and purchase a measure of independence as well. Another helped former tenant creditors develop a plan of reorganization that put all of a slumlord's properties into a new nonprofit organization. Still another used professional skills to reorganize a state legal services program to preserve its federal funding and give it a sound, independent footing.

The work offers professional benefits along the way. Sometimes a small business served in a pro bono case turns the financial corner, becomes profitable, and needs a business lawyer. Firms use pro bono as training—lawyers handling pro bono work may have their own cases earlier than usual. Participation in a pro bono program can offer new networking opportunities.

But what volunteer lawyers mention over and over again are the rewards their everyday practices would never offer.

*I almost always get cookies or a card, and that makes you feel like you've made a difference in someone's life.*

*I loved this guy. He was my ideal client. He was honest and hard-working. He was not trying to take advantage of anything. We were making the system work the way it is supposed to—and that is gratifying.*

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\*The cases and quotations reported here are drawn from articles in *Bankruptcy Court Decisions*, October 1998–July 1999 which profile bankruptcy lawyers who have provided pro bono services.



*You get more out of it than the client does. The feedback is wonderful. Sure, companies send me cards, checks, and handshakes. But I've never gotten a hug from a corporate client.*

This book is about those clients who need the assistance of a pro bono lawyer. It is for lawyers who are willing to provide those services and who seek the intangible rewards. This book is also for bankruptcy bar associations and bankruptcy judges who want to put clients and lawyers together and solve the growing problem of pro se representation in the bankruptcy courts.

Putting enough clients and lawyers together to make a difference in the bankruptcy system is a more complicated undertaking than might appear. But it is something that can be accomplished. It has been accomplished in many parts of the country. To accomplish it in your part of the country, read on.

## Tab 1

## **I. Overview of a Bankruptcy Pro Bono Program**

### **A. A New Kind of Pro Bono Program**

Staffed legal aid offices go back into the latter part of the 19th century and the early part of the 20th century. Those early programs sometimes had modest pro bono components. However, those legal services offices and their pro bono components did not become major factors in the delivery of legal services until the late 1960s and early 1970s, marked particularly by the formation of the national Legal Services Corporation in 1974.

Pro bono programs, in which clients who are unable to pay for legal services are matched with volunteer lawyers willing to provide those services on a pro bono basis, have existed in an organized form for several decades. Several of the strongest programs in this country go back to the 1960s. Before then, the process of matching clients with volunteer lawyers occurred in much less formal ways. Sometimes judges would appoint attorneys to provide those services. Other times, needy clients would find their way to sympathetic lawyers or to officers of a bar association who would call on fellow lawyers until a volunteer was found.

These organized pro bono programs, which we sometimes refer to as volunteer attorney programs, have developed from their roots in the 1960s into sometimes complex entities managed by pro bono coordinators who have become part of a well-established profession. The types of clients' needs served by these volunteer attorney programs are broad. Some programs focus on particular types of needs while other programs handle cases as they come in the door, on a first-come, first-served basis. Individuals needing bankruptcy and debtor-creditor legal services have sometimes been served by these programs.

At the same time, staffed legal services programs have developed into significantly more complex organizations with larger staffs. These legal services organizations, because of a shortage of funding, utilize priority-setting processes to decide which types of cases they will handle. Often, these offices do not provide extensive services in bankruptcy cases because priority is given to other types of cases.

The 1990s have witnessed a development of a new kind of specialized pro bono program focused on bankruptcy representation. It is these new programs that are the subject of this book, which we call the Starter Kit. In 1992, a program to provide representation in adversary proceedings was begun in Minnesota. That same year a program to provide representation in the filing of bankruptcy cases was started in Philadelphia. In the early 1990s, the bankruptcy bar association in South Carolina expanded and strengthened programs begun in the 1980s to recruit volunteer attorneys and to support the existing legal services and pro bono programs in that state.

In 1994, a newly formed Subcommittee on Pro Bono of the Bankruptcy and Insolvency Committee of the ABA Section of Litigation decided to make information about these new programs available to interested bankruptcy lawyers and judges. This led to the publication of the first edition of the Starter Kit, which

was distributed to all bankruptcy judges and to many bankruptcy lawyers who attended meetings and workshops on this subject.

Now, in 1999, this trend toward specialized bankruptcy pro bono programs is far more developed. The programs that were new in 1992 are now seasoned, and many additional programs have been started. More than a dozen other programs, most of them started after 1992, are described in this edition. We anticipate that in time, most states or urban areas will have such programs. The purpose of the Starter Kit is to encourage that trend, to help emerging bankruptcy pro bono programs off to a successful start, and to help them overcome the challenges they will encounter.

The original Starter Kit was a single volume consisting of a number of outlines and lists followed by copies of several articles that had been published elsewhere. That edition also contained a loosely organized set of materials from existing programs. This second edition is divided into two parts: a shorter Volume I, which contains a basic description of these programs, articles, and other materials of general interest; and Volume II, an appendix, which contains detailed information about some programs as well as forms, more articles, and background resources. It is anticipated that those who have a general interest in this subject and are beginning to consider starting a new program will need only Volume I, while those in the process of starting a program or who have a program already running will want to use both Volume I and Volume II.

## **B. Elements of a Bankruptcy Pro Bono Program**

All pro bono programs have three components. The first component is the clients, the individuals or organizations that need representation. The second component is the volunteers. The third component is the administration, the process by which clients are matched with volunteers.

Those who are not experienced with pro bono might initially be inclined to underestimate the importance of the third element, the administration. However, long experience has shown that the process of matching clients and volunteers and all that should go with that is far more complicated than first appears. To understand this, it may be helpful to picture a hypothetical community in which the local bar association provides that administration for a volunteer attorney program. The bar association uses its regular office or has a special office for this program, which is guided by a board of directors or an advisory committee. The program makes decisions as to the kinds of matters that will be handled, eligibility requirements, and how to make the services known to the clients who need them. How to recruit volunteers, what kind of reporting and record keeping is needed, how to give training and support to the volunteers, how to distribute cases to the volunteers, and how to take a case back when problems arise are additional issues that will be addressed. The program will also need to answer operational questions such as who answers the phone, who screens the clients for eligibility, how lawyers are contacted, how information concerning the case is delivered, and whether the organization itself assists in the representation in any way. It will have to address how the program is funded and how this program re-

lates to the staffed legal services programs, other volunteer programs, and other institutions in its community.

The kind of program described here exists in most places in the country. In some places the administration is provided, as in the example just given, by a bar association. In other places, the administration is handled in the offices of the staffed legal services program. And in yet other places the program is free-standing, independent of both bar associations and legal services offices.

A recent survey regarding pro se cases, described in more detail in the accompanying article at Tab 2, listed at least 36 bankruptcy clerk's offices that responded that they referred pro se parties to local legal services programs or general volunteer attorney programs. It is an assumption of this Starter Kit that in many areas of the country, if not all, simple referral to these existing programs will not be sufficient to meet the need. Moreover, these programs will usually not use some of the creative approaches that are now being developed for bankruptcy, such as representation in reaffirmation hearings, pro se clinics, or screening panels. Nevertheless, in some areas where pro se filings are low, this approach may be adequate. There is no intent to denigrate these programs. They are adequate although more could be done.

Specialized bankruptcy pro bono programs are modeled after general pro bono programs but have three special characteristics. (1) They focus on the needs of individuals for representation in the bankruptcy courts and debtor-creditor matters generally. (2) They have the active involvement of the organized bankruptcy bar. (3) They usually have the active involvement of the bankruptcy judges. The combined effect of these characteristics is that there is a much higher amount of representation, and different types of representation, in bankruptcy matters than would otherwise be provided by general pro bono programs and legal aid offices.

There is no bright line that divides general pro bono programs that occasionally, or even regularly, handle bankruptcy cases from specialized bankruptcy pro bono programs. It is a matter of degree. The more these special characteristics are present, the more clearly we identify the method of handling bankruptcy pro bono matters as a specialized bankruptcy pro bono program.

Nor is this emphasis on these special characteristics meant to suggest that the ideal or most advanced form of bankruptcy pro bono programs is separate and independent from local legal services offices or general pro bono programs. To the contrary, the best bankruptcy pro bono programs are a part of or well integrated with these broader community programs.

### **C. Types of Bankruptcy Pro Bono Programs**

One of the things that is striking about the first bankruptcy pro bono programs, which began independently of each other, is how different they are from one another. There are many models to choose from, and many ways to categorize them. There is a good theoretical discussion of this subject in Susan Block Lieb's article, "A Comparison of Pro Bono Representation Programs for Consumer Debtors," reprinted in Volume II.

At this stage, however, we will take these examples and divide them into four basic types of programs. Further descriptions of the specific programs will be included in Volume II.

1. **Adversary Proceeding (or Task Program).** These programs are newly developed under the guidance of the bankruptcy bar and the courts to do a particular type of representation. One form is to provide lawyers to represent parties who would otherwise not be represented in litigation in bankruptcy court in adversary proceedings.

In **Minnesota**, the program was designed by the members of the Bankruptcy Section of the Minnesota State Bar Association, and provides representation to individuals who were defendants in adversary proceedings. The clerk's office gives defendants a separate notice telling them of the availability of the pro bono services for those who are not able to pay for the services of an attorney. Defendants are encouraged to call the office of Volunteer Lawyers Network, which is an existing general pro bono program located in Hennepin County. Staff at VLN call lawyers—members of the Bankruptcy Section—who have agreed to take these cases on a pro bono basis and report back to VLN after the completion of the case. The Bankruptcy Section provides some financial support to VLN.

In the Los Angeles Division of the **Central District of California**, the Los Angeles County Bar Association, in conjunction with Public Counsel, a large free-standing pro bono organization, matches pro bono attorneys with defendants in § 523(a) adversary proceedings. Volunteers are solicited from the L.A. Bankruptcy Forum and the Financial Lawyers Conference. This program also provides representation at reaffirmation hearings. A description of that aspect of the program is contained in Volume II. This program also works with the Los Angeles Free Clinic, which assists individuals filing Chapter 7 bankruptcy *in proper*.

The state of Washington has a telephone hotline. Clients who call the hotline on their own, or are referred to the hotline by the bankruptcy court, will receive brief advice and may be referred to volunteer attorneys. Eligible clients who need assistance in adversary proceedings in the **Eastern District of Washington** are referred to bankruptcy attorneys recruited by the Bankruptcy Section of the Federal Bar Association of the Eastern District of Washington.

In the **Western District of Washington** a new Debtor-Creditor Resource Committee includes a broad cross-section of practitioners, judges, clerks, and others. The Committee has implemented bankruptcy clinics at two law schools—the University of Washington and Seattle University, and has helped supply volunteers in bankruptcy matters to the King County Bar Association's Volunteer Legal Services. The Committee is also working with the bar association's Debt Clinic and is seeking funding for a program that would expand consumer education and direct legal assistance in pro se cases.

In the **Eastern District of Michigan**, the Court and the Detroit Bar Association cooperated to launch the Bankruptcy Pro Bono Project. The project provides representation in adversary proceedings in Chapter 7 cases.

In the **Northern District of Georgia** (Atlanta), the bar association has two pro bono committees. If matters are referred to the Chapter 7/13 Committee from the court or other sources, the chair of the committee calls a volunteer attorney who is a Committee member. Similarly, the chair of the

Bankruptcy Litigation Committee refers representation in adversary proceedings and contested matters to members of that committee.

2. **Debtor Representation.** These programs provide representation to debtors filing cases under Chapter 7 and sometimes under Chapter 13, and thus attack the pro se filing issue directly.

In Philadelphia, **the Eastern District of Pennsylvania**, a group of consumer and business bankruptcy lawyers, the Eastern District of Pennsylvania bankruptcy judges, and other lawyers and nonlawyers explored the idea of establishing a special project to meet the needs of indigent Philadelphians for basic Chapter 7 consumer bankruptcy representation. Often these individuals need to file bankruptcy cases-to preserve their right to stay in public housing or maintain other public benefits or utilities. Within a year, in 1992, the Consumer Bankruptcy Assistance Project, a newly-formed 501(c)(3) organization, was initiated and its Fresh Start Clinic began operations. The Fresh Start Clinic is a public interest group with an office, equipment, and employees. The clinic uses both volunteer lawyers drawn from the bar association and law students. Each volunteer commits to work on three cases from start to finish. Volunteer lawyers and law students also agree to attend a four-hour training session given by the Consumer Bankruptcy Assistance Project, which consists of lectures given by local practitioners and bankruptcy judges on issues relating to consumer bankruptcy law. Community Legal Services, the Legal Services Corporation grantee, works closely with the Fresh Start Clinic. The clinic acts primarily as a facilitator and administrative assistant to the pro bono lawyers and law students. It also recruits lawyers and law students to participate in the program.

The same approach has been used in the **Western District of Pennsylvania**. The Allegheny County area (Pittsburgh) also provides client representation of debtors after the debtors have been advised at a clinic.

**Arizona** has (as of 1994) two clinic-type programs. In Maricopa County (Phoenix), the Volunteer Lawyers Program (which is funded by the legal services office and the bar) provides a bankruptcy workshop (clinic) conducted by volunteers. Individuals are given assistance in filing their bankruptcy cases pro se. If their case requires attorney assistance (such as a Chapter 13 filing) and meets certain qualifying standards, individuals may be referred to a volunteer attorney for assistance. In Pima County (Tucson) the Volunteer Lawyer Program works with the legal services office and similarly operates a clinic for pro se filing with volunteers available to assist in some individual cases.

In two of its three divisions in **Connecticut**, the court itself maintains a panel list of Chapter 7 and Chapter 13 volunteer attorneys. If an individual contacts the court regarding assistance in filing a case, the court sends an application form that asks for financial information. The court issues an order either granting or denying the application for appointment and if the order is granted, a court deputy selects the attorney from the panel. Volunteers have agreed to accept up to three cases per year.

In Cleveland, in the **Northern District of Ohio**, the Bankruptcy Section of the Cleveland Bar Association has recruited members to assist in the filing of Chapter 7 cases through the legal services office. In addition, volunteers assist an organization that provides job training for the unemployed.

In New York City, the **Southern District of New York and the Eastern District of New York**, some debtor representation is supplied by volunteers from the New York County Lawyers Association working with the Legal Aid Society, which supplies the clients and the training. The lawyers who receive the training agree to take two pro bono cases. Other volunteer lawyers and law students work directly with the Legal Aid Society. The Association of the City Bar of New York supplies volunteers to handle bankruptcy litigation in consumer cases. Both bar associations organize short meetings between clients and volunteer lawyers (sometimes called Monday Night Lawyers) on topics which may include debtor-creditor and bankruptcy matters.

In Boston, the **District of Massachusetts**, the bankruptcy committees of the Boston Bar Association and of the Massachusetts Bar Association have regularly responded to the crises created by abandonment of practice, suspension, disbarment, or death of solo practitioners by getting volunteers to step in to handle bankruptcy matters. Boston has an unusual advantage with the National Consumer Law Center located there. NCLC regularly offers free training to lawyers who agree to take at least one consumer bankruptcy case, with the result that the Boston Volunteer Lawyer Project has been able regularly to handle bankruptcy cases because of a large pool of volunteers.

3. **Clinic.** These programs give guidance to individuals who will be filing pro se petitions. On a clinic night, groups of potential debtors are given information, forms, and some guidance. Often direct representation is also provided.

In San Francisco, in the **Northern District of California**, a monthly Collection Defense and Bankruptcy Consultation Clinic is put on by the Volunteer Legal Services Program of the Bar Association of San Francisco. Potential clients are screened through an intake process and then routed to the clinic. An expert attorney gives a preliminary presentation about collection defense, bankruptcy, and who may or may not need to file. After the presentation, clients have an individual consult with an attorney in regard to their own particular situation. The clinic offers advice only. Pro bono representation is offered on a limited basis. A similar bankruptcy screening panel has been operated in Minneapolis, Minnesota, by the Volunteer Lawyers Network for some time.

In **Washington, D.C.**, the D.C. Bar Public Service Activities Corporation has a Pro Bono Bankruptcy Clinic. Volunteer lawyers present a seminar to pre-screened income-eligible clients. These clients complete questionnaires, which are reviewed by the volunteer attorney to determine who might benefit by filing. Volunteer attorneys then assist in the filing and provide other services that might be necessary.

In **Oregon**, the Pro Bono Subcommittee of the Debtor/Creditor Section of the Oregon State Bar established a Pro Bono Clinic that operates in the Portland area. Individuals are screened by the legal services office, which also schedules appointments. At the clinic, a volunteer conducts a class and has the potential clients complete paperwork. Later, individual volunteers represent the clients in their case filings.

A new program of the Allegheny County Bar Association Bankruptcy and Commercial Law Section (Pittsburgh area) in the **Western District of Pennsylvania** mixes a clinic approach with debtor representation. The Section has appropriated \$15,000 per year for at least two years in a joint venture with the local legal services office. Individuals meeting the poverty



guideline attend clinics conducted by a legal services attorney. Individuals needing assistance in filing are represented by volunteer lawyers who either handle the case on a reduced fee basis or pro bono. The program is expected to serve at least 250 indigent clients per year.

4. **Supportive.** These programs call on the private bar and the court to support and assist an existing broad community-based volunteer attorney program that seeks to provide assistance to individuals with a variety of legal problems. The bankruptcy bar or court may help by recruiting volunteers for bankruptcy cases and conducting training and developing materials for volunteers to handle bankruptcy cases. The clients in these cases come to the volunteer attorney program by the usual sources—referral from staffed legal services offices and community services agencies and by information supplied in the court system.

In **South Carolina**, the existing legal services offices and at times the bar's pro bono offices continue to handle intake and assignment of cases but the South Carolina Bankruptcy Bar Association has undertaken significant support to the existing programs. Direct representation is limited to Chapter 7s, but volunteers may take Chapter 12 or Chapter 13 cases. The bar association takes an active role in recruiting the volunteers, conducting training, and developing materials for volunteers who handle the cases, and recognizes those who excel with the result that nearly 90% of its members are volunteers.

In 1994 **New Jersey** began a statewide program as a cooperative effort among the bankruptcy judges who actively expressed a desire for a pro bono program, the 14 legal services agencies, and the Bankruptcy Law Section of the New Jersey State Bar Association. Potential clients are directed by the bankruptcy judges and clerks, the U.S. Trustee, panel trustee, and private practitioners to the legal services offices, which screen the cases. Appropriate cases are referred to volunteers recruited by the Bankruptcy Law Section. Most of the representation involves the filing of a Chapter 7 case but some involves Chapter 13 cases, defending debtors in adversary proceedings, or representing indigent creditors. The program is modeled, in part, on the Philadelphia and South Carolina programs as well as a program jointly organized by the Camden County Bar Association Debtor/Creditor Section and the local legal services office of Rutgers-Camden Law School. New Jersey also has a "hot line" through which clients can get brief advice from a legal services attorney or referral to a bankruptcy attorney.

The Bankruptcy Bar Association of the Southern District of Florida supports "Put Something Back" ("PSB"), a pro bono program. PSB sends cases to volunteer attorneys recruited by the Bankruptcy Bar Association to file cases for debtors with extraordinary medical debts, who face driver's license revocation, or who need to use Chapter 13 to save their homes from foreclosure. Volunteers handle about 10 cases per month. The Bankruptcy Bar Association helps by sponsoring a seminar for attorneys to provide a broad overview of personal bankruptcy. Fees are waived for those willing to handle a pro bono case. In 1999, the Bankruptcy Bar Association funded a \$3,000 fellowship for a law student to assist the bankruptcy portion of PSB. The Southern District of Florida has a local rule that provides for referral of settlements (and presumably some defaults) in adversary proceedings, where the defendant is pro se and there is doubt about the validity of the creditor's

claim, to the Bankruptcy Bar Association for representation in the trial of the adversary proceeding.

Of course these categories are not hard and fast; they blend together. Most local programs have elements from more than one of the categories, and some offer other kinds of representation that resist placement in these categories. In South Carolina, for example, creditor attorneys often represent the South Carolina Department of Human Services in collecting child support from debtors. In Dallas, the John C. Ford Program, Inc. concentrates on assisting minority business development but offers some bankruptcy assistance. In Philadelphia there is a bankruptcy mediation project in which the mediators are volunteers.

#### **D. The Law Schools**

For the most part, this Starter Kit does not discuss the role of law schools in addressing the unmet need. However, the law schools can be important contributors.

Law schools usually have clinical programs as part of their skills training. In the “live client” clinics, students represent or help represent indigent clients under the supervision of clinical faculty or adjunct faculty. Usually these clinics do not use volunteer attorneys in delivery of the services, but there are exceptions. One program that actively uses volunteer lawyers is the program jointly sponsored by the Camden County (New Jersey) Bar Association Debtor/Creditor Section, the local legal services office, and the Rutgers-Camden Law School.

Some law schools have mandatory pro bono as a requirement of graduation. Others strongly encourage pro bono. Many law schools have a pro bono student organization, often affiliated with Pro Bono Students America or the National Public Interest Law Center (NAPIL). Some law schools have offices and staff available to help match students with pro bono opportunities. All of these are potential resources for and even partners in a successful local program. In one interesting recent example, Professor Karen Gross developed a program in which 23 New York law school students work with the one bankruptcy attorney at the Legal Aid Society of New York.

#### **E. Ten Keys to Success**

Successful programs usually have certain things in common. These are the keys to success:

1. One or more highly respected bankruptcy lawyers leading the charge to create the program.
2. One or more interested bankruptcy judges actively involved in designing and promoting the program.
3. “Ownership” by the bankruptcy bar association, thus giving access to volunteers, expertise, energy, and funding.
4. Thoughtful analysis of the kinds of cases to be handled and how the prospective clients will find their way to the bankruptcy pro bono project.
5. Successful recruitment campaigns to assure the necessary number of volunteers and the provision of training and back-up help.

6. Thoughtful analysis of the administrative tasks involved with the project, the costs, and the sources of funding.
7. Integration with existing local legal services offices and volunteer attorney programs.
8. Funding sources to pay for costs incurred by volunteers, to fund cooperation with local legal services offices or volunteer attorney programs, etc.
9. Cooperation with other groups in the community.
10. A three-way balance among the number of clients, the volunteers, and the administration of the programs.

## II. Designing a Program

Designing a bankruptcy pro bono program should start with an evaluation of the needs in the community. What are the unmet needs in that bankruptcy court? How many individuals are filing cases pro se? How many are unrepresented in adversary proceedings, in motions for relief from the stay, in reaffirmation hearings? Is the need in Chapter 7 only or is Chapter 13 also a problem area? How much of a burden is this for the court? What is the risk of injustice to the debtors or creditors? What is the effect of pro se representation on public perception of the bankruptcy system? Is there a need for types of representation that do not show up in pro se statistics? Are people who should file not getting the help they need and therefore not filing? Are people who should not file being properly advised and helped outside of the court system? This information should be gathered from local court statistics and from interviews with the judges, clerks, the U.S. Trustee, and practicing attorneys. The needs vary enormously from court to court with some courts being overwhelmed by pro se filings and others at relatively low rates (which does not necessarily mean that there are not significant unmet needs). See the article at Tab 2 for more information on the available statistics.

Second, there should be a consideration of the capacity of the present network of legal services and pro bono programs to meet this need. This information should be gathered by meeting with representatives of those programs.

Third, there needs to be some assessment of the willingness of the local bankruptcy attorneys and the court to help. At this point, if not before, a committee should be formed with representatives of the bar, the court, and the existing providers to decide more specifically how to proceed.

That will be followed by a number of specific questions to be addressed: What types of cases should we handle? Should we do Chapter 7s only, Chapter 13s, adversary proceedings, counseling, or some combination of these? Who is going to be eligible for pro bono assistance? How do we let the people who need help know that help is available? How do we connect the clients to the program? Do we have a willing pool of attorneys ready to assist? Where do we get them? How do we train business lawyers to represent consumer debtors? Will consumer bankruptcy lawyers support this program or will they see it as competition? Who is going to administer the program and screen clients? How will we coordinate

with existing legal services, pro bono programs, and local law schools? How should we set up the governance of the program? What will we do about malpractice insurance? What do we do about conflicts? How much money do we need to fund the program? Where will it come from? What is the role of the judiciary? These questions create the outline for the remainder of this Starter Kit.

Finally, in the design of the program, it is important to realize that there should be a three-way balance among the clients, the volunteers, and the administration. Programs founder if they recruit more clients than they are able to serve—they may be overcome by the requests and create expectations of service they cannot meet. On the other hand, it is a great disservice to the volunteers and to the idea of a pro bono volunteer program to “sell” the need by recruiting a large number of volunteers and then not give them cases. This is not only discouraging for the volunteers but suggests that there is not really a need. Finally, it does both volunteers and clients a disservice if the administration is not up to handling the workload.

### III. The Clients

#### A. Locating the Clients

What are the sources of clients? The first step, of course, is to decide on the type of program. With many types of programs, locating the clients is obvious. If the program concentrates on helping clients who are already in the court system pro se, such as defendants in adversary proceedings, the clients are easily identified. But even then there will be questions about how to let those parties know of available services. For programs that will counsel clients before they file cases, locating the needy clients is more complex. Here are some of the possibilities.

1. **Courts.** Courts fear the problems of pro se filings. The clerk of court's intake desk is an excellent source for discovering pro se filings. Once a potential pro se bankruptcy filing has been discovered, the clerk's office can refer the case to someone who can review the schedules to see if the debtor qualifies under the pro bono program's indigency guidelines. The case can then be sent to the referral office. In New Jersey, for example, a list of the 14 legal services offices, which also serve as intake for the pro bono programs, is available in all of the clerks' offices and is posted outside each of the bankruptcy judges' courtrooms. In all dischargeability cases in Minnesota, the clerk prepares a notice to defendants to be served with the pleadings advising them of the potential availability of pro bono representation.
2. **United States Trustees and Panel Trustees.** The United States Trustees' offices can instruct their personnel and the panel trustees to inform unrepresented parties of the availability of pro bono services. In Illinois, for example, some panel trustees post a one-page announcement near the sign-in sheet outside of the hearing rooms before § 341 hearings.
3. **Volunteer Attorney Programs.** Nearly all areas of the country have some form of volunteer attorney program. A bankruptcy pro bono program should certainly be connected to such an organization. A benefit is that the bank

ruptcy pro bono program can have their staff do the screening and initial interviews and refer only qualified cases.

4. **Legal Services Offices.** Any pro bono program will attract the interest of the legal services providers. Many of these have formal guidelines for which cases can be accepted and rejected. Most legal services offices have an excess of cases and thus have created priority lists for cases that they will take. For example, some of them will take abused spouse cases but will not take “no fault” divorces. The local legal services office will usually be happy to send all its bankruptcy cases to a specialized pro bono program. Many of them simply do not have the resources to handle bankruptcy cases. The offices may also refer those cases that are over the income guidelines, or ones that otherwise might appeal to sympathy but might not fit the eligibility guidelines.
5. **Hotlines and Websites.** More and more communities have developed hotlines for legal services to the indigent. Potential clients are urged to call the hotline, often instead of the legal services offices or pro bono programs. These hotlines vary as to the type of information provided. Some provide brief telephone service; most function in part to evaluate the type of service needed and to refer the caller to the right provider. In New Jersey, callers are handled by the legal services offices. Those needing bankruptcy services can be referred to the volunteer lawyer. In the state of Washington, a hotline called CLEAR (Coordinated Legal Education Advice and Referral) refers the caller directly to the volunteer bankruptcy attorneys. Washington also has a website that gives information to potential clients.
6. **Bar Associations.** Any state or local bar association will be public relations oriented. Sponsoring or conducting a pro bono program within the bar entity is an excellent source of goodwill and image improvement. The bar association should be a useful ally in looking for potential clients and in solving other problems such as funding.
7. **Lawyer Referral Services.** Many bar associations have a referral service (generally called Lawyer Referral and Information Service—LRIS) through which subscriber attorneys can pay an annual fee and agree to accept cases referred to them. The bar lists a toll free number. Potential clients will call, describe their problem, and be referred to the next available attorney in that geographical area. Clients who call and qualify for pro bono assistance can be referred to pro bono volunteers. Also as a quid pro quo for referral of fee-generating cases, the bar may require the referral attorney to handle pro bono cases or to take cases for a reduced fee.
8. **Bar Ads or Publications.** The bar association may provide ads, articles, and publications, and even public service announcements on television and radio informing the public of the fact that a pro bono volunteer is available to handle cases for qualifying indigents.
9. **Crises in Representation.** Occasionally practitioners are arrested, disbarred, disappear, die suddenly, or become institutionalized. Their caseloads need attention. Most state bar or supreme court offices have some means of dealing with that unattended caseload. The bankruptcy pro bono program should make its services available to pick up the bankruptcy cases for which a fee may have already been collected, but all the work not performed.

10. **Other Sources of Referrals.** Consumer credit counseling services may be a source of bankruptcy debtor referrals. Local churches and other social service agencies may be additional sources.

## **B. Eligibility Guidelines**

Federally subsidized legal services programs (through the Legal Services Corporation) are limited to representations of individuals with incomes at or below 125% of the official poverty income guidelines prescribed by the federal Office of Management and Budget. (The annual poverty income guideline for 1999 was \$20,875 for a family of four.) Low-income debtors at 125% to 185% of the official poverty income guidelines receive subsidized legal assistance only under certain prescribed conditions. Programs that are independent from legal services offices have greater flexibility with respect to eligibility. Occasionally moderate means debtors are ineligible for subsidized legal services but still unable to afford private counsel, although generally these cases should be represented on a fee basis.

In any event, the program's eligibility requirements and the guidelines for the waiver of the requirements by the board should be designed so as not to compete with the attorneys who make their livings servicing debtors who can pay \$500 or \$1,000 for a basic bankruptcy case.

## **C. Screening Prospective Clients**

Methods of screening candidates for pro bono bankruptcy services should be simple, and the screening process should be quick, because bankruptcy services are needed on an urgent basis.

The most effective screening method is the completion of an application containing an affirmation that the information furnished is true and correct. The application will require financial data necessary to determine eligibility for the pro bono services and, later, for preparation of the schedules and statement of affairs. After the application is completed, an experienced administrator should test the information by asking questions of the applicant to evaluate the responses. Forms used for screening are found in Volume II of the Starter Kit.

Another screening method is to refer candidates directly to lawyers who volunteer for pro bono work. While this method, combined with the use of an application form, might be efficient in some ways, it may result in fewer volunteers because it requires the lawyers to perform detail work.

The use of volunteer law students as screeners may be effective. In general, however, the most effective screener is probably a person in the business of looking at such applications regularly, i.e., an experienced pro bono coordinator.

In short, the better route to screening is to use the local legal services provider or volunteer attorney program with which the program is affiliated.

## IV. The Volunteers

### A. Obtaining a Pool of Volunteers

This book assumes that the volunteers will generally be bankruptcy lawyers recruited through the bankruptcy bar association. There is likely to be a high level of volunteerism in response to a description of the need in the bankruptcy system, a call from the judges, and peer pressure. The paragraphs below address some additional factors that may bear on recruiting and give examples from different programs.

All attorneys are being reminded of an ethical responsibility to provide pro bono service in a variety of ways. Pro bono service is mandatory in some limited ways only in some small jurisdictions of the country. However, mandatory pro bono has been seriously considered in some jurisdictions.

A review of the status of that debate on a state-by-state basis is beyond the scope of this book. For more discussion of the topic, see the article at Tab 2. The New Jersey Supreme Court in *Madden v. Delran*, 126 N.J. 591 (1992) has indirectly imposed a kind of mandatory pro bono. All licensed attorneys are subject to municipal court case assignment, but procedures have been developed that exempt attorneys if they provide 25 hours of pro bono services of certain types. Attorneys who provide services through the organized bankruptcy pro bono program described elsewhere in this book receive credit.

Florida does not have mandatory pro bono but it does have mandatory reporting of pro bono hours as part of the annual license renewal process. Minnesota seems poised to join Florida. In both states bankruptcy pro bono services, whether or not provided through an organized program, will qualify.

The ABA's Model Rule 6.1, which has been adopted in a number of states, although sometimes in a modified form, provides an aspirational standard of a minimum of 50 hours of pro bono effort annually. Rule 6.1 is reproduced at Tab 5. The ethical rules of every state are based either on the ABA's Model Rules of Professional Conduct (see Rule 6.1) or the older ABA Code of Professional Responsibility (see the preamble and EC2-25). In some situations it may aid the recruiting efforts to remind attorneys of the rule which is applicable in that state.

Another spur can be the ABA Law Firm Challenge in which 155 of the largest firms in the country have challenged each other to commit at least 3% of billable hours to pro bono services and to include the majority of both partners and associates in the effort. Firms can only succeed if they involve their business lawyers, including bankruptcy lawyers, as well as litigators.

The bankruptcy bar itself could adopt an aspirational standard. The Bankruptcy Section of the Atlanta Bar Association adopted the following rule on February 11, 1992:

All members of the Bankruptcy Section of the Atlanta Bar Association, Inc., by virtue of their membership in the section, agree to participate in the Atlanta Volunteer Lawyer Referral Program ("Referral Program") by being listed as possible pro bono referral lawyers on bankruptcy related matters. Each section member may be contacted by the Referral Program for pro bono representation one time per year or more frequently if the

member so desires. Any members may decline to participate in the Referral Program by written notice to the Secretary of the Bankruptcy Section.

This is not a mandatory pro bono program. Instead, the Atlanta rule puts all members on call for one referral per year unless they opt out in writing and relieves the Atlanta Bar Association from the need to recruit a list of attorneys willing to volunteer pro bono services by presuming that all of the Bankruptcy Section members are willing to serve.

In South Carolina, the Pro Bono Program of the South Carolina Bar Association ("SCBA") together with the South Carolina Bankruptcy Law Association ("SCBLA") has, since its inception in 1986, assisted in the pro bono representation of individual debtors in Chapter 7 bankruptcy cases in a number of ways. SCBLA has recruited bankruptcy lawyers willing to provide at least 50 hours of pro bono services to indigent consumer debtors. It also conducts live training sessions for volunteers and provides volunteers with a video training session on interviewing consumer clients as well as software containing form bankruptcy petitions. Many other bankruptcy bar associations use training as a recruiting tool.

Minnesota's program deals solely with adversary proceedings. Since 1992, the Bankruptcy Section of the Minnesota State Bar Association has supplied a pool of volunteer lawyers. Lawyers who provide 50 hours of service in a year are recognized at the annual Bankruptcy Institute, the major local educational seminar for bankruptcy practitioners. One law firm challenged all other firms or individual lawyers to meet or beat the per-lawyer efforts of that firm. This resulted in friendly competition between law firms and assists in the efforts to enlist lawyers and law firms in the program.

In some jurisdictions, federal courts allow third year students, under the supervision of admitted attorneys, to practice in bankruptcy court. In Washington, D.C., the Bankruptcy Clinic of the D.C. Law Students in Court Program has been active in preparing and filing petitions under the supervision of a staff attorney and in attending and conducting the Section 341 First Meeting of Creditors. Philadelphia, as already described, uses law students as a significant component of their program. Others work directly with law schools through a clinical program or student volunteer program in the law schools. Students can also assist with legal research or drafting in connection with adversary proceedings.

Recruiting of volunteers need not be limited to lawyers and law students. Some general pro bono programs recruit legal assistants, secretaries, court reporters, accountants, and experts and consultants of various kinds, depending on the type of matters being handled.

Finally, recruiting volunteers is one thing. Keeping them is another. This means that no individual should be overloaded. It also means recognition. Volunteers should be thanked personally and recognized publicly. This is a good way for judges to assist. Some programs, such as those in South Carolina and Philadelphia, give their own annual awards to volunteers.



## B. Training Business Lawyers to Handle Consumer Cases

Many lawyers who do not normally handle consumer cases are reluctant to accept pro bono representation because they fear they are not qualified. Attorneys tend to feel most comfortable within their own field. For some attorneys, this may mean bankruptcy generally, but for many others, their practice may be primarily business bankruptcy.

Because a bankruptcy pro bono program cannot solely or even primarily be placed on the backs of consumer lawyers, training is a major part of any such program. Various training techniques have been used. The South Carolina organizers, for example, prepare and give seminars on representing consumer debtors. They have sets of standard forms, some of which are included in Volume II. They have also produced a videotape that illustrates the normal types of questions asked by clients and the recommended responses to these questions. In Philadelphia, the bankruptcy judges are active participants in the training. This is one of the best ways for bankruptcy judges to perform service. Training materials are now available in a number of programs around the country.

There are five major points a program can use to persuade business bankruptcy attorneys who are unfamiliar with consumer cases to take on pro bono bankruptcy cases.

1. **It is routine.** The key to manageability is forms and a computer. Once a lawyer has handled the first bankruptcy case either as a creditor or a debtor, he or she will be familiar with these forms and may be able to use a secretary, paralegal, summer associate, or junior associate to complete them. The National Consumer Law Center will provide computer forms at a nominal fee to a pro bono volunteer. Because most Chapter 7 pro bono cases are no-asset cases, after the petition, schedules, statements, and disclosure of compensation forms are filed, and the 341 hearing has been completed, the representation is usually close to complete. Limitations in the retention agreement, such as limiting representation to the case itself and not including adversary proceedings, is common. Creditor's attorneys may also want to consider programs that utilize pro bono creditor representation.
2. **It is good training for the lawyer.** There is no better way to prepare a business bankruptcy attorney for a specialization exam than hands-on experience and a pro bono case is a good place to learn. In addition, it is always educational to see things from the other side. Representing a pro bono debtor can help the creditor's lawyer develop strategies that can be used later when the lawyer returns to his or her own practice. Many pro bono programs offer primer seminars to teach attorneys how to handle pro bono cases, and some bar associations offer reduced rates at continuing legal education seminars to attorneys who accept pro bono cases.
3. **It is good training for everyone.** In addition to training the creditor's attorney, a pro bono case can be used to teach secretaries, paralegals, law students, and new associates. If everyone accepts a small responsibility, the case gets finished and everyone feels that he or she helped make a difference in someone's life. Delegation can be the timesaver and should begin at the outset. The referral office will probably screen applicants and record information that an assistant can transfer to the schedules. These programs may also

have detailed forms needed to do the bankruptcy intake and it is often fairly easy to transfer the information given by these agencies to the schedules and statements. Upon receiving information from legal services or the local pro bono program, basically, the volunteer attorney will have what is usually a short meeting with the client to describe bankruptcy, determine the need for filing bankruptcy, and to review the choice of the chapters, confirm the written information provided by the debtor, and receive the filing fee.

4. **Expert assistance is available.** Most bankruptcy lawyers will be able to handle these cases easily. If they need help, most good programs have mentors ready to provide advice. The volunteer does not need to be out there alone.
5. **It is good PR.** Clients often are pleased to hear of the pro bono representation. Some companies consider the extent of pro bono representation as criteria for retaining a law firm. Even clients that normally enforce conflicts will often waive the conflict if they learn the lawyer is practicing for free.

### C. Dealing with the Concerns of Consumer Bankruptcy Attorneys

It is often a surprise, during a first look at existing bankruptcy pro bono programs, to learn that business bankruptcy attorneys are the most active supporters of the program and that in many areas the consumer bankruptcy attorneys are not involved or may even be hostile to the programs. After all, the clients of bankruptcy pro bono programs are usually consumer debtors. Who better to help them than the experts in consumer bankruptcy?

Consumer bankruptcy lawyers, however, frequently have concerns about pro bono programs. These concerns are often legitimate and, in any event, they are understandable. They should be taken into consideration in designing a pro bono program. It would be even better to include leaders of the consumer bankruptcy bar in the process of designing the program, have them participate in its governance, and thus draw the consumer bankruptcy bar into the program.

What are the concerns of the consumer bankruptcy attorneys? First, they may believe pro bono assistance is not needed because debtors who cannot afford to pay an attorney should not file bankruptcy. Second, they may believe that pro bono cases could be generating fees for consumer bankruptcy attorneys. Third, they may fear that, after the initial burst of enthusiasm by business bankruptcy attorneys, all the real work in the pro bono program will be placed on the shoulders of the consumer bankruptcy attorneys. Fourth, many consumer bankruptcy attorneys believe that they are already doing pro bono because they are not always fully paid for each case they handle and because they often provide extra services beyond the value of the flat fee they charge. Let's address these concerns one-by-one, and also consider some of the reasons that pro bono programs are in the best interests of all attorneys, including consumer bankruptcy attorneys.

**Is bankruptcy pro bono needed?** For most bankruptcy attorneys it is a first principle that debtors who have no assets to protect—who are judgment proof—should *not* file bankruptcy. The discharge is a valuable right, it is available in Chapter 7 only once every six years, and should be used only when needed. For example, an unemployed debtor with only exempt assets should generally not file

bankruptcy. Only when the debtor becomes employed and has wages to protect from garnishment should he or she file bankruptcy. Then the debtor will have money to pay an attorney. Moreover, the flat fees charged for Chapter 7 cases are modest and some attorneys will take a case in return for a promise by the debtor to pay the fee from post-petition assets.

That description is generally correct. That said, it should also be acknowledged that the description is only generally true and that there are exceptions. Bankruptcy pro bono programs should be designed to address the exceptions. In Pennsylvania, for example, tenants in public housing who have few assets and whose only income is public benefits (and therefore have no money to pay an attorney) must sometimes file bankruptcy to use § 525 non-discrimination provisions to protect their right to stay in public housing or to preserve utility services that provide heat, water, and electricity. Other individual debtors suffer severe emotional distress due to collection efforts even though they have no non-exempt assets to protect; thus it may occasionally be in their best interest to file bankruptcy. (Attorneys may differ on this proposition. In any event, it is a judgment call.) In states that have not opted out of the § 522 exemptions, bankruptcy may help protect some assets that cannot be protected from collection efforts under state exemptions. For these and other reasons, there may be situations where bankruptcy is appropriate for some individuals who cannot afford to pay a fee. Whether such debtors can actually pay a fee will depend on the particular circumstances.

In addition, pro bono does not apply just to the filing of Chapter 7 cases. A debtor who has filed and received the services of an attorney to whom he has paid a flat fee may be faced with an adversary proceeding (for example, on dischargeability), a hearing on reaffirmation, or a motion for relief from the stay. This debtor often does not have the ability to pay an additional fee—or at least not a full fee—for those additional services. In those circumstances, because the debtor is compelled to go back into bankruptcy court, either the debtor will go unrepresented or an attorney, whether it is the attorney who filed the case or a new attorney, will be providing pro bono services.

If these theoretical examples do not suffice, look at the facts. In every jurisdiction there are pro se case filers and there are pro se parties in adversary proceedings and contested matters. The reasons people find themselves in those circumstances vary but many of them need help, would be eager to have help, and cannot afford to pay for it.

**Could pro bono cases be fee generating?** It is not enough to be able to argue that there are some cases that could not be handled on a fee basis. A program should have eligibility guidelines so that it handles only those types of cases. To handle a case that could be a fee-generating case risks invoking the ire of the consumer bankruptcy bar and wastes pro bono resources. If the program is affiliated with a Legal Services Corporation grantee (Legal Aid or Legal Services Office) it may not handle cases in which the debtor's family income is more than 125% of the federal poverty guidelines. If the program is not an LSC grantee, it is free to adopt its own eligibility guidelines unless other founders impose restrictions. The pro bono programs should not answer the question of representation simply by

mechanical application of the federal poverty guidelines. Some people below those guidelines could afford to pay a fee for the bankruptcy filing and in fact may pay that fee with assets that might otherwise have gone into the bankruptcy estate. The program's guidelines should aim to answer the question "Could this case be handled on a fee basis by a private attorney?" If the answer is "yes," the case should be referred out. (Referral of these fee-generating cases may present another set of issues. A fair method of referral should be designed. One possibility is to refer these cases to a bar-sponsored Lawyer Referral and Information Service (LRIS) panel. Another is to refer these cases to a specially created panel consisting of consumer attorneys who are active volunteers in the bankruptcy pro bono program.)

Properly designed, the pro bono program will not be taking cases that would be handled by the consumer bankruptcy bar. In fact, for reasons described below, the existence of such a program can be very helpful to the members of the consumer bankruptcy bar.

**Will consumer bankruptcy attorneys have to do all the work?** The fact is that the best and largest running programs do not rely too heavily on consumer bankruptcy lawyers. Some programs hardly involve them at all. As described elsewhere in this book, at its inception the plan for the new bankruptcy pro bono program should not be too grandiose. The program should attempt to undertake no more cases than it is confident it can handle with the committed volunteers it has, or is sure it can get, without forcing unwilling attorneys to step into the breach. The program should have the strong support of the bar leaders and other leaders of the business bankruptcy bar. This should reassure the consumer bankruptcy bar.

Some programs use consumer bankruptcy attorneys in special ways—in addition to, or instead of, having those attorneys provide direct representation. Consumer bankruptcy attorneys may be members of a panel of volunteers willing to mentor or answer questions for less experienced volunteers. These are the real experts and their assistance may be used in developing training materials or teaching classes. Some consumer bankruptcy attorneys may be very attracted to the chance to do these things and receive recognition for their expertise.

**Are consumer bankruptcy attorneys already doing pro bono?** Does defining pro bono and counting hours make a difference? If consumer bankruptcy attorneys are providing pro bono services and believe they are not being recognized for it, their resentment may be a barrier to obtaining their cooperation. Of course, exactly what constitutes "pro bono" could be the subject of a lengthy philosophical discussion. Usually there is no point in having that discussion. If an attorney genuinely believes he or she is doing pro bono work, we should acknowledge the work and express our appreciation.

In a few situations counting does make a difference. For example, Florida has mandatory reporting of pro bono services as part of the attorney license process. A number of states or metropolitan areas have voluntary pro bono reporting procedures. Counting makes a difference in large law firms that are part of the Law Firm Pro Bono Challenge. It also makes a difference if bar associations or programs want to provide recognition to the volunteers.

Each of these situations which involve defining and counting pro bono hours may utilize a different definition of pro bono. However, the consensus view and the most thoughtfully designed and broadly accepted definition is contained in the ABA's Rule 6.1 of the Model Rules of Professional Responsibility. (See Tab 5). Generally uncollected fees or cases in which the fees turned out not to be fully compensatory, including contingent fee cases that did not turn out well, are not "counted" because to be pro bono the representation has to have been *undertaken* as a public service. Uncollected fee cases and losing contingent fee cases were not taken on for free and are (unfortunately) inevitably part of the economics of every practice.

However, many consumer bankruptcy attorneys may provide services that should be considered pro bono by any definition. For example, suppose a consumer debtor pays a fee to an attorney and goes through bankruptcy. Later the debtor calls the same attorney for advice on an unrelated matter or on a bankruptcy or debtor-creditor issue clearly outside of the original fee agreement. Often the attorney will help without charging an additional fee. The fact that the attorney previously represented a client for a fee does not prevent a later representation from being considered pro bono. Nor does the representation have to be referred through an organized pro bono program in order to be considered pro bono. If counting makes a difference to an individual bankruptcy attorney the time for pro bono matters, such as the later free consultation, should be recorded separately.

A bankruptcy pro bono program which recognizes (for example, by giving awards) may want to limit "what counts" to cases handled through its program, but that is not the only possible resolution. Self-reported hours for cases handled on their own by the members of a group, such as a bankruptcy bar association, could well be the subject of recognition by that group.

**Are there special reasons for consumer bankruptcy attorneys to support pro bono programs?** There are some selfish reasons why all bankruptcy attorneys should support pro bono programs. There are pro se cases filed everywhere. In some jurisdictions the volume is low, in others it is high. Attention to the pro se filing issue through development of a pro bono program could result in some of the cases that would otherwise be filed pro se being referred to private attorneys and handled on a fee basis. It is possible that the total volume of fee-generating cases will increase when a pro bono program is in place. Certainly judges can be freer to be firm with pro se filers and on debtors assisted by petition filers when there is truly an alternative—pro bono representation. Bankruptcy matters that go through an intake process at a legal services office or pro bono program and are then referred out could become part of the caseload of all consumer bankruptcy attorneys, or of those who become part of a panel affiliated with the pro bono program.

Usually consumer bankruptcy cases are handled for a flat fee—\$500 or less is common in some jurisdictions. The debtor and the attorney agree in writing that the attorney will conduct an initial interview, prepare the petition, schedules, statement of affairs and related documents, and attend the first meeting of creditors. Further representation is not included. The existence of a pro bono program

also reduces the possibility that a judge will require the consumer bankruptcy attorney, who has received a flat fee, to provide additional services later in contested matters and adversary proceedings in the same case. These additional services may perhaps represent thousands of dollars of services for which the attorney has little hope of being paid. These situations have occurred. See *In re Edsall*, 89 B.R. 722 (N.D. Ind. 1988).

Finally, the system needs to work for everyone, not just those who earn their living in it (and it can be a very good living for some who represent consumer debtors). If it does not work for everyone, alternatives will be considered. It is not far-fetched to consider a bankruptcy system in which consumer bankruptcies are handled as routine administrative matters without private attorney involvement. Such a system was envisioned in separate bills actually proposed to Congress by a Bankruptcy Commission and by the National Conference of Bankruptcy Judges in the 1970s. The ABA's rejection of both bills because they were based on an administrative, not a judicial model, may have been essential to preserving the system in which the role of lawyers is critical. (For a further discussion of this issue, see Tab 2.) Making sure the system works is a price of having the system as it is.

## **V. The Administration**

### **A. Relating to Legal Services and to Volunteer Attorney Programs**

Throughout the country, staffed or Judicare programs, as described above, provide legal services to the indigent. In addition, in a much less cohesive and organized pattern, there are, in most parts of the country, volunteer attorney programs by which volunteer attorneys can provide pro bono service. These volunteer attorney programs may be free standing; sponsored by bar associations; or (in the most common model), funded and administered through the legal services offices.

In any particular community these providers likely work together cooperatively and efficiently. But there can be competition and tension among these providers as well. It is extremely important that any bankruptcy pro bono project be coordinated with both legal services offices and volunteer attorney programs in the local community. It makes little sense for any community to have a hodgepodge of separately conceived and administered programs all intended to get legal services to those who cannot afford them. In addition, the legal services offices and volunteer attorney programs are the primary location of real expertise and experience on these subjects in each community. These programs often have professionals hired to work through the kinds of issues that the new bankruptcy pro bono program will face.

It is also very important to be aware that all of the legal services offices and volunteer attorney programs are underfunded, usually do not have enough volunteers, and cannot meet all the needs in their communities. Many of them go through priority-setting processes and may have determined that assistance in bankruptcy is not one of the highest priority needs. Therefore, they may have de-

cided not to address that need. The local legal services offices and the volunteer attorney programs may welcome and be enthusiastic about new sources of expertise, energy, and volunteers to meet more needs in their community. They may also be concerned, however, that these new programs will be managed by people without sufficient knowledge or commitment to see them through and thus, in one way or another, these new programs will add a new burden to their established programs and possibly compete for funding and volunteers. They may be further concerned that the new program will not meet important unmet needs and that the programs are really set up to help the volunteers feel good.

Therefore, a specialized bankruptcy pro bono project should not be organized without discussions with leaders of the legal services offices and volunteer attorney programs in the community. This discussion will help clarify the extent to which the existing programs attempt to meet bankruptcy needs in the community and how they do that. The design of the new bankruptcy pro bono program should be such that it is complementary to the established programs. It will be helpful, too, to demonstrate that the needs to be met by the bankruptcy pro bono program are real and important, that the design of the program is well thought out, and that the program will have sources of funding and volunteers that will not take away from these existing providers.

It is logical to ask why bankruptcy pro bono needs should not simply be addressed through these established programs. The short answer is that bankruptcy needs are not now being met by these programs. The existing programs are usually short on funding and volunteers and often do not understand bankruptcy very well. If the bankruptcy judges and bar associations become actively involved, they should be able to recruit volunteers far beyond the capacity of the existing programs. These new volunteers usually will bring a much higher level of energy and expertise. It may be enough simply to get the bankruptcy bar association to support the established volunteer attorney program by taking a responsibility for funding the bankruptcy effort, finding volunteers, preparing training materials, and the like.

If a new program is to be designed and administered primarily by the bankruptcy bar association, it is tempting to join it with the local volunteer attorney program as just described. However, it is very important not to underestimate the cost of administration necessary for a successful program. Because all volunteer attorney programs are underfunded, a suggestion that the existing volunteer program create a new bankruptcy attorney project could be met by reactions ranging from enthusiasm to outright hostility. It is only fair that the bankruptcy bar association help to find the additional funding necessary to cover the administration of the new program. That amount would then be contributed to the established volunteer attorney program. In doing so, the project would be the joint project of the existing volunteer attorney program and the bankruptcy bar association.

## **B. Governance**

As with any volunteer organization, there is no single best structure for a governing body for a pro bono bankruptcy project. In Volume II are descriptions of established pro bono projects and the structure of their governing bodies.

In Minnesota, the program is administered by a steering committee of members of the Bankruptcy Section of the Minnesota State Bar Association. The chair-elect of the Section automatically serves on this committee.

The Consumer Bankruptcy Assistance Project in Philadelphia, which is an independent nonprofit corporation, is another model for governance of bankruptcy pro bono efforts and is much more structured. Board members come from all constituencies: law schools, lawyers, the public service sector, and legal services providers. Leadership comes from senior lawyers in major firms. Law school coordination comes from law school faculties and administration. Coordination with the local legal services organization comes from leadership of that organization. Service comes from the leadership of that organization and the consumer bar. The bankruptcy bench is represented and recruited volunteers. Young commercial bankruptcy lawyers from large firms are extremely active in numerous project activities.

Philadelphia's first acts of governance were to adopt bylaws, establish a funding plan, select managers (an administrator, a project lawyer, and a secretary were recruited on a part-time basis to run project activities), create a training program, and establish a volunteer recruiting plan that included a conflict waiver policy. The Project sought and obtained 501(c)(3) status and created numerous committees. Five or six times a year, the board meets at law firms throughout the city, usually preceded by committee meetings. Recently, one of the most active committees has been the Practice Standards Committee—which is working to establish practice standards for the students and volunteers.

A list of board members, the constituencies they represent, and officers and committees, is found in Volume II. Note that the officers and board members are drawn from leading lawyers in major law firms, the law schools, and the legal services providers and that the Project has subcommittees dealing with everything from practice standards to fund raising.

More about this topic and many others is found in the "Standards," which are described in Section VII.

## **C. Malpractice Insurance**

All organized pro bono programs should either encourage or insist that its volunteers be covered by malpractice insurance. This is for the benefit of the program as well as the client and the volunteer. And the program itself should have coverage. However, the experience with volunteer attorney programs and legal aid offices is that malpractice claims are rare and in most instances when they are brought, they are usually small. For example, Volunteer Lawyers Network in Hennepin County, Minnesota, which is a large and well-developed volunteer attorney program that has been in operation for thirty-four years, has never had a



successful claim brought against it requiring any payment by it or its insurance company.

Insurance for the individual volunteers may be obtained in one or more of four ways:

1. **The volunteer's own insurance coverage.** Most attorneys in private practice have malpractice insurance coverage, although in some areas of the country, an increasingly large number of attorneys are "going naked." Corporations, government employers, and other non-law firm employers generally do not supply that insurance to their employees who assume outside legal work. With most, if not all, insurance covering lawyers in law firms, the fact that the attorney is doing the work on a pro bono basis does not make a difference; insurance coverage applies equally to paying clients and pro bono clients. Volunteers may want to check their policies to determine whether it makes a difference whether the files are opened as firm files. The volunteer should also pay attention to the issue of whether the coverage is primary or secondary. In addition, larger firms in particular are buying policies with higher deductibles so that, in effect, the firm is self-insured as to all but the most major matters. Most firms with enlightened attitudes toward pro bono will expect the malpractice policy of the firm to apply and if a claim occurs, the firm would pay for it in the normal manner.
2. **The policies of established pro bono programs.** Virtually all of the well established pro bono programs, whether they are free standing programs, bar association programs, or components of the federally funded legal services offices, provide malpractice insurance for their volunteers. Generally, coverage comes with low deductibles and relatively low limits. Again, attention should be paid to the issue of whether the coverage is primary or secondary. In most situations, it will be possible to affiliate a new bankruptcy pro bono program with a volunteer attorney program to give the bankruptcy volunteers the benefit of the malpractice coverage.
3. **New group policies.** If a new bankruptcy pro bono program, for whatever reason, does not wish to affiliate itself with an existing volunteer attorney program, it is possible to obtain group insurance for pro bono matters at relatively low cost, quite possibly under \$1,000 in total. Insurance companies of which the authors are aware are:
  - National Legal Aid and Defender Association (Marsh USA and CAN Insurance Companies) (1-800-725-4513; [www.nlada.org](http://www.nlada.org))
  - Complete Equity Markets, Inc. Professional Liability Insurance Program for Legal Service Organizations (1-800-323-6234; [www.cemine.com](http://www.cemine.com))
  - CIMA Liability Protection Program for Legal Services and Public Defenders (1-800-468-4200; [www.cimaworld.com](http://www.cimaworld.com))
4. **New individual policies.** Special policies for individual volunteers are available, although they are obviously considerably more expensive than group policies.

#### D. Conflicts Issues

Under the ethical rules in every state, attorneys are prohibited from representing a client if the representation will be directly adverse to another client,

unless the clients consent after being informed of the conflict. There are restrictions on representing current clients adverse to former clients, particularly where an attorney may have secrets or confidences that could be to the disadvantage of the former client. These rules apply equally when the client is a pro bono client.

Particularly in larger firms, conflicts can create a real barrier to taking on new work in bankruptcy practice. A law firm that is creditor-oriented may have a difficult time in representing pro bono Chapter 7 debtors. Any firm taking on pro bono representation must clear conflicts in the same way as for paying cases.

We hope that addressing a conflict issue can be done with as much zeal in a Chapter 7 pro bono case as would be applied to resolve a conflict involving a potential billable case. Some suggested solutions to conflict problems include:

1. **Avoid the conflict at the outset.** If there is a particular client that never gives conflict waivers, advise the referring entity of that fact so that cases will not be referred.
2. **Consider whether it is really a conflict.** Is there a conflict with an active client or a former client as to which the firm has secrets or confidences? Or is the concern really about aggravating a potential client?
3. **Confer with in-house counsel.** One of the best allies for waiving a conflict is the in-house attorney of the client. Lawyers may be able to appeal to his or her sense of public service.
4. **Blanket Waivers.** That successful model has been described in a memorandum and a form prepared by the Pro Bono Legal Services Subcommittee of the Business Bankruptcy Committee of the ABA Section of Business Law based on the success of the Philadelphia program. The memorandum and form can be found at Tab 5.

The Philadelphia program took these steps:

First, it determined who the “target creditors” were. In bankruptcy cases, this was done by reviewing schedules to see which creditors appeared most frequently. These would include utilities, banks, housing authorities, hospitals, and retailers.

Second, it prepared a blanket conflict waiver, tailored to the thresholds of dollars thought to be acceptable to target creditors. Most blanket waivers do not permit directly adverse representation. The attorney may file a case and discharge debt but may not handle dischargeability issues.

Third, it prepared a letter, or a script, which described the purpose of the blanket waiver, the legal justification (usually, in states with the Rules of Professional Conduct, Rule 1.7), and the need for the waiver from a creditor’s perspective (competent representation for the debtor should, but does not always, suffice).

Fourth, it identified people interested in the program who could relate to each target creditor, either through prior contacts or reputation, to go to that target creditor group.

Fifth, it made initial contacts with the target creditors, and followed up repeatedly but politely. When the project achieved the first waivers, that fact was publicized among other target creditors.

Sixth, it was flexible and responsive to a target creditor's specific needs—not all waivers have to be alike.

Seventh, it followed up on the waivers, notifying the creditors when they were in effect in a specific case, and had the volunteers do their best to be attentive to the target creditor's needs in the case without affording special treatment.

## E. Funding

Before fund raising begins it is necessary to determine how much funding is necessary. It may be best to plan on a large one-time start-up cost, and then decide on what will be recurring annual costs. In addition to an annual budget, the program should budget for the next several years.

Planners also need to decide whether or not the program will be one that will grow or remain stable. Is the field of potential clients likely to grow or decrease?

It is best to have a broad base of funding and not to depend on any single funding source. Indeed, many foundations will require either matching funds or a broad base of support so that the program is not dependent upon that grantor. Also it is good to consider whether a funding source will be stable and available to provide consistent funding from year to year. Some available sources of funds include (keeping in mind that some of these compete with other providers):

1. **The Bankruptcy Bar Association.** The sponsoring group, the one which is claiming ownership of the program, should contribute some of its own funds. In addition, its members should be asked for contributions.
2. **District Court Funds.** The federal district courts sometimes have a fund generated by admission fees. A polite approach to the district court may produce some support.
3. **Foundations.** Estate planning lawyers in some of the firms may have good contacts with foundations and other private sources.
4. **General Bar Dues.** Consider going to the bar board of directors and asking that the dues be increased and that the dues increase be earmarked for a pro bono program. This will have more appeal if it is earmarked for a state-wide pro bono program and not just a specialty practice area pro bono program. This funding source should be fairly stable and as the bar population increases the amount of funds available should increase.
5. **IOLTA.** This refers to interest on lawyers' trust accounts. All states have statutes or court rules that allow interest earned on lawyers' trust accounts to be used for legal charities. Usually the court system or a bar foundation is charged with overseeing the expenditure of these funds. There is ongoing litigation over IOLTA but as of 1999 those programs are all still in effect.
6. **Legal Services Offices.** The national Legal Services Corporation requires that 12.5% of the funds allocated to local legal services programs be spent on private attorney involvement (referred to as PAI). Legal services offices do not advertise that fact, but it is possible to approach the local legal services office and ask that it make a grant to the pro bono program or otherwise assist it. Unfortunately, with those funds will come reporting requirements and restrictions that might inhibit a pro bono program. One example of these restrictions

is that a program would be limited to those indigents who meet the federal poverty guidelines. Many entities have declined this source of funds for that reason.

7. **Resource-Sharing and In-Kind Contributions.** A great deal of support can come in the form of resource sharing. For instance, the state bar can provide an empty suite of offices that might be intended for future growth. The law school clinical program or the law school pro bono program might be willing to provide student volunteers as staff personnel. A law firm may provide a suite of offices, computer resources, telephones, etc.
8. **Court Fines.** Courts sometimes have discretion as to where fines or penalties or cy pres funds should be paid. In South Carolina recently a court fined two law firms and directed that \$40,000 be paid to the state bar's pro bono program.

The Philadelphia Consumer Bankruptcy Assistance Project model for fund raising is instructive. First, the project focused on a source that historically has not been called upon as a group to donate money to pro bono activities: bankruptcy lawyers. This was to be a bankruptcy lawyers' project. Support in the form of money, organizational time and effort, and volunteer work was essential for it to succeed. Bankruptcy lawyers had to buy into the project for it to succeed. This was stressed in the initial fund-raising campaign. Also stressed were comparative contributions by individuals and firms and the fact that all contributions would be acknowledged in writing at the Eastern District of Pennsylvania Bankruptcy Conference's Annual Forum, which is attended by most bankruptcy lawyers in the district. The first lawyer fund-raising effort was a success: \$31,760 was raised. Other funding came from the Eastern District of Pennsylvania Bankruptcy Conference, two foundations with which certain Project leaders were closely affiliated (Horace Goldsmith Foundation and Dolfinger-McMahon Foundation), the Philadelphia Bar Foundation, the Meridian Bank Foundation, and other sources.

In the second year of its fund-raising efforts, the fund-raising committee decided to widen their focus to include other professionals who participated in the bankruptcy process—accountants, investment bankers, appraisers, auctioneers, printers, copying services, court reporters, and others who profited from bankruptcy. As an incentive to these professionals, the fund-raising committee promoted an "advertising book," a directory for nonlawyer bankruptcy professionals and service providers to describe their services. In recent years, attorney fund raising has averaged about \$50,000 per year in addition to the \$13,000 per year from the Eastern District of Pennsylvania Bankruptcy Conference. The directory adds \$15,000 to \$20,000 per year.

The fund-raising committee was a group of lawyers who basically hate to ask others for money. How did they succeed? Why do they continue to serve on the committee, year after year, despite hating to ask people for money? Because, in the words of the founders, they believe in the project. They are committed to it. They are among the leaders of the bankruptcy bar, so they are respected by their peers. These two components, the solicitors' belief in the project and the respect the solicitors have among their peers, are essential in fund-raising activities of this type.

## **VI. The Role of Bankruptcy Judges**

It may be fair to say that there is no successful program that does not have the active support of at least some of the local bankruptcy judges. However, many judges are hesitant to be supportive because they are concerned about the Code of Conduct for United States Judges and the importance of maintaining the role of impartiality. On the other hand, these judges recognize that they have ultimate responsibility for the administration of justice and know that the Code explicitly allows “activities to improve the law, the legal system and the administration of justice.” At Tab 3 is a scholarly article by Bankruptcy Judge Nancy C. Dreher which discusses the background of the legal and ethical issues and what bankruptcy judges may do. At Tab 4 in this volume is an article by Judge Judith Billings generally describing the activities in which judges often engage. At the state court level, the Conference of Chief Judges have unanimously adopted a resolution encouraging judges to support and assist pro bono programs. A copy of that resolution will be in Volume II.

## **VII. More Help**

Volume II of this Starter Kit will be published soon after Volume I, and will contain a collection of materials from existing programs—descriptions of many bankruptcy pro bono programs and some of their forms. Volume II will also contain a “Contact List” of individuals who have agreed to be a connection to their local programs and to provide information. In some cases the list also includes the names of bankruptcy judges who have shown a special interest in this topic and who most likely are knowledgeable about their local programs.

A resource in the future will be the ABA’s Center for Pro Bono (312-988-5769), described more fully at Tab 6. The Center provides support to pro bono programs of all kinds, of which there are more than 900 nationally. The Center has agreed to provide assistance to the development of bankruptcy pro bono by serving as a repository of materials, including training materials, from these bankruptcy pro bono programs. The Center will be able to provide information about ordering copies of this Starter Kit, Volume I and Volume II. On a limited basis, the Center may also be able to provide peer reviewers to visit and assist with the development or improvement of local bankruptcy pro bono programs.

The Center also has copies of the Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means (“Standards”). An order form is at Tab 6. The Standards represent a several year-long project of the ABA’s Standing Committee on Pro Bono and Public Service (then called the Standing Committee on Lawyers Public Service Responsibility (SCLPSR)), culminating in adoption of the Standards by the ABA House of Delegates in 1996. Its nearly 200 pages cover virtually all of the issues that can arise in the operation of a pro bono program and provide recommended procedures on all issues. The Standards are written to apply to all types of pro bono programs and much of it will be useful for bankruptcy pro bono programs.

With the support of Michelle Johnson and writing assistance from Donna Tuttle, *Bankruptcy Court Decisions* (BCD), which publishes weekly bankruptcy news and comment, has published more than 20 feature articles on bankruptcy lawyers and their pro bono projects. In addition, BCD has frequently provided news articles on workshops, meetings, and other events involving pro bono. Those who want to be aware of what is going on in the bankruptcy pro bono world would do well to read BCD (215-784-0860).

The American Bankruptcy Institute (ABI) has a pro bono committee (703-739-0800; <http://www.abiworld.org>). George Cauthen of South Carolina chairs the Pro Bono Service Subcommittee.

The American College of Bankruptcy also has a pro bono committee (703-934-6154; [amercol@ix.netcom.com](mailto:amercol@ix.netcom.com)). The College currently has a grant program under which bankruptcy pro bono programs may be awarded up to \$500 for the cost of preparing material for training programs. An application form for the grant is at Tab 8. David Sykes is the chair of the Pro Bono Committee.

The National Consumer Law Center in Boston has bankruptcy forms and a wide range of publications available (617-523-8010).

Finally, the Business Bankruptcy Committee of the ABA Section of Business Law, the subcommittee principally responsible for this edition of the Starter Kit, has an active Pro Bono Legal Services Subcommittee. That subcommittee has been responsible for workshops on this topic at the annual meetings of the National Conference of Bankruptcy Judges in 1997 (Philadelphia), in 1998 (Dallas), and in 1999 (San Francisco). That subcommittee has also developed the form for blanket waivers (based on the example of the Philadelphia program) and has otherwise worked to support these programs and pro bono services by bankruptcy lawyers generally. A resolution prepared by that subcommittee and adopted unanimously by the Council of the Business Bankruptcy Committee of the Section of Business Law urging judges and lawyers to support these programs is at Tab 7. Individuals who are interested in joining that subcommittee or finding out about current activities of that subcommittee are encouraged to contact the ABA Section of Business Law, or a current member of the Pro Bono Legal Services Subcommittee.

## **VIII. Conclusion**

A bankruptcy pro bono program is no longer a recent innovation. Although the problems that need to be addressed as described in this book might seem daunting, we hope that this book also shows that they can be solved—and have been solved—in a growing number of cities and states.

## Tab 2

# Bankruptcy Lawyers, Bankruptcy Judges and Public Service

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## I. Introduction

*"Isn't the judiciary the quintessential entity that should be ensuring equal justice?"*

*—Chief Justice Rosemary Barkett, Florida Supreme Court, February 1, 1993 at hearings on proposed rule changes in Florida*

Most of the legal needs of low income people are not being met. These needs cannot be met by the existing combined efforts of legal services organizations and volunteer attorney programs. These unmet legal needs include the need for assistance in bankruptcy cases as well as in the related areas of debtor-creditor and consumer law. There has been a dramatic increase in pro se filings of bankruptcy cases in many districts. In addition, many individuals appear pro se in bankruptcy court in hearings in the case and in adversary proceedings. A 1992 study estimated that 12.7% of bankruptcy cases were filed without the assistance of a lawyer, an increase of 300% in five years. More recent national statistics are not available but it is likely that the percentage of cases filed pro se is at least that high today. The level of pro se filings varies enormously from district to district with many districts below 5% but with some districts above 30%, according to a 1996 survey. This is ironic because in the 1970s the proposals for bankruptcy reform legislation, the Commission Bill and the Judge's Bill, provided that consumer bankruptcy cases would be handled primarily by administrative or clerical personnel without the substantial involvement of private lawyers. Lawyers, through the ABA, argued successfully for the importance of judicial resolution of issues in consumer bankruptcy cases and for the importance of private lawyers and recommended "court appointment of legal counsel for assistance to indigent consumer bankrupts."

Lawyers have an ethical responsibility to assist in the administration of justice and to provide legal services to those who cannot afford to pay. Lawyers should act to help those who are unrepresented in bankruptcy matters. Judges have a special responsibility for the administration of justice and a special opportunity to take leadership roles to achieve it. A recent trend in the legal profession is for specialized practice groups to undertake their own pro bono programs. That is beginning to occur in bankruptcy; a number of bankruptcy bar organizations have organized their own pro bono programs. This paper reviews the unmet needs, particularly for bankruptcy legal services, and describes the existing efforts to meet those unmet needs. It describes local bankruptcy pro bono programs in Minnesota, Philadelphia and South Carolina. This paper also provides

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specific suggestions for bankruptcy lawyers and bankruptcy judges regarding pro bono programs.

## **II. The Need**

### **A. Legal Needs Generally**

As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, whether rich or poor. However, because the legal problems of the poor often involve areas of basic need such as minimum levels of income and entitlements, shelter, utilities, and child support, their inability to obtain legal services in these areas, including bankruptcy matters, can have dire consequences. For example, the failure of a poor person to have effective legal counsel in an eviction proceeding may well result in homelessness. The failure to have legal counsel present at a public aid hearing may result in the denial of essential food or medical benefits. Inability to file a bankruptcy case can leave an individual without an economic future. A wrongly filed bankruptcy case can do serious damage to the debtor.

The inability of the poor to obtain needed legal services has been well documented: since 1983, at least one national and many statewide studies assessing the legal needs of the poor have been conducted. There has been a consistent finding that only about 10–30% of the legal needs of the poor are being addressed.

One consistent recommendation to address these unmet legal needs is that the private bar increase its level of pro bono service to help meet the need. For example, the Massachusetts study recommends that “private attorneys and bar associations in Massachusetts should continue to expand their activities in support of the delivery of free civil legal services to low income persons.” In Maryland, it was recommended that bar associations “in coordination with legal services programs and others, expand private attorney pro bono delivery of civil legal assistance to low income persons through direct services, participation with legal services programs, training, community legal education, legal counsel to organizations serving low-income persons, and other appropriate approaches.”

The private bar alone cannot be expected to fill the gap. The federal government, through adequate funding of the Legal Services Corporation (LSC), should bear the major responsibility for addressing the problem. Although the federal government has never provided sufficient funding for the LSC, during the past eighteen years funding has fallen even further, causing the crisis of unmet legal needs among the poor to be exacerbated. Specifically, in FY 1981, the annual budget for LSC was \$321 million, while in FY 1999, the annual budget was only \$300 million. Adjusted by the consumer price index the current level of funding represents only a small fraction of the previous budget.

### **B. Bankruptcy Legal Needs**

The legal needs studies have generally not measured the specific need for bankruptcy services. Bankruptcy is generally treated as part of the broader category of consumer law. A number of studies have determined that approximately 12–15% of the total unmet need is in the consumer area. That typically places consumer law second or third on lists that usually have divided legal needs into ten or more categories.

It is generally, but not inevitably, true that individuals without non-exempt assets should not file bankruptcy cases. If they do have non-exempt assets, they should be able to pay an attorney. In addition, in most areas of the country, consumer bankruptcy prac-

tice is a high volume business with heavy advertising and low fees for basic Chapter 7 or 13 cases. Presumably for these reasons, pro se filings are still low in many districts. However, in some situations, there are good reasons to file a bankruptcy case even if the debtor does not have assets that can be reached by creditors or used to pay an attorney. For example, with the aid of § 525 of the Bankruptcy Code, bankruptcy filing can help protect valuable public benefits such as access to low cost public housing or other benefits (see section VI.C.).

Moreover, even in those districts where pro se filings are low there are many pro se appearances in relief from the stay motions and other motions, reaffirmation hearings and in adversary proceedings. That occurs because the attorney who handles the Chapter 7 or 13 case filing usually does so for a flat fee and is often unwilling to perform further services without additional payments, which the client is often unable to provide, having, by definition, no remaining non-exempt assets. In these cases presumably the lawyer who filed the case simply does not appear at a hearing or in the adversary proceeding. In some situations, the lawyer may make a motion to withdraw. A few bankruptcy courts have refused to permit withdrawal and required the attorney to continue to represent the debtor, for example, in dischargeability litigation. That was the result in *In re Edsall*, 89 B.R. 772 (Bankr. N.D. Ind. 1988) where the court said:

The public responsibility on behalf of members of the bar, thus, compels the court to conclude that the non-payment of attorney fees, standing alone, does not constitute sufficient cause for the withdrawal of counsel, given the significance of the issues raised by Plaintiff's complaint.

For whatever reason pro se bankruptcy case filings are increasing dramatically. The Administrative Office of the United States Courts keeps the case statistics for the bankruptcy court system. Information on the number of pro se case filings has not been computed nationally since 1987. For the year ending June 30, 1987, there were a total of 36,377 pro se filings nationally representing a little less than 5.5% of the total case filings. For Chapter 7 cases there were 28,735 pro se filings representing 7.2% of the total. In September 1992 the Administrative Office, based on a sampling selection of fourteen districts, estimated that there were 86,360 pro se Chapter 7 filings annually representing 12.7% of the total Chapter 7 cases. In five years the total pro se Chapter 7 filings rose from 28,735 to 86,360, *an increase of over 300%*. As a percentage of the total filings, pro se Chapter 7 filings rose from 7.2% to 12.7%.

In 1996, the Ninth Circuit Judicial Council Subcommittee on Non-Prisoner Pro Se Litigation, with the assistance of the Administrative Office of the U.S. Courts, conducted a national survey. Seventy-four of the 89 clerk's offices responded. Of those, 56 kept some kind of statistics on pro se case filings. The study did not attempt to determine an overall national percentage of pro se filings. One of the major findings was that the variation from district to district is enormous. Seventy-one percent of the districts reported pro se filings of 10% or less with a few below 1%. (However, if there were 10,000 cases in a hypothetical district, 5% of that number would still be 500 pro se cases per year, a sizeable number in absolute terms for a single district.) Fourteen districts that responded reported they had more than 10% pro se filings in at least one chapter and some were overwhelmed—above 30%. The fourteen districts with pro se filings above 10% were: Arizona, Eastern District of California, Central District of California, Middle District of Florida, Southern District of Florida, Northern District of Georgia, Massachusetts, Nevada, New Jersey, Eastern District of New York, Southern District of New York, Oregon, Eastern District of Washington, and the Western District of Washington. The survey did not attempt to determine the number of hearings or adversary proceedings in which a party was pro se even in cases where the debtor was represented in the filing.

The survey and resulting report addressed a number of aspects of the pro se problem that are beyond the scope of this article. For example, most of the courts that had kept statistics showed a marked difference in success rates in Chapter 13 cases between pro se and counsel assisted cases. The report addressed the use of handouts, brochures, and handbooks available through the court, as well as foreign language and computer assistance. The report also addressed document preparation services, the formation of court committees concerning pro se litigants, special judicial procedures, and the like. There is a brief discussion of the survey responses relating to the availability of pro bono programs. The most common recommendation for the district was the improved use of handouts, brochures, and sample forms. The next most prevalent recommendation for improvement was "expanded use of legal service organizations and the bankruptcy bar to help litigants without counsel."

This situation is ironic, to say the least, in light of the fact that the Report of the Commission on the Bankruptcy Laws of the United States, July 1973, and its proposed "Commission Bill," recommended that consumer Chapter 7 filings be handled by an administrator, generally, without the involvement of an attorney except where disputes arose. An administrator could help prepare the petition and schedules and counsel the debtor. At the same time the so-called "Judges Bill" recommended that consumer bankruptcy cases be handled by clerical personnel, also without the substantial involvement of private lawyers. Lawyers vociferously disagreed and this became a controversial issue in the evolution of the law that became the Bankruptcy Code. The various committees of the Business Law Section presumably were unable to resolve this issue and the Section did not address it in its report and recommendation to the House of Delegates of the ABA. Minnesota submitted its own report to the ABA House of Delegates stating:

... the inherently adversary character of consumer bankruptcies requires judicial resolution, and that consumer bankrupts or debtors, their creditors and the public will best be serviced by continued use of the judicial process, a judicial forum, and personal legal representation during the courts of bankruptcy or insolvency proceedings; ...

Most lawyers working in the field know that nearly every consumer debtor or bankrupt needs continuous legal counseling and representation during the entire bankruptcy case, not just at the threshold, and that confidential interviewing, even if partly done by the lawyer's legal assistant under his supervision, is a needed professional task and service. Most such lawyers also know that administrative counseling could be helpful but ultimately is at least as expensive. Both bills establish administrative agencies for the service contemplated and ignore the superior capabilities of the private lawyer to render personal legal service to the consumer client at reasonable cost.

The Minnesota report also elaborated on the problems with conflicts of interest that would arise when bankruptcy cases and marital dissolution cases intertwine if both spouses and former spouses are assisted administratively. The ABA thus adopted a resolution concerning the Commission Bill and the Judges Bill that included the following:

The American Bar Association favors incorporation of provisions in any bankruptcy legislation affecting consumer bankrupts to be adopted by the Congress that would: (1) retain a court-supervised judicial proceeding for consumer bankruptcies; (2) continue the system of private legal representation of consumer bankrupts; (3) establish an Administrative Office of the U.S. Bankruptcy Courts to provide necessary independent administrative support and support systems; and (4) provide for court appointment of legal counsel for assistance to indigent consumer bankrupts.

The fourth recommendation, has not been implemented and as described above, many consumer debtors are now without counsel. One consequence is unnecessary filings; probably many of the pro se cases should never have been filed. The pro se filings may damage credit, cost the debtor the right to use the privilege of a Chapter 7 bankruptcy filing for six years, or cause the loss of non-exempt assets or assets that could have been protected as exempt. Moreover, without assistance, those who file cases may become subject to criminal prosecution if they violate federal bankruptcy criminal laws in the process of filing and handling their own cases. That is now a more serious problem than ever before. Through an April 29, 1992 United States Attorney General's memorandum, the Justice Department was notified to give bankruptcy fraud high attention and priority. A number of special efforts have been taken and the number of cases under consideration for criminal prosecution is up more than 50%. See Brown, "Bankruptcy Fraud Prosecutions," *Bankruptcy Litigation*, Newsletter of the Bankruptcy and Insolvency Committee, Section of Litigation of the American Bar Association, January 1993, pp. 7-9.

For creditors, pro se filings are usually of no benefit. They take up an abnormal amount of attention without providing much payment to creditors. In many situations both debtors and creditors would have been better off dealing with each other outside of the bankruptcy arena.

These cases put special strain on the administration of the bankruptcy system because they require special attention from the clerks and judges. So much of what is done by the pro se debtor is wrong. How do clerks, trustees, and judges deal with these individuals? It is especially difficult for the judges who must remain in the neutral judicial role but who, to reach the correct judicial result, are tempted to leave that role to become a counselor or even an advocate for a pro se party.

Standing behind the pro se filings are a large number of other matters that call for the assistance of bankruptcy lawyers without involving the filing of a bankruptcy case. Individuals need counseling to deal with their debtor-creditor problems, asserting rights under the Fair Debt Collection Act, defending home foreclosures, evaluating whether there are legal rights to assert in response to collection actions, negotiating payment schedules in the best interests of the debtors and the creditors, and counseling debtors in handling their finances. These are services in the interests of administration of the bankruptcy judicial system and in the best tradition of our profession.

### **III. Lawyers' Obligation to Serve**

#### **A. Professional Tradition**

Law, along with medicine and the clergy, started as a public profession. Its roots are service to the public and for long periods of time making an income sufficient to support continued public service was secondary to the service itself.

In such a professional ethos, no one is refused service because of inability to pay. In all, or almost all states, that is part of the oath that lawyers take when they are admitted to the bar. In addition, lawyers pledge through the ethical rules to serve the court: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . ." See Rule 6.2 of the Model Rules of Professional Responsibility.

Public service is a core element in defining any profession:

There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means

of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

—R. Pound, *The Lawyer from Antiquity to Modern Times*, 5 (1953).

These principles have been applied in bankruptcy court. In a case in which the bankruptcy court refused to permit withdrawal, *In re Edsall*, *supra*, the court also said:

The need for legal assistance is not a function of the ability to pay. It is an unfortunate reality, however, that those most in need of legal services are often those who are least able to afford them. Yet a system of justice in which only the rich or well to do have meaningful access to the courts is no system of justice at all. Thus, it is imperative for legal assistance to be available not only to those who can afford the price but also to those who cannot . . .

Attorneys must never lose sight of the fact that 'the profession is a branch of the administration of justice and not a mere money getting trade.'

See also *In re Pair*, 77 B.R. 976 (Bankr. N.D. Ga. 1987) and *Kriegsman v. Kriegsman*, 150 N.J. Supr. 474, 375 A.2d 1253 (1977), which are the sources of the inner quote above.

The most general statement of the lawyers' public service obligation is in the ethical rules of the profession. In these ethical rules, the public service rule is unusual because it is the only rule that is not enforceable by discipline. Its expression is generally referred to as *aspirational* rather than *mandatory*.

## B. Applicable Rule

In most circumstances, lawyers are bound by the ethical rules adopted by the highest court of the state in which they practice. Practice in federal courts, however, is governed by local rules adopted by the local district courts, which sometimes adopt the ethical rules of the state in which the district is located and sometimes adopt the ABA Model Rules of Professional Responsibility. *In re Glenn Electronic Sales Corp.*, 99 B.R. 596 (D.N.J. 1988).

## C. Canons

A number of states still follow the older Canons, the ABA Code of Professional Responsibility. Legal services to those unable to pay is addressed in Ethical Consideration 2-25:

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 life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find 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, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

## D. Model Rules

More states follow the newer ABA Model Rules of Professional Conduct. As originally drafted by the Kutak Commission, public service was mandatory but that provision was later changed and until recently the rule remained both aspirational and general:

### RULE 6.1—PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

## E. 1993 Amendment of Model Rules

The ABA Model Rules of Professional Responsibility were modified in February 1993. The change originated with the ABA Standing Committee on Lawyer's Public Service Responsibility (SCLPSR) which studied the subject of mandatory and aspirational pro bono and the legal needs of the poor. It decided against a mandatory rule but recommended that the Model Rules be amended to incorporate the essence of two prior ABA resolutions in favor of a specific recommended number of hours and to emphasize the provision of legal services to persons of limited means. The new rule now reads:

### RULE 6.1—VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

A number of states have adopted this new model rule, some with a different number of hours. Other states that still follow the Canons have amended EC-25 to incorporate a recommended number of hours. A detailed list of the pro bono services nationwide is updated regularly by the Pro Bono Committee.

## IV. Mandatory Pro Bono and Alternatives

### A. Pro Bono Service and Reporting Rules

The question of whether public service ought to be mandatory is one that will not go away. Mandatory pro bono exists only in limited degrees in a few jurisdictions such as El Paso, Texas; Orange County, Florida; and Westchester County, New York and does not affect all of the lawyers in those jurisdictions. Mandatory pro bono has been seriously proposed either by the chief justice of the highest court, by a bar association or a committee of a bar association, or by legislation in at least six states: New York, Texas, North Dakota, Hawaii, Maryland, and Connecticut. New Jersey has adopted what might be described as a form of mandatory pro bono. In Florida, an alternative approach, described as comprehensive pro bono, has been adopted.

### B. New Jersey

In *Madden v. Delran*, 126 N.J. 591 (1992), the New Jersey Supreme Court ruled that attorneys were subject to assignment to represent parties in municipal court cases. However, the court excepted attorneys who provided at least 25 hours of qualifying pro bono services of a type on a list maintained by the court. Services provided through a bankruptcy pro bono program were added to that list soon after the program was organized through the intercession of then Chief Bankruptcy Judge William Gindin.

### C. Constitutional Issues

Arguments that mandatory service violates the Thirteenth Amendment (involuntary servitude) or the Fifth and Fourteenth Amendments (taking without compensation) have been rejected by the courts. *Butler v. Perry*, 240 U.S. 328 (1916); *Hurtado v. United States*, 410 U.S. 578 (1973). At least one circuit court has ruled that assignment of uncompensated counsel does not constitute a taking without compensation. *United States v. Gellor*, 346 F.2d 633 (9th Cir. 1965). In *Mallard v. U.S. District Court for the Southern Dist. of Iowa*, 490 U.S. 296 (1989), the United States Supreme Court declined to address this issue when confronted with a challenge to a statutory court appointment. The court determined that the applicable statute did not mandate acceptance of the case but added:

We emphasize that our decision today is limited to interpreting section 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to section 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.

### D. New York

The Chief Judge of the Court of Appeals formed a special committee named the Committee to Improve the Availability of Legal Services. In its final report in April 1990, that Committee recommended a 20 hour pro bono annual requirement for all members of the bar. At the request of the New York Bar Association Special Committee to Review the Proposed Plan for Mandatory Pro Bono, consideration of the recommendation was

postponed for two years and then again for another year to give the bar a chance to increase its pro bono work voluntarily. A committee to monitor the response was created and statistical baselines and program reports have been submitted.

#### **D. Florida**

In Florida, a special bar committee headed by Talbot D'Alemberte, later ABA president, petitioned the Florida Supreme Court to establish a number of new pro bono rules. The sponsors have referred to this their approach as comprehensive pro bono. The 1990 decision, *In re Amendments to the Rule Regulating the Fla. Bar*, 573 So.2d 800 (Fla. 1990) is a landmark. It established the following rule:

We hold that every lawyer of this state who is a member of the bar has an obligation to represent the poor when called upon by the courts and that each lawyer has agreed to that commitment when admitted to the practice in this state. Pro bono is a part of a lawyer's public responsibility as an officer of the court.

Two of the seven judges dissented, stating that mandatory pro bono should be imposed.

The court established an *expectation* of 20 hours per year or a contribution of \$350. Service or monetary contributions are not mandatory but annual *reporting* is mandatory. The court also established a pro bono committee in each circuit. Each committee is chaired by the chief judge or the judge's designee. The duties of the committee are to prepare, implement, and report on a plan for each district.

Implementing the 1990 decision required changes in the rules regulating the practice of law in Florida. Those were addressed in hearings and in decisions in 1992 and 1993. In the most recent decision, the court determined that members of the judiciary and their staffs "should be deferred at this time from participating in the program." The court noted the restrictions on judges (requirement of full time judicial service; and prohibitions of service to charitable organizations likely to be engaged in litigation, service in a fiduciary capacity, and practice of law). The court went on to say:

We emphasize, however, that judges and their staffs may still teach or engage in activities that concern non-adversarial aspects of the law. Canon 4. Although those activities would not be governed by these rules, we strongly encourage the participation of the judiciary in those activities and request the judicial conferences to consider appropriate means to provide support and allow participation of judges and law clerks in pro bono activities.

We note that there are activities that judges can do to advance the principles of pro bono service. For example, the Eleventh Judicial Circuit in Dade County, in a cooperative effort with the Dade County Bar Association, created a comprehensive pro bono program called "Put Something Back." More than forty judges participate in the program. They train attorneys, staff clinics, and prepare forms and handbooks. Additionally, such activities as teaching seminars for legal aid lawyers or serving on legal aid boards could count toward pro bono service for judges.

### **V. Organized Legal Services and Pro Bono Programs**

#### **A. The Structure of Legal Services to Persons of Limited Means**

The ways in which persons of limited means who need legal assistance receive that assistance is a very complex patchwork system. This section and the next section will provide a very general background on that subject and will focus on the growing ten-



gency to organize programs around targeted needs or specific groups of volunteers and will describe some bankruptcy pro bono programs.

## **B. Legal Services Offices**

In the latter part of the last century, communities began to develop legal aid societies to hire lawyers to provide services at no fee. The successors to these early community legal aid societies, which are now generally referred to as legal services offices, now often cover larger geographical areas, sometimes whole states. The main source of funding for most of these legal service offices is federal funds through the Legal Services Corporation. While the principal characteristic of these organizations is the use of full time professional poverty law attorneys, most of them either have their own volunteer attorney programs or assist separate volunteer attorney programs.

## **C. Legal Services Offices and Priority Setting**

Because the staffed legal aid organizations do not have the funding to meet more than a small percentage of the legal needs of the poor, they all use priority setting to control case acceptance. Generally, the needs relating to sources of income and housing receive highest priority. Family law is usually the area of greatest need in terms of number of cases. Some offices have decided not to handle family law cases, except the most difficult cases—those with custody issues and abuse. Consumer law cases, including bankruptcy cases, are accepted much less frequently. With a few significant exceptions, most legal service offices do not have highly developed bankruptcy expertise. When a bankruptcy issue arises in a matter they have undertaken, lawyers in these legal service offices frequently look to the private bar for help.

## **D. Volunteer Attorney Programs**

Historically pro bono service by private attorneys has been done on an individual basis. Much of that still occurs but the amount of that work is not subject to easy measurement. However, now probably the larger part of pro bono service is now provided through volunteer attorney programs (VAPs) organized in geographic areas. These began to be organized in the 1960s with most formed in the 1970s and 1980s. The American Bar Association through its Center for Pro Bono has historically assisted and encouraged the development of these VAPs and also provides technical assistance to approximately 900 VAPs. Although the statistics are not reliable because of the lack of uniform definition of the term “volunteer,” in 1996 there were about 220,000 volunteers in these programs assisted by the ABA, representing about 23% of the bar. Many VAPs receive funding through the legal service offices but many VAPs rely heavily on funding through donations, United Way, county and state bar associations, governmental units, IOLTA, filing fee surcharges, and the like. While some of these programs set priorities and limit the scope of their service, others attempt to match every eligible client that comes to them with a volunteer attorney. As described above, they fall far short of meeting the need. Some of the larger programs have special panels and occasionally those panels are focused on bankruptcy. For example, Volunteer Lawyer Networks in Hennepin County (Minneapolis, Minnesota) has had a Bankruptcy Panel for at least 20 years. The primary part of the work of the panel is screening; bankruptcy attorneys talk by telephone with individuals who have debtor-creditor problems. Usually the conclusion is that bankruptcy is not needed and the attorneys often follow through by helping the individuals deal with their creditors.

### **E. Trend toward Specialized Pro Bono**

As lawyers have become more specialized, pro bono service and pro bono organizations have begun to follow suit. For most people, their primary communities are not their neighborhoods but groups of people of similar work or interests. So for many lawyers their primary communities in the law are not their geographic neighbors but groups of lawyers with the same specialty. For many of them, the court system they associate with and feel most responsible for is not the local court of general jurisdiction but the specialty court in which they practice. Pro bono systems built around bankruptcy practice and the bankruptcy courts are beginning to appear locally. Within the American Bar Association there is no single section exclusively for bankruptcy law. Most bankruptcy lawyers are members of the Litigation Section or the Business Law Section, or both. Each section has its own pro bono programs.

### **F. ABA Litigation Section**

The Litigation Section has a pro bono committee that sponsors the Litigation Assistance Partnership Project (LAPP). LAPP matches large litigation projects that are beyond the resources or expertise of a legal services office or other direct provider with a litigation law firm interested in taking on that litigation on a pro bono basis. The Litigation Section also has pro bono programs relating to the needs of children and other pro bono programs, and gives national awards—the John Minor Wisdom Awards—for public service. The Litigation Section joined as a co-sponsor with SCLPSR of the amendment to Rule 6.1 described in Section III.E above.

The Bankruptcy and Insolvency Committee of the Litigation Section has a Pro Bono Subcommittee which has helped sponsor several workshops on pro bono bankruptcy assistance. It developed a manual described as the “Starter Kit” to help in the development of local bankruptcy pro bono programs.

### **G. ABA Business Law Section**

In 1993, the Business Law Section formed its own pro bono committee chaired by John Martin, general counsel for Ford Motor Company, and Maury Poscover, a member of the Section Council and a bankruptcy practitioner. The Committee was formed in part in response to the letter of Joseph Mullaney, vice chair and general counsel of Gillette Company who wrote:

I believe that there will be no significant change in this situation unless lawyers, such as those involved in our Section and on our Committees, recognize the need and their responsibility and respond. Pro bono service has to become as much a part of our substantive efforts as corporate law, tax law, real estate law and all of the other aspects of law that form part of our business law practice. I could not help but believe as I heard discussions at the Council meeting of the ALI proposals, that if one half of the intelligence, effort and energy involved in that effort had been directed towards the problem of homelessness, for example, we would be one half way towards resolving the legal aspects of that problem.

I believe that our Section, one of the largest and most respected units of the ABA, should take a leadership role in its effort. Just as our Section and its Committees and Task Forces have distinguished themselves in various other areas, I am sure that our Section could act with equal distinction and provide an example to the other Sections and units of the ABA.

The Business Law Section matches requests for business law pro bono services with lawyers willing to provide those services. It also encourages the development of

specialized business law pro bono programs, and it awards National Public Service awards. The Business Law Section also joined as co-sponsor with SCLPSR of the amendment to Rule 6.1 described in Section III.E above.

The Business Bankruptcy Committee of the Business Law Section has a Pro Bono Services Subcommittee that has organized several workshops and taken other steps to assist bankruptcy pro bono programs. It has been primarily responsible for the preparation of a second edition of the Starter Kit.

#### **H. ABA Law Firm Pro Bono Challenge**

On April 30, 1993 the ABA announced the Law Firm Pro Bono Challenge, another significant recent development sponsored by the Pro Bono Committee, which may affect many bankruptcy lawyers. The Law Firm Pro Bono Project focuses on the nation's 500 largest law firms (approximately 60 lawyers or more). Those firms have issued a firm-to-firm challenge to adopt a statement of principles, which includes establishing a written pro bono policy involving a majority of both partners and associates in pro bono work, and committing either 3% or 5% of the firm's billable hours to pro bono service. Forty-seven firms became charter members and 155 firms are now committed. That commitment has resulted in an estimated 1.8 million pro bono hours of service in 1998. Firms that have previously made such a commitment have found that it can dramatically affect the culture of the firm and force the firm to actively seek pro bono work suitable for all of its attorneys, including bankruptcy attorneys.

### **VI. Bankruptcy Pro Bono Initiatives**

#### **A. Local Program**

A number of local bankruptcy committees or sections as part of state or local bar associations have recently introduced their own programs as a vehicle for bankruptcy lawyers to use their specialized expertise to assist otherwise pro se clients with bankruptcy problems and to assist their court system. This section will discuss three: Minnesota, Philadelphia, and South Carolina.

#### **B. Minnesota**

In 1992, the Bankruptcy Section of the Minnesota State Bar Association launched a program for representation of individuals in adversary proceedings. All defendants in adversary proceedings are given a notice by the court that if they are unrepresented they may be able to obtain a volunteer attorney if they are financially eligible. Individuals who appear in court without representation may be referred by the judge to the screening agency. The potential clients are screened by Legal Advice Clinics, the pro bono program of the Hennepin County Bar Association, and if eligible, are referred to volunteers on a panel recruited by the Bankruptcy Section. Most of the cases were dischargeability cases. Most of the cases were favorably resolved for the defendants through settlement or dismissal of the claims against them.

#### **C. Philadelphia**

The approach of the Eastern District of Pennsylvania Bankruptcy Conference working with the local bankruptcy judges and the local legal services office and volunteer attorney program is quite different. In the summer of 1992, that group created the Consumer Bankruptcy Assistance Project, with the primary goal of filing Chapter 7 cases for

indigents. The program is called the “Fresh Start Clinic.” In that district there were a growing number of pro se filings. More than one hundred people per month were asking the local legal services office for help in filing their cases. The representation through the Fresh Start Clinic is provided primarily by law students and new attorneys after extensive training and with the supervision by or mentoring of an experienced bankruptcy attorney. Those experienced bankruptcy attorneys either represent clients directly or serve only as trainers or mentors. Attorneys whose experience is primarily in business bankruptcy are given training on consumer bankruptcy issues or may call on a mentor.

Although most of these debtors were “judgment proof,” they needed to utilize Chapter 7 or 13 to restore utility service or to avoid eviction from public housing. *Matter of Gibbs*, 9 B.R. 758 (Bankr. D. Conn. 1981); *In re Sudler*, 71 B.R. 780 (Bankr. E.D. Pa. 1987); *In re Yardley*, 77 B.R. 643 (Bankr. M.D. Tenn.); *In re Szymecki*, 87 B.R. 14 (Bankr. W.D. Pa. 1988). Accountants have volunteered to do intake and screening. This program has staff and a substantial budget. Philadelphia is also relatively unique in that many of its full time legal services lawyers have provided bankruptcy services. Still, the need has far surpassed the ability of that office to respond.

#### **D. South Carolina**

The statewide bankruptcy group, the South Carolina Bankruptcy Law Association, through its public service committee, works closely with the statewide volunteer attorney program. The Bankruptcy Law Association assists with recruiting bankruptcy lawyers as volunteers to handle particular cases if a volunteer cannot be found among registered volunteers. Ninety percent of the members of the Bankruptcy Law Association eligible to practice law are registered volunteers. The Association also conducts training for volunteers and has prepared a video on client interviews and software forms.

## **VII. What (Specifically) Lawyers and Judges Should Do**

### **A. The Expertise Issue**

Even with specialties there are subspecialties. Many bankruptcy lawyers who specialize in business cases are not comfortable with the idea of filing consumer Chapter 7 and especially Chapter 13 cases. There are a number of approaches to this issue. First, as the list below illustrates, there are a number of things that can be done that do not involve actually filing a bankruptcy case. Second, many larger VAPs include training for their volunteers. A seminar on consumer bankruptcy may be all that is needed. Third, many larger VAPs offer a mentor, someone to call with questions or to help through the first few cases. If no mentor is provided by the VAP, the volunteer could find his or her own mentor, pairing up with an experienced consumer law attorney. Probably both attorneys would be pleased with the networking. The experienced attorney would be able to do valuable work without actually having to file the cases, multiplying the value of his or her expertise. Fourth, the volunteer should consider that knowledge of Chapters 7 and 13 will broaden the volunteer’s understanding and capability as a bankruptcy lawyer. Experience with Chapters 7 and 13 should be part of the business bankruptcy lawyer’s own training program for professional development in any event. Fifth, the volunteer should consider that the same exceptional ability that brought these lawyers very successfully through law school, and to a mastery of a complex and difficult area of law, will also bring that volunteer lawyer to mastery of consumer bankruptcy. The lawyer might even consider going on to a different type of case altogether where the need is even greater, per-

haps family law. A variety of work can help with skills development and deepen the volunteer's satisfaction with his or her professional career.

## **B. For Bankruptcy Lawyers**

1. Call the local VAP and volunteer to handle the bankruptcy cases or issues. Or go further and take on cases in a broader range, learning a new area of practice. In addition, many VAPs have a variety of tasks for attorneys without any poverty law expertise: for example, intake and screening, or interviewing at homeless shelters.
2. Call the local staffed legal services office and volunteer to be a resource to take referred cases or to assist a staff attorney on bankruptcy issues. As an example, one of the most interesting cases, pro bono or otherwise, for the author whose practice is in Chapter 11, involved representing clients of the legal services office who held a judgment against a notorious slum landlord who filed Chapter 11. Our office filed and confirmed a creditors' plan that transferred all of the remaining housing into a newly formed nonprofit corporation which worked with the city to rehabilitate the housing and to keep it as housing for low and middle income persons.
3. Become part of, or organize, a bankruptcy screening panel, as part of a VAP, to give advice-only bankruptcy screening and to follow through with letters to creditors and provide other simple but valuable assistance.
4. Help other attorneys in a bankruptcy pro bono program by research and drafting of pleadings or other assistance supportive of the attorneys who actually file the cases.
5. Represent pro se parties in adversary proceedings. As an example, one of the author's more satisfying cases was to win a new trial for a woman who had represented herself and lost on a student loan discharge case. After obtaining an order for a new trial, our office negotiated a settlement for a payment of one-half of the loan amounts for the woman whose only income was disability payments. For the new associate who worked on the case, it was her first chance to prepare for a real trial.
6. If you are in a large practice group, urge your group to take on a large project or a specific number of smaller cases as a team. Work together and learn together as you do in other matters. As an example, in our bankruptcy department, we have one lawyer serve as intake person through the local VAP. We take on the cases and assign the work as we do with all other cases.
7. Teach, train, or mentor students, young lawyers, legal services staff attorneys, or others.
8. Urge your bankruptcy section to form a pro bono committee. Study the needs in your community and design and implement a program to meet the needs.

## **C. For Bankruptcy Judges**

Although, as described above, there are restrictions on the activities of judges, Canon 4 of the Code of Conduct for United States Judges is explicitly encouraging in this important area:

A judge may engage in activities to improve the law, the legal system, and the administration of justice . . . .

C.A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Note that Advisory Opinion No. 12 states that a judge may not serve on a board of a legal aid bureau whose representatives make appearances in the court in which the judge presides.

1. Form a committee to deal with the issue of pro se parties in bankruptcy court and perhaps the broader problem of legal services for the poor.
2. Give calendar preference to pro bono cases.
3. Be sure that the clerk's office is especially cooperative and supportive to attorneys handling bankruptcy cases pro bono.
4. Call on lawyers to serve. Consider direct appointments under Model Rule 6.2. While some judges have been reluctant to be involved in recruiting, many others believe that it is appropriate. In many states or districts the chief judge has written letters to all attorneys, or to all new attorneys, encouraging them to join volunteer attorney programs.
5. Help in training programs for the volunteers.
6. Help give recognition to pro bono service. Praise lawyers for taking a case and give recognition at seminars or other meetings of bankruptcy lawyers. In Minnesota, lawyers who meet 50 hours' service are recognized at the annual CLE Bankruptcy Institute and taken for dinner by the law firm that issued a challenge to other bankruptcy lawyers.
7. Become active in broader bar programs to help get legal assistance to the disadvantaged. As examples, Frank Gordon, Chief Judge of the Arizona Supreme Court received the ABA National Pro Bono Award for his efforts. Rosemary Barkett, Chief Judge of the Florida Supreme Court, now a member of the Eleventh Circuit court of Appeals, and Judith Billings, Justice of the Utah Court of Appeals, have been members of the ABA Standing Committee on Pro Bono and Public Service (formerly SCLPSR).

The ABA Center for Pro Bono has prepared a "Pro Bono Involvement of the Judiciary" InfoPak that gathers sample recruiting letters sent by judges, articles discussing ethics issues, and other materials useful to judges interested in doing more.

## **VIII. Conclusion**

There is a vast unmet need for legal services and bankruptcy attorneys have the requisite knowledge and skills to meet much of that need. It is part of our professional heritage and professional ethics to help. For bankruptcy judges, while there are restrictions on what they may do, these restrictions need not prevent significant service. Judges should have a special interest in the topic because their responsibilities consist not only of the deciding of cases but of the administration of the system of justice. Bankruptcy judges should take leadership roles with the purpose of assuring justice.

## Tab 3

## Bankruptcy Pro Bono Programs: The Judge's Role

Nancy C. Dreher\*

*"If ever a time shall come when . . . only the rich . . . can enjoy the law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."*<sup>1</sup>

—E. Brownell

Judicial involvement in addressing the problem of the unrepresented poor is long standing.<sup>2</sup> It is only in recent years, in fact, that we have deviated from the former practice of direct court appointment of counsel for the indigent to more formalized pro bono programs designed to deliver legal assistance to those who need it and cannot afford it. The following is my perspective on the duties of bankruptcy judges in connection with such programs, the ethical issues raised by participation in such programs, and the reasons why judges should actively encourage and support specialized pro bono programs for bankruptcy courts.

The existence of a democratic society is intrinsically measured by the presence or absence of a fair and effective system of justice for all.<sup>3</sup> The American legal system is in fact premised on the very idea that people are entitled to equality of rights.<sup>4</sup> Although access to the doors of justice is certainly integral to the likelihood of its realization, equality under the law and a meaningful opportunity to be heard often can only be attained with the assistance of counsel.<sup>5</sup>

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\* This article first appeared in *The Judges' Journal* (Summer, 1996), copyright by the American Bar Association, and is reprinted here with permission. Judge Dreher gratefully acknowledges the assistance of George H. Singer, her law clerk, without whose yeoman efforts this would not have gone to print. Mr. Singer had previously clerked for the Hon. William A. Hill, U.S. Bankruptcy Judge, District of North Dakota.

<sup>1</sup> John R. DeSteiguer, Note, *Mandatory Pro Bono: The Path to Equal Justice*, 16 PEPP. L. REV. 355 (1989) (quoting E. Brownell, *Legal Aid in the United States*, xiii (1951)).

<sup>2</sup> See, e.g., the following language from a lecture given in 1560:

The integrity of a Judge lies principally in keeping free of obligation to people, being not an acceptor of persons, knowing and seeing not the parties, but only the cause and the question at issue before him, without respect to persons. . . .

Yet I haste to add and will not deny, that in sitting judgment there are many things a Judge may and shall do to favour the poor man, the widow, the orphan, the afflicted, the innocent, the stranger and other unlucky wights. I mean by expediting justice, by guarding them against oppression and so on.

Jarilyn Dupont, *Judicial Participation in Pro Bono: How Far Can It Extend?*, 1987 ABA Materials, at 1 (quoting Maitre Jean DeCoras, *The Qualifications and Duties of a Good and Complete Judge*, at 76. Lecture presented to French Parliament of Toulouse in 1560 (Walter Johnson, K.C. trans. 1934)).

<sup>3</sup> "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." Brownell, *supra* note 1, at xviii (quoting the Honorable Judge Learned Hand. New York Legal Aid Society 75<sup>th</sup> Anniversary Dinner (1901)).

<sup>4</sup> Emblazoned above the steps to the entrance of the United States Supreme Court is the most visible icon of the American justice system: "Equal Justice Under the Law."

<sup>5</sup> With respect to criminal litigants, the United States Supreme Court has in fact long ago recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 63, 77 L. Ed. 158 (1932).



The right to be represented by counsel is as essential as any right in this country. Whether rich or poor "[a]s our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance."<sup>6</sup> However, access to legal services is invariably the result of the invisible hand of economics. While those who have the financial wherewithal to pay for a lawyer can consider the services of a lawyer to be an optional convenience, necessary only under limited and well-defined circumstances, those in our society who cannot afford to pay a lawyer paradoxically require legal services more frequently.<sup>7</sup> For those at or below the poverty line, the need for legal services is not in any real sense optional, but rather involves protecting the very basics of life: housing, attaining or protecting minimum levels of income, entitlements, child support and other matrimonial relief, health care, etc.<sup>8</sup> The inability of the indigent or "working poor" to obtain legal representation in the aforementioned areas as well as in bankruptcy-related matters can have devastating consequences not only for those directly affected, but also for society at large. For instance, an inability to obtain effective counsel in an eviction proceeding may well result in homelessness, which in turn will impose significant economic costs on society. Similarly, an inability to obtain representation prior to or during the course of a bankruptcy case can have a serious impact on the future of a debtor and her or his family.<sup>9</sup>

Numerous state and national studies have attempted to both quantitatively and qualitatively document the magnitude of the gap between unmet legal needs and legal resources dedicated to the resolution of problems that routinely beset the poor. The statistics clearly demonstrate that the ability of the poor to safeguard even the most basic rights has been seriously impaired by a lack of access to legal services. On a national level, it has been estimated that the poor have nearly twenty million legal problems, of which 93.2 percent goes unserved on an annual basis.<sup>10</sup> About 6.1 percent of the need

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<sup>6</sup> James L. Baillie, *Bankruptcy Lawyers, Bankruptcy Judges and Public Service*, 67TH ANNUAL MEETING OF THE NAT'L CONF. OF BANKR. JUDGES, Oct. 1993, at 7-27. See *Model Rules of Professional Conduct* Rule 6.1 cmt. ("The rights and responsibilities of individuals . . . in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.")

<sup>7</sup> Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York* (April 1990), reprinted in 19 HOFSTRA L. REV. 755, 771 (1991) [hereinafter "REPORT"]. Those who are indigent or otherwise in need of pro bono legal services are frequently the very people against whom the greatest injustices are wrought precisely because of their inability to be in a position to defend themselves. Richard C. Rueben, *The Case of a Lifetime*, 80 ABAJ 70, 73 (April 1994).

<sup>8</sup> REPORT, *supra* note 7, at 771.

<sup>9</sup> Although the United States Supreme Court has expressly held that the right to discharge in bankruptcy is neither a constitutional nor an inherent right, see *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991); *United States v. Kras*, 409 U.S. 434, 446, 93 S. Ct. 631, 638, 34 L. Ed. 2d 626 (1973), the importance of the ability of the "honest but unfortunate debtor" to obtain a financial "fresh start" cannot be seriously questioned. Even in cases in which a debtor does not have assets that can be reached by creditors, the availability of bankruptcy can assist in protecting valuable public benefits. See 11 U.S.C. § 525. See, e.g., *Hiser v. Blue Cross (In re St. Marv Hoss.)*, 89 B.R. 503, 504 (Bankr. E.D. Pa. 1988) (protecting debtor from denial of continued participation in Medicare Program due to a failure to pay prepetition obligations); *Bibbs v. Housing Authority*, 76 B.R. 257, 263 (D. Conn. 1983); *Housing Authority v. Szymeckii (In re Szymeckii)*, 87 B.R. 14, 15-16 (Bankr. W.D. Pa. 1988) (protecting debtors from eviction from low-income housing project based upon the discharge prepetition rental obligations).

<sup>10</sup> Sophia M. Deseran, Note, *The Pro Bono Debate and Suggestions for a Workable Program*, 38 CLEV. ST. L. REV. 617, 636 (1990) (citing Brooksley Born, *Serving the Poor*, 74 ABAJ 144 (March 1988)). It has been recently suggested that these numbers are even higher. Alexander D. Forger, president of the Legal Services Corporation, has estimated that in 1993 there were nearly 50 million clients eligible for funded legal assistance, of which only about 1.5 million received services at the 328 legal services programs nationwide. James Podgers, *Chasing the Ideal*, 80 ABAJ 56, 57 (August 1994). Statistics have suggested that approxi-

that is being served is responded to by Legal Services Corporation, whose funding base is being constantly eroded by congressional budgetary cuts and which is currently under severe attack by an unfriendly Congress; only 0.7 percent is being disposed of by the private bar through voluntary pro bono publico<sup>11</sup> programs.<sup>12</sup> These figures are staggering to say the least:

It is grotesque to have a system in which the law guarantees to the poor that their basic human needs will be met but which provides [them] no realistic means with which to enforce that right. The absence of legal assistance to the poor goes to the essence of some fundamental principles ingrained in our jurisprudence: simple equity, due process, equal protection, equal elementary access to the judicial system to redress wrongs. When the stakes of legal representation versus no representation at all to an indigent tenant run as high as the difference between having a home and being homeless, and when this harsh outcome could be easily averted by the mere courtroom presence of a lawyer on a tenant's behalf, the denial of counsel undercuts the basic ideals of justice that our society proclaims. The gap between the demand for legal services and their availability thus amounts to a gap in justice, a blot on our legal system and our whole society."<sup>13</sup>

Increasingly, individuals are turning toward self-representation as a method of gaining access to the courts. Statistics clearly reveal that pro se case filings in the civil arena have increased dramatically over the years. Despite the complexity of the substantive and procedural provisions of the Bankruptcy Code and Rules, which pose problems even for lawyers, pro se bankruptcy case filings have markedly increased as well.<sup>14</sup> The Administrative Office of the United States Courts has reported that though 7.2 percent of Chapter 7 case filings nationally were commenced pro se in 1987, the estimated number of pro se cases filed under Chapter 7 in 1992 rose to 12.7 percent.<sup>15</sup> If one considers the fact that there were 643,538 Chapter 7 bankruptcy petitions filed by debtors in 1992, nearly 84,000 Chapter 7 debtors who may have needed assistance proceeded without the benefit of counsel.<sup>16</sup> Although these figures obviously vary from district to district,<sup>17</sup> the plain import of the continued increase in pro se filings is that there are a number of

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mately 12–15 percent of the aggregate unmet need is in the area of bankruptcy and consumer law. Baillie, *supra* note 6, at 7-28.

<sup>11</sup> "For the public good; for the welfare of the whole." BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).

<sup>12</sup> DeSteiguer, Note, *supra* note 1, at 357 n. 17 (citing Brooksley Born, *Serving the Poor*, 74 ABAJ 144 (March 1988)). Various statewide studies assessing the legal needs of the poor suggest that approximately 15–20 percent of the legal needs of the poor are being provided. See Baillie, *supra* note 6 at 7-28. Although an exact quantification of the unmet need is not possible, the irrepressible truth to which there is near universal consensus is that millions of Americans who need legal assistance to safeguard basic human requirements are simply unable to obtain it.

<sup>13</sup> REPORT, *supra* note 7, at 775.

<sup>14</sup> The ability of individual debtors to proceed in bankruptcy pro se is, however, a privilege that under certain circumstances can and should be restricted. See, e.g. *Winslow v. Hunter (In re Winslow)*, 17 F.3d 314, 315–16 (10th Cir. 1994) (relying on its inherent power to enter orders "necessary or appropriate" in aid of jurisdiction to enjoin the debtors from filing future proceedings without the representation of a licensed attorney).

<sup>15</sup> Susan Block-Lieb, *A Comparison of Pro Bono Representation Programs for Consumer Debtors*, 2 AM. BANKR. INST. L. REV. 37, 41 (1994).

<sup>16</sup> *Id.* If all pro se "parties" were added to the abovementioned figures, whether debtor or non-debtor, the statistical data would be more certainly be higher and more reflective.

<sup>17</sup> *Id.* For example, over 50 percent of the Chapter 7 and 13 cases filed each year in the Los Angeles Division of the Central District of California are filed by pro se debtors. *Consumer Bankruptcy: A Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 5, 5 (1994). That translates into over 23,000 cases each year.

debtors who desperately need legal services but are simply unable to afford them.<sup>18</sup> Of even greater significance than the raw statistical data is the view by the judiciary that those who proceed pro se in bankruptcy generally “fare very poorly.”<sup>19</sup> Indeed, we all have seen the pro se litigant who, even with a most understanding and lenient judge, loses some right because of pro se representation.

It is an unassailable fact that there exists a need for vastly increased legal services to alleviate the plight of the indigent and to curb the growing social and economic costs to society that the absence of such legal services imposes. In an era when government funding and resources are stretched to their limits, new approaches directed at providing equal access to justice are imperative.<sup>20</sup> Pro bono activity is a relatively untapped resource with great potential to make inroads at closing the gap of inequality.

### The Bar’s Response

Nationwide, collective attempts by private bar associations in past years to encourage and expand voluntary pro bono legal services failed to garner much more than token participation by individual attorneys. It has been estimated that only about 13.8 percent of the attorneys licensed to practice law (or roughly 1 out of every 7) actually participate in formal pro bono publico programs.<sup>21</sup> It should therefore be painfully obvious that, from a broad perspective, “[t]he grand legend often expressed at bar association meetings that local lawyers will contribute efforts when needed is, unfortunately, a mere fantasy.”<sup>22</sup>

This stark dose of reality is not meant to denigrate the critical efforts and contributions of those in the legal profession who have recognized their public service responsibility as not only a matter of conscience, but also a duty that emanates from the special relationship members of the legal profession have to the justice system. Indeed, the contributions of pro bono lawyering have had a dramatic impact on the development of the law in this country and many of the civil liberties enjoyed by all today—*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966); and *Roe v. Wade*, 410 U.S. 113 (1973), were all shepherded through the justice system by volunteer lawyers. Similarly, the efforts of the American Bar Association, private bar associations, and a number of courts across the country to mobilize the legal profession into providing legal aid to those of limited means have been growing and are substantial.

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<sup>18</sup> Nonlawyer assisted services, or “para-professionals” such as typing pools and the like, are beginning to crop up across the country and assisting debtors with preparing bankruptcy petitions and schedules at a relatively low cost. In the Los Angeles Division of the Central District of California, for example, nonlawyers prepare approximately 6,500 bankruptcy cases each year. *Id.* at 6.

<sup>19</sup> *Id.* at 5 n.2 (comments of the Honorable Samuel L. Bufford, United States Bankruptcy Judge, Central District of California). See generally, *Faretta v. California*, 422 U.S. 806, 845, 95 S. Ct. 2525, 2546, 45 L. Ed. 2d 562 (1975) (Burger, C. J., dissenting) (opining that pro se representation will add “congestion in the courts and . . . the quality of justice will suffer.”) Pro se filings put an extraordinary strain on the administration of the bankruptcy system simply because they require special attention from trustees, clerks, and judges.

<sup>20</sup> [I]n a time when the need for legal services is growing and public funding for such services has not kept pace, lawyers’ ethical obligation to volunteer their time and skills pro bono publico is manifest.” *Mallard v. United States District Court*, 490 U.S. 296, 310, 109 S. Ct. 1814, 1823, 104 L. Ed. 2d 318 (1989).

<sup>21</sup> DeSteiguer, Note, *supra* note 2, at 360 n. 39 (citing ABA Consortium on Legal Services and the Public Through the Private Bar Involvement Project, Directory of Private Bar Involvement Programs 212, table no. 5 (1987)).

<sup>22</sup> Chesterfield H. Smith, *Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 731 (1981).

The American Bar Association's Standing Committee on Lawyers' Public Service Responsibility, for example, issued a pro bono challenge to 500 of the country's largest law firms. Firms accepting the challenge have agreed to devote either 3 or 5 percent of the firm's aggregate billable hours to the delivery of pro bono legal services. Backed by a letter of endorsement from retired Supreme Court Justice William J. Brennan, Jr., the law firm challenge has been accepted by more than one hundred large firms.<sup>23</sup>

Since its inception, the American Bar Association has viewed pro bono service as an integral component of a lawyer's obligation to both the profession and the society that created it. In an effort to further encourage individual lawyers to provide voluntary public service to the indigent, the ABA House of Delegates adopted an ethics rule at its Midyear Meeting in February 1993 that amended Rule 6.1 of the Model Rules of Professional Conduct.<sup>24</sup> The amendment provides that a lawyer "should aspire to render at least (50) hours of pro bono publico legal services per year" and specifically delineates the manner in which the lawyer's responsibility may be fulfilled.<sup>25</sup> Rule 6.1 as amended remains unenforceable by discipline and its charge is still expressed in *aspirational* language. However, the ABA has clearly signaled that the unavailability of lawyers to many who are in need of legal services is a chronic problem, and the ethical rules now unequivocally nod in the direction of every lawyer to remedy this problem and provide meaningful guidance for doing so. Although expressed in aspirational language and captioned as "voluntary," the Rule codifies standards that serve as a pointed reminder of the oath or pledge virtually every lawyer swore to in some form or another upon being admitted to the bar: "I will support provision of legal services for indigent persons; . . . I will work to make the legal system more accessible, responsive and just; . . . I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed . . ."

The Hawaii, Montana, and Minnesota Supreme Courts have been the first courts to substantially adopt the amendment to rule 6.1 so far, and Minnesota is considering it. At least five states (Arizona, Florida, Georgia, Kentucky, and Virginia) had adopted or been in the process of adopting a similar ethical rule prior to the promulgation of the ABA amendment.<sup>26</sup> Courts, both at the state and federal level, have also become involved in the attempt to procure attorney participation in pro bono service for indigent clients in need of representation in civil cases, either by adopting local rules or general orders.<sup>27</sup>

Across the country, state and local bar associations have developed programs aimed at increasing involvement in pro bono publico and providing the indigent with im-

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<sup>23</sup> See Rueben, *supra* note 7, at 72-73.

<sup>24</sup> The ABA House of Delegates adopted the amendment to Rule 6.1 by a vote of 228 to 215. The amendment passed despite opposition from the Standing Committee on Ethics and Professional Responsibility, which is the ABA entity charged with drafting and revising the Model Rules. Don J. DeBenedictis, *Fifty Hours Pro Bono*, 79 ABAJ 32, 32 (April 1993).

<sup>25</sup> A "substantial majority" of the public service hours should be devoted to those individuals "of limited means" or organizations dedicated to assisting them.

<sup>26</sup> See, e.g., *Amendments to Rules Regulating the Florida Bar*, 630 So.2d 501 (Fla. 1993).

<sup>27</sup> District Courts in at least eight federal jurisdictions—Eastern and Western Districts of Arkansas, District of Connecticut, Northern and Southern Division of Iowa, Northern and Central Districts of Illinois, and the San Antonio Division of the Western District of Texas—have enacted such rules that provide for mandatory appointment of free counsel to the indigent in civil cases. Deseran, Note, *supra* note 10, at 633. Some commentators have argued that federal courts have the inherent power to compel representation of indigents in civil matters. See e.g., David Moore, Note, *Invoking the Inherent Powers Doctrine to Compel Representation of Indigent Civil Litigants in Federal Court*, 10 REV. LITIG. 769 (1991); Howard A. Matalon, Note, *The Civil Litigant's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545 (1991). At the state level, proposals aimed at considering the mandatory pro bono option have been seriously considered by the chief justices of the state's highest court in at least three states: New York, North Dakota, and West Virginia.

proved access to the justice system. Specific practice sections of various local bars and associations have rallied to provide a mechanism by which those in need can gain access to specialized services. For example, a number of local bankruptcy committees and sections of state or local bar associations—including those in Texas, Arizona, New Jersey, and Los Angeles—have introduced programs designed to enable bankruptcy practitioners to use their special expertise to provide assistance to otherwise pro se debtors. Their programs have been drawn in part from activities in several of the districts that already had established specialized bankruptcy pro bono programs. These include: *South Carolina*, where the bar association has recruited bankruptcy practitioners willing to contribute at least 50 hours of pro bono services annually to consumer debtors in Chapter 7 cases who are indigent; *Minnesota*, where the clerk's office issues notices of the availability of pro bono legal assistance in adversary proceedings and where there are more lawyers ready to serve than there is work available; *Philadelphia*, which has a highly structured and enormously successful Chapter 7 program; and *Georgia*, which is in the process of developing a full-scale program modeled on the other three. These efforts are described more particularly in a publication produced by the Pro Bono Sub Committee of the Litigation Section's Bankruptcy and Insolvency Committee. [See accompanying sidebar article.]

These programs are not the only such in the country, but they are quite visible and successful. The programs have several things in common. First, they all are fairly new—almost all of them have been established within the past several years or so. Second, most were built from scratch with little, if any, information of what was being done elsewhere. Third, and most significantly for the purposes of this article, they *all* needed and still need strong judicial support and involvement, as well as cooperation from the clerks' offices to be successful.

### The Proper Role of the Judiciary

As bankruptcy judges, we are bound by the Code of Judicial Conduct for United States Judges. We are also subject to the strictures of 28 U.S.C. § 455.<sup>28</sup> The Code, however, provides precious little guidance regarding our ethical obligations in connection with support for pro bono activities. We must “uphold the integrity and independence of the judiciary” (Canon 1) and “avoid impropriety and the appearance of impropriety” in all of our activities (Canon 2). We must also perform the duties of our office “impartially and diligently” (Canon 3), file all required reports (Canon 6), and refrain from political activity (Canon 7).

The Code goes on to give some further limited guidance as to engagement in activities not purely judicial in nature. Canon 4 explicitly provides that “A judge may engage in activities to improve the law, the legal system and the administration of justice.” More specifically this canon states that:

A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

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<sup>28</sup> A judge must disqualify him- or herself in any proceeding in which his or her “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The laudable purpose of 28 U.S.C. § 455(a) is to avoid even the possible appearance of partiality. Consequently, the test is an objective one and does not require the judge to actually know of a disqualifying circumstance. *Liliebert v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60, 108 S. Ct. 2194, 2202–03, 100 L. Ed. 2d 855 (1988); *Scott v. United States*, 559 A.2d 745, 749 (D.C. Cir. 1989) (opining that “[n]either bias in fact nor actual impropriety is required to violate the Canon.”).

A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in planning fund-raising activities and may participate in their management and investment of funds, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Interpretations of this Canon, which are based on Canon 4 of the American Bar Association's Code of Judicial Conduct and have been widely adopted in the states, are few and far between—both at the federal and state levels. At the federal level, Advisory Opinion No. 12 does hold that, while a judge may sit on the board of directors of a fraternal or charitable organization, the judge may not serve on the board of a legal aid bureau whose representatives appear before the judge. Canon 5 further provides that a judge should regulate extra-judicial activities to minimize the risk of conflict with his or her judicial duties. This canon encourages avocational, civic, and charitable activities that will not interfere with the judge's ability to remain impartial. But there are virtually no advisory or other disciplinary decisions dealing with participation in activities that involve providing legal service to the poor.<sup>29</sup>

Because pro bono programs demonstrably and undeniably improve the administration of justice, bankruptcy judges may all become intensively involved in the development and nurturing of bankruptcy pro bono programs without running afoul of ethical strictures. Our efforts can include initiating the formation of such programs, recruiting, assisting in training, and any other means of assisting with the proper implementation of such a program. Except for limitations on direct fundraising, political activity, and the need for impartiality and the appearance of impartiality, our opportunity to do right by doing good is virtually unlimited.

"Doing good" is precisely what is happening at the state and national levels. Judges of prominence around the country, including members of the United States Supreme Court and many state supreme courts, have been urging more directly and consistently than ever that lawyers volunteer their services. Judges are regularly seen giving speeches on this subject and writing articles about it for publication. In the bankruptcy area, the Georgia program was strongly supported by Bankruptcy Judges Kahn and Bihary, in particular; Bankruptcy Judge Kressel and I especially encouraged the formation of our programs in Minnesota, and we were enthusiastically supported by our two fellow Minnesota bankruptcy judges; in Philadelphia, Bankruptcy Judges Scholl and Fox have been heavily involved in working with the Bankruptcy Assistance Project. The New Jersey program was spearheaded by Bankruptcy Judge Wizmur.

Although Canon 4 is permissive, I believe that the responsibility to ensure that access to the courts and equality under the law is provided to all segments of society is more akin to an obligation. It *cannot* rest solely in the hands of practicing attorneys; by its very nature, it *must* also rest in the hands of judges who serve as prime movers or catalysts in the drive for designing and implementing programs that will bring about change. Lawyers will serve the poor, if asked, but they will be reluctant to do so until they are assured that the judiciary is supportive and enthusiastic. As judicial officers, we are given the often arduous task of enforcing the laws of the land and resolving disputes between parties—and that is part of our job—but we also are surely charged with safeguarding the

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<sup>29</sup> Jarilyn Dupont, *Judicial Participation in Pro Bono: How Far Can It Extend?*, 1987 ABA Materials, at 2.

Constitution and protecting individual rights.<sup>30</sup> We occupy an exalted and unique status in society. In the face of an enormous need for legal services and the dire consequences of their denial, we are *the most visible symbols of justice* in our society. I would hope that none of us relegates ourselves to merely sitting on the sidelines as spectators; rather, we need to assume leadership roles in the pro bono effort in order to assure that the “justice for all” concept is not devoid of reality for an ever-growing segment of our society.

Because a truly independent judiciary is an indispensable condition of justice in our society, there are restrictions placed on the activities of judges that are designed to preserve public confidence in the integrity of the judge and the judicial process. These have been discussed. However, these restrictions should be construed as limited and should not prevent significant service contributions. Although there are necessarily restrictions on what judges may do, we can make invaluable contributions and still preserve the appropriate distance between ourselves and the practicing bar.

The activities that bankruptcy judges can perform to advance the principles of pro bono service are virtually limitless. Here are some examples:

- Build a consensus among other judges that a need for action exists and that the problem can only be addressed by coordinating functions and resources with the active support and involvement of the judiciary. Persuade other judges that as members of the profession they indeed have a public service *obligation* that is an obligation of the profession, and it cannot be equated with acts of charity any more than jury duty can be so regarded. By analogy, that obligation can be gauged by the guidelines set forth in the amendment to Rule 6.1. Encourage the involvement of other bankruptcy judges and federal judges.
- Assess what has been done in other judicial districts. The South Carolina, Minnesota, Philadelphia, Georgia, and New Jersey programs are successful examples of what can be done. Expand on ideas for developing program variations that comport with available resources.
- Form a working committee comprised of leaders from the local bar associations and others who specialize in bankruptcy to study and deal with the issue of pro se debtors and underrepresented persons of limited means. Encourage those on the committee to implement a pro bono program that enlists the efforts and resources of current pro bono programs in the community as well as solicits efforts from members of the bar. Establish any necessary local rules or general orders.
- Present specific calls to service, and general calls for volunteers. Lecture at bar association meetings and law schools.
- Provide pro bono cases with calendar preferences. Enlist the critical support of the staff and the clerk's office.
- Participate in programs geared toward training volunteer lawyers.
- Give judicial recognition and special thanks to those accepting pro bono service assignments. “No applause sounds louder and sweeter . . . than judicial applause.”<sup>31</sup> Implement and participate in awards programs designed to recognize pro bono service.
- Try to tap into available court funds, if necessary, to compensate for costs incurred by lawyers who serve.

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<sup>30</sup> *In re Amendments to Rules Regulating the Florida Bar*, 598 So.2d 41, 42–43 (Fla. 1992)(citing *The Federalist* No. 78 (Alexander Hamilton)).

<sup>31</sup> Talbot D'Alemberte, *Lawyers Have a Duty to Serve the Poor and Judges Have a Duty to See That They Do*, 31 *Judges' J.* Summer 1992 (No. 3), at 18. Distributed as a reprint at the 67th Annual Meeting of the National Conference of Bankr. Judges, Oct. 1993, at 7-7.

As I write this article, I am reminded of the oath of office I took when I was sworn in as a bankruptcy judge:

I . . . do solemnly swear [or affirm] that I will administer *justice* without respect to persons, and *do equal right to the poor and to the rich*, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [judge] under the Constitution and laws of the United States. So help me God. (Emphasis added.)<sup>32</sup>

With the effort of each bankruptcy judge who can and will help, I believe that we can and we will move much closer to providing equal justice to the poor.

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<sup>32</sup> 28 U.S.C. § 453.



## Tab 4

## **That Thing Called Pro Bono**

Judge Judith Billings\*

Utah Court of Appeals

Chair, ABA Standing Committee on Lawyers' Public Service Responsibility

Member, NJC Board of Trustees

As judges, we have a special opportunity—and obligation—to use our positions to provide access to justice. With dramatic cuts in federal funding for legal services programs and the imposition of severe restrictions on what those programs can do, there has never been more of a need for judges to step forward and provide leadership on this critical issue.

In 1996, Congress reduced federal funding for legal services from \$400 million to \$278 million—when adjusted for inflation, the lowest amount of federal funding since 1977. The programmatic budget cuts that followed have resulted in the closing of more than 100 main, branch or outreach legal services program offices. The number of legal services lawyers and paralegals available to provide legal representation and assistance was reduced by approximately 15 percent. In addition, new restrictions on Legal Services Corporation grantees forbid them from assisting some categories of low-income individuals that they formerly represented, barred them from giving legal assistance to poor families regarding several common legal issues, and prohibited them from giving eligible clients access to certain legal procedures.

As leaders in our community and the legal system, we can encourage lawyers to provide pro bono legal assistance to the poor. We must use our influence to help fill the increasing gaps in the legal service delivery system.

There are a number of specific ways in which judges can promote and expand pro bono legal services to the poor. We can recruit lawyers to participate in organized pro bono efforts and assist in their retention on the panels of pro bono programs. We can implement procedures in our courtrooms to facilitate pro bono representation. We can speak to other members of the judiciary about the role of judges in promoting pro bono work. I have listed a few examples of what our colleagues are doing in the hope that you will use one or two of the ideas in your jurisdiction:

### **Recruitment and Retention of Volunteers**

- Send recruitment letters to attorneys not involved with an organized pro bono program and periodic thank you letters to attorneys who have been serving on a program's panel of volunteers.
- Write letters, editorials and opinion pieces for newspapers, magazines and bar publications on the need for volunteer attorneys.
- Review the ethical rules concerning lawyer pro bono activity for your state and consider appropriate changes to strengthen the message about pro bono public service and to develop new strategies for encouraging pro bono service.

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- Participate in continuing legal education seminars for pro bono attorneys.
- Sponsor and support judicial resolutions calling on lawyers to engage in pro bono service.
- Include references to pro bono in speeches to bar associations and new bar admittees.
- Lend your names and presence to pro bono recognition ceremonies.
- Write invitation letters, sponsor and attend pro bono attorney recruitment events of bar associations, legal services offices and pro bono programs.
- Serve as a member of the advisory board of a pro bono program.

### **Procedural Incentives to Encourage Pro Bono Service**

- Have the court files marked indicating when an attorney is serving on a pro bono basis through an organized program, and, while avoiding the appearance of partiality, express the court's appreciation to attorneys for appearing pro bono.
- Provide scheduling flexibility for pro bono attorneys, for example, scheduling the attorney's pro bono case close to the time when the attorney is appearing in another matter or scheduling special pro bono matters on the default calendar.
- Provide calendar preference on the daily list to attorneys with pro bono cases.
- In coordination with local pro bono programs, develop systems for providing pro se litigants with assistance in preparing pleadings, information about the law and the court system, and directions about where and how to apply for a pro bono attorney.

### **Judicial Training and Education**

- Include the role of judges in promoting pro bono work in judicial training sessions.
- Ensure that judges have information about the availability of legal services, including existing pro bono programs in their area.

## Tab 5

## **Model Rules of Professional Conduct**

### **Rule 6.1**

#### **Voluntary Pro Bono Publico Service**

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and education organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services though:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

#### **Comment**

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation

of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer

may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

**Tab 6**



## **Resolution**

### **Business Bankruptcy Committee, ABA Section of Business Law**

WHEREAS, access to justice in the United States depends on the availability of high quality legal services and such services should be available to all individuals, regardless of their ability to pay; and

WHEREAS, the need for high quality legal service for those who cannot afford to pay for those services is a serious problem in every judicial district in the country; and

WHEREAS, pro se representation in bankruptcy cases and provision of inadequate services through petition preparers is on the increase throughout the United States, and that increase is dramatic in many districts, potentially resulting in injustice for the parties who are proceeding pro se or with the assistance of petition preparers, and placing a burden on the administration of the bankruptcy courts; and

WHEREAS, the Code of Professional Conduct or the Rules of Professional Responsibility in place in every state recognize the professional obligation of every lawyer to provide legal services without regard to the ability of the client to pay for those services; and

WHEREAS, through changes to the Rules of Professional Responsibility, resolutions of bar associations, the Law Firm Pro Bono Challenge, and in many other ways, lawyers are increasingly being exhorted to provide those services through organized pro bono programs; and

WHEREAS, bankruptcy lawyers have a special responsibility for the quality of justice and for administration of the bankruptcy courts in which they work; and

WHEREAS, increasingly bankruptcy courts, bankruptcy bar associations, and groups of bankruptcy lawyers have worked to develop programs to facilitate the provision of pro bono services in the bankruptcy courts in the districts in which they practice;

NOW, THEREFORE, the Business Bankruptcy Committee of the Section of Business Law of the American Bar Association hereby resolves:

1. Members of the Business Bankruptcy Committee and all bankruptcy lawyers are encouraged to provide pro bono assistance to persons who need pro bono legal services of all types, and particularly to clients who need pro bono services regarding bankruptcy law and procedure.

2. Members of the Business Bankruptcy Committee and all bankruptcy lawyers are encouraged to assist in the development and strengthening of local bankruptcy pro bono programs through which bankruptcy pro bono services can be provided by bankruptcy lawyers.

3. Bankruptcy judges who are members of the Business Bankruptcy Committee, and all bankruptcy judges, are encouraged to assist in the development and expansion of bankruptcy pro bono programs by such methods as requesting the assistance of lawyers in their district, assisting in the recognition of lawyers who provide such services and other ways consistent with the Canons of Judicial Conduct.

**Tab 7**

## How to Obtain a Blanket Waiver

TO: Creditor Bankruptcy Attorneys Interested in Pro Bono Service  
FROM: Pro Bono Subcommittee, Business Bankruptcy Committee  
Section of Business Law, American Bar Association  
DATED: April 10, 1998

Attorneys who regularly represent creditors in bankruptcy cases have sometimes been reluctant to undertake pro bono representation of debtors for fear that that will lead them into an actual or perceived conflict of interest with their creditor clients or other creditors whom they may wish to represent in the future. This is a problem that has been addressed in Philadelphia in its Consumer Bankruptcy Assistance Project, Inc. also known as the "Fresh Start Clinic." In that situation through a well-organized campaign, essentially all of the city's financial institutions and utilities agreed to a blanket waiver of conflict for attorney representation in consumer cases. The purpose of this memorandum is to describe the procedure which was used in Philadelphia and which could be used elsewhere.

A central assumption to this undertaking is that in a number of consumer cases *there are no assets and therefore the creditors do not have a real interest in the case.* In addition, it is often true that creditors look favorably upon their law firms and lawyers providing pro bono public service and are either eager to support the provision of public service or are at least willing to go along given the fact that the other financial institutions and utilities in their community have already done so. Another assumption is that the possibility of a conflict can be used by some attorneys as an excuse to avoid taking on pro bono representation and that the waiver eliminates that excuse.

Attached is a "General Waiver of Conflict of Attorney Representation" which was prepared for the Philadelphia program. The form provides for representation providing the amount due the financial institution or utility is equal to or less than \$10,000. The general waiver is given to permit attorneys to undertake representation under those circumstances and a form has been prepared to give notification to the creditor and provide a record of the application of the waiver to a particular case.

The first step is to identify a leading financial institution and an attorney who has a strong personal relationship with a decision-maker at that financial institution. The attorney points out that the creditor won't really suffer losses by reason of the waiver because the prospective debtors have no assets (the waiver is only good in no-asset cases) and because the waiver is only used in cases in which the creditor's claim is less than \$10,000. The organization undertaking this effort to obtain the blanket waiver seeks the best possible match-up between a committed attorney and a creditor representative.

Once a waiver is obtained from a leading institution, similar efforts are made with other financial institutions and utilities and the same approach is used. In addition, it is pointed out that another institution in that community has already agreed. It is then important to have a well-organized campaign to identify the other financial institutions and utilities whose assistance will be needed and from whom waivers should be obtained.

It is also possible that once general waivers are obtained, the financial institutions and the utilities are entitled to some good publicity and a press release may be appropriate. Attached is the form used in Philadelphia. If you have further questions, call David Sykes, 215-979-1500.

### General Waiver of Conflict of Attorney Representation

WHEREAS, the Consumer Bankruptcy Assistance Project, Inc. trading as the "Fresh Start Clinic" is incorporated under the laws of the Commonwealth of Pennsylvania, as a non-profit corporation (the "Project").

WHEREAS, the Project has been established to obtain greater resources from attorneys, businesses, professional organizations, and educational institutions for the purpose of increasing the availability of critically-needed legal services in the area of bankruptcy law for those individuals who cannot afford to pay for such services.

WHEREAS, attorneys representing clients on behalf of the Project may have in the past, present, or in the future represent \_\_\_\_\_ Bank in matters unrelated to the services to be provided to clients on behalf of the Project.

WHEREAS, such circumstances may result in a conflict of interest under the Pennsylvania Rules of Professional Conduct requiring the consent of \_\_\_\_\_ Bank before an attorney (the "Attorney") may undertake representation of the client (the "Client") on behalf of the Project.

WHEREAS, \_\_\_\_\_ Bank and the Project seek to resolve the matter of conflict of attorney representation before such circumstances arise.

NOW, THEREFORE, the Project and \_\_\_\_\_ Bank hereby consent and agree as follows:

1. \_\_\_\_\_ Bank agrees to waive any conflict resulting from the representation by an attorney of the Client on behalf of the Project provided that the indebtedness to \_\_\_\_\_ Bank by the Client is less than or equal to \$10,000.

2. Under circumstances in which the Attorney undertaking representation of the Client deems that an actual or apparent conflict of interest may exist that requires the consent of \_\_\_\_\_ Bank, the consent of \_\_\_\_\_ Bank shall be deemed given hereby upon the sending to \_\_\_\_\_ Bank of a notice in substantially the form attached hereto as Exhibit "A", for circumstances meeting the debt limitations set forth in paragraph 1.

The undersigned hereby consent and agree to the foregoing.

### CONSUMER BANKRUPTCY ASSISTANCE PROJECT

By: \_\_\_\_\_  
President

By: \_\_\_\_\_  
Secretary/Treasurer

\_\_\_\_\_ BANK

By: \_\_\_\_\_  
ESQUIRE  
General Counsel

**Tab 8**

# AMERICAN COLLEGE OF BANKRUPTCY GRANT REQUEST

DATE: \_\_\_\_\_

NAME OF ORGANIZATION: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

Street /P. O. Box

City

State

Zip

Telephone

Fax

DATE ORGANIZED: \_\_\_\_\_

TAX STATUS: \_\_\_\_\_  
(ATTACH TAX-EXEMPT LETTER)

DESCRIBE THE GEOGRAPHICAL AREAS AND THE CLIENTELE SERVED BY YOUR ORGANIZATION. \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DESCRIBE THE PROJECT (PANELS, CLINICS, INDIVIDUAL REPRESENTATIONS, ETC.) BY WHICH YOUR ORGANIZATION SERVES CLIENTS WITH NEED FOR BANKRUPTCY OR DEBTOR/CREDITOR LEGAL SERVICES: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DESCRIPTION OF EDUCATIONAL PROGRAM (Describe the purpose of the educational program, use of the grant, including the subjects to be taught, the instruction tools and methods, the total cost of the educational program): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AMOUNT REQUESTED: \_\_\_\_\_

ORGANIZATION BUDGET  
(CURRENT YEAR): \_\_\_\_\_

BANKRUPTCY PRO BONO BUDGET  
(IF SEPARATE): \_\_\_\_\_

**PRINCIPAL FUNDING SOURCE FOR BANKRUPTCY PROJECT:** \_\_\_\_\_  
\_\_\_\_\_

**CONTACT PERSON FOR ORGANIZATION:** \_\_\_\_\_

**ADDRESS (if different than organization's address):** \_\_\_\_\_

\_\_\_\_\_  
Street /P. O. Box

\_\_\_\_\_  
City State Zip

\_\_\_\_\_  
Telephone Fax

PHI\400886.4





## **ABA Center for Pro Bono**

The ABA Center for Pro Bono, a project of the ABA's Standing Committee on Pro Bono and Public Service, is a national resource and support center that provides technical assistance and planning advice to pro bono advocates as they endeavor to fulfill the promise of equal access to justice for those who cannot afford paid counsel.

The Center provides a wide range of services to bar associations, legal services offices, pro bono programs, bar leaders, law firms, corporate counsel, judges, government attorneys, law schools and others regarding the development of pro bono policies, programs and projects. The Center encourages and assists these groups to develop, expand and improve their efforts in the delivery of pro bono legal services to the poor.

The Center's technical assistance efforts are designed to activate or expand pro bono delivery by local programs administered through bar associations, legal services offices or independent entities. Consultations, meetings and publications are designed to support statewide pro bono efforts. Assistance is available to programs that provide statewide support to local pro bono projects, as well as to statewide direct delivery programs.

Teams of experienced volunteer peer consultants provide on-site technical assistance and planning advice to the Center for Pro Bono's many constituent groups regarding the activation or expansion of pro bono initiatives. Peer consultants provide technical assistance on the topics of program operations (e.g., recruitment, training, intake, use of technology, referral of cases), as well as planning efforts (e.g., priority-setting, collaboration with other community providers and identifying new resources for meeting legal needs).

The Center has prepared for distribution a variety of publications regarding pro bono issues. Info packs on over 25 subjects are maintained, updated and distributed regularly; a directory that lists the over-900 state, local and specialty pro bono programs across the country in a state-by-state format is published bi-annually; a web site containing information about pro bono developments and materials that can be downloaded is maintained; and manuals geared toward targeted audiences (bar leaders, government attorneys, mid-sized law firms, etc.) are written and distributed widely. The Center also maintains the only nationwide clearinghouse containing information on a multitude of subjects impacting the pro bono community.

Gregory A. McConnell  
Director  
ABA Center for Pro Bono  
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Chicago, IL 60611  
312/988-5775  
312/988-5483 fax  
mcconneg@staff.abanet.org.

The Standards for Programs Providing Civil Pro Bono Legal Services is no longer available in print to purchase. However, you can obtain a free copy at

<http://www.abanet.org/legalservices/pbpages/pbstandards.html>