RECOMMENDATION

RESOLVED. That the American Bar Association encourages state and territorial bar associations and other attorney licensing entities to adopt practice rules that establish guidelines to allow pro bono legal service by qualified, retired or otherwise inactive lawyers, under the auspices of qualified legal services or other non-profit programs.
REPORT

Background

In a 1994 national survey, the American Bar Association determined that 80 percent of the civil legal needs of low income persons were not being met. Since then, the situation has not improved, despite the significant efforts of the Legal Services Corporation and other publicly funded programs such as IOLTA and Older Americans Act legal assistance, as well as the courts, private attorneys, and bar associations. Indeed, the situation has deteriorated. In October 2005, the Legal Services Corporation issued Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, culminating a year-long study that considered both federally and non-federally funded legal services programs and concluded that the level of unmet legal need among low income persons now exceeds 80 percent.1 Each year, according to the report, tens of thousands of low-income individuals and families are denied access to justice. Many such individuals fail to contact legal services because they are unaware they have a legal problem, or do not know that the program can help them. But even those who recognize that there is a legal problem and know who to contact are not ensured assistance. The report notes that 50 percent of those who contact LSC funded programs and are eligible for services are turned away because the program lacks the resources to help them.

In many jurisdictions, the justice gap is being filled in part by volunteer lawyers. But only in part – in its August 2005 report, Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers, the Standing Committee on Pro Bono and Public Service concludes that while the legal community has a profound sense of responsibility for engaging in public service, there remains a significant need to increase the amount of pro bono legal services that lawyers provide for the poor.2

Most lawyers who perform pro bono services are still in the active practice of law. Some, however, are retired or otherwise inactive. These retired or inactive lawyers can encounter issues that are quite different from those faced by lawyers who handle pro bono cases as part of their day-to-day practices. In traditional pro bono representation, cases are screened by the local bar association or legal services program and referred to a volunteer lawyer. That volunteer usually has her own office and staff, carries professional liability insurance, and handles the matter from beginning to end. This traditional system is not well-suited to lawyers who do not maintain an office or administrative support, who no longer carry professional liability insurance, who may be unfamiliar with the issues about which low and moderate income individuals most commonly seek advice, and who may be living in a state in which they are not licensed. The traditional pro bono system also is not well-suited to lawyers who are no long in the active practice of law.

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Pro Bono Emeritus, or Pro Bono Practice Rules

While issues of administrative support, training, and insurance must be considered in any effort to encourage volunteering by retired or inactive lawyers, the focus of this Report is on licensure rules, and how those rules can encourage pro bono service while protecting both the public and the profession.

Many lawyers who retire or otherwise leave the active practice of law convert their bar membership to inactive status to avoid the expense of mandatory bar dues and continuing legal education programs. Some, particularly retirees, may have moved to states in which they are not licensed. To address the hurdles that licensure rules may pose when retired or otherwise inactive lawyers seek to participate in pro bono service, states began in the mid-1980s to adopt so-called Pro Bono Emeritus or Pro Bono Practice Rules, also known as Emeritus, Active Emeritus, Inactive Pro Bono, Pro Bono Practice or Pro Bono Publicus rules.

Pro Bono Practice Rules differ from pro hac vice rules permitting lawyers to enter their appearance for a particular purpose in a jurisdiction in which they are not licensed. They are not the same as rules that allow admission on motion by lawyers licensed in another jurisdiction. They are different from rules allowing lawyers to work for legal services or other not-for-profit programs for a limited time (typically two years) pending bar admission. Moreover, they are different from rules—also called emeritus rules in some states, which waive dues, continuing legal education, or other professional requirements unconditionally for retired lawyers (see, e.g., Nebraska, New York, or Wisconsin rules).

These rules were originally aimed at retirees, and designed to allow them to continue to practice law under certain conditions. In recent years, the target audience has broadened beyond retired lawyers so as to attract otherwise qualified and experienced younger lawyers who are not in active practice but who are interested in public service. The trend is to encourage pro bono service while also establishing guidelines to protect both the public and the profession by requiring that (1) the volunteer activity be performed under the auspices of a legitimate legal services or other non-profit organization; (2) the volunteer be a member of the bar in good standing; and (3) the volunteer work be supervised by a lawyer licensed in the jurisdiction. Many rules require that some form of certification, or acknowledgment of the volunteer’s status, be filed with the court along with proof of malpractice insurance.

Some rules include a length of practice requirement (usually ten to fifteen years, frequently with five of those in the jurisdiction of current residence). Only Georgia still restricts application to lawyers of a certain age (70). Delaware and Oregon apply somewhat different standards to younger lawyers who are inactive and those who are retired; California, Delaware, Georgia, Hawaii, Maine, Massachusetts, Montana, Oregon, Utah, Virginia, and West Virginia apply the rule only to lawyers licensed in that state; Arizona, the District of Columbia, Florida, Idaho, South Carolina and Texas allow licensed out-of-state lawyers to volunteer under certain conditions. Pro Bono Practice Rules include some or all of the following provisions:

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3 This report will use the term Pro Bono Practice Rules.
Selected Practice Rule Provisions for Volunteers

- Is admitted to practice before the highest court of that or another state.
- Has been in active practice for minimum number of years.
- Has not been disciplined for professional misconduct within certain time.
- Has not failed bar examination of state in question three or more times.
- Agrees to abide by Rules of Professional Conduct and submit to jurisdiction of the court for disciplinary purposes.
- Will not ask for or receive compensation for legal services to be rendered.
- Will volunteer for a qualified not-for-profit legal services organization.
- May seek waiver or reduction of bar dues and/or CLE requirements.
- May give legal advice in consultation, where appropriate, with supervising attorney.
- May appear in court or administrative proceeding.
- May accept reimbursement from organization for actual expenses incurred.

Selected Practice Rule Provisions for Sponsoring Programs

- Must be a qualified not-for-profit legal services program.
- Must extend malpractice insurance coverage to volunteer.
- Will not accept a fee for services rendered by volunteer.
- Must supervise volunteer.
- Supervisor is member of bar in good standing and program employee or volunteer.
- Supervisor co-signs pleadings and assumes responsibility for volunteer’s legal work.
- May collect court-awarded attorney fees for representation by volunteer.

The chart below summarizes existing rules:

State Bar Pro Bono Practice Rules as of February 1, 2006

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<tr>
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</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>No</td>
<td>10 of last 15</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Inactive: No Emeritus: Yes</td>
</tr>
<tr>
<td>California</td>
<td>No</td>
<td>10 3 of last 8 in Calif.</td>
<td>Yes</td>
<td>Yes</td>
<td>No, but CLE fee waived</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Delaware</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Reduced</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>N/A</td>
<td>Yes</td>
<td>Yes, if not DC bar member</td>
</tr>
<tr>
<td>Florida</td>
<td>No</td>
<td>10 of last 15</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Georgia</td>
<td>70</td>
<td>25</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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</table>

4 Not all existing rules include all provisions.
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<tbody>
<tr>
<td>Hawaii Supreme Court Rule 20 <a href="http://www.courts.state.hi.us">www.courts.state.hi.us</a></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Idaho Bar Rule 223 <a href="http://www2.state.id.us/ish">www2.state.id.us/ish</a></td>
<td>No</td>
<td>10 of last 15</td>
<td>No</td>
<td>Reduced</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Maine Bar Rule 6(d) <a href="http://www.courts.state.me.us/rules">www.courts.state.me.us/rules</a></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Reduced</td>
<td>Reduced</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Massachusetts Sup. Jud. Ct Rule 4:02(8) <a href="http://www.mass.gov/courts">www.mass.gov/courts</a></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Montana Bar Rule Art. 1, §3 <a href="http://www.montanabar.org">www.montanabar.org</a></td>
<td>No</td>
<td>10 of last 15</td>
<td>Yes</td>
<td>Yes</td>
<td>No, but fee waived</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Oregon Bar Rule 6.1 <a href="http://www.osbar.org">www.osbar.org</a></td>
<td>No</td>
<td>Pro Bono: No Emeritus: 40</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Pro Bono:Yes Emeritus: No</td>
</tr>
<tr>
<td>South Carolina Supreme Court Rule 415 <a href="http://www.judicial.state.sc.us">www.judicial.state.sc.us</a></td>
<td>No</td>
<td>10 of last 15</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Texas Bar Rule Article XIII <a href="http://www.texasbar.com">www.texasbar.com</a></td>
<td>No</td>
<td>5 of last 10</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Utah Code Ch 16 Bar Rules <a href="http://www.utcourts.gov/resources">www.utcourts.gov/resources</a></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Reduced</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Virginia Supreme Court Rule 6:4-3 <a href="http://www.vsb.org">www.vsb.org</a></td>
<td>No</td>
<td>10 of last 15</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Washington Court Rule 8(e) <a href="http://www.wsba.org">www.wsba.org</a></td>
<td>No</td>
<td>5 of last 10; 10 of 15 if out-of-state</td>
<td>No</td>
<td>Reduced</td>
<td>Yes, but required training</td>
<td>Yes; one year renewable</td>
<td>No</td>
</tr>
<tr>
<td>West Virginia Bar Rule Article II §11 <a href="http://www.state.wv.us/wvsc">www.state.wv.us/wvsc</a></td>
<td>No</td>
<td>10</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

In the states listed above, retired or otherwise inactive lawyers volunteer in legal services programs funded by LSC, IOLTA, or the Older Americans Act, among others. They come from the government, from private firms large and small, and from corporate counsel offices. Depending on the state, the program, and their personal interests, these volunteers are interviewing prospective clients, providing brief services or advice, and representing clients in administrative and court proceedings. They tackle housing, government benefits, family, health, domestic relations, and consumer law issues. Some volunteer in long-term care ombudsman programs, visiting nursing home residents, investigating complaints, and helping to resolve disputes. Others take calls on legal hotlines, work with self-help programs, and participate in courthouse resource centers or court-annexed dispute resolution programs. Recently retired or inactive volunteers have been advising seniors about Medicare and other health insurance options.

Some retired or otherwise inactive volunteers work in the international arena, or engage in legislative advocacy. Others represent the legal services program in which they volunteer on
community or professional boards or bar committees, or assist the program and other non-profits with fundraising, business matters, or recruitment. Depending on their professional experience, volunteers are serving as trial advocacy or appellate practice mentors to less experienced staff of the programs in which they volunteer. Others become Court Appointed Special Advocates, investigating and reporting to the court in child abuse and neglect cases. Of course, there are many as yet unexplored public service avenues down which these volunteer lawyers might stride.

**Existing ABA Policy and Effect of the Proposed Recommendation**

The American Bar Association’s long history and strong commitment to volunteer service and to the expansion of access to justice for all is unquestioned. In 1975, The Association declared that lawyers engaged in the practice of law have a basic professional responsibility to provide pro bono or reduced fee services on such issues as poverty and civil rights law, and we have continued to demonstrate this commitment. We are on record recognizing and supporting the professional obligation of all attorneys to devote a reasonable amount of time, but in no event less that 50 hours per year, to pro bono and other public service activities; urging law firms and corporate employers to promote and support the involvement of partners and associates in pro bono and public service activities; urging law schools to adopt a policy under which they would request law firms recruiting on campus to provide a written statement of their policies, if any, concerning the involvement of their attorneys in such activities. We have resolved to make the expansion of pro bono legal services by practicing lawyers a critical priority; to develop effective and innovative strategies to promote pro bono service and to allocate sufficient bar resources to ensure that these strategies can be effectively implemented; and to coordinate development of the strategies with legal services providers and pro bono programs.

The Association’s commitment to expanding access to justice for low income persons is evidenced by the adoption of Model Rule of Professional Responsibility 6.1 and unwavering support for the Division for Legal Services, the Standing Committee on Pro Bono and Public Service, and the Center for Pro Bono, and for individual entity support of pro bono projects. In addition, the Senior Lawyers Division and the Commission on Law and Aging have promoted retired lawyer pro bono through co-sponsorship of the SAVE program and through trainings and other events.

Two recent presidential initiatives underscore the importance of including retired and otherwise inactive lawyers in the dialogue about expanding pro bono efforts and closing the justice gap. In establishing his Commission on the Renaissance of Idealism in the Legal Profession, ABA President Michael S. Greco observed the need to “nourish the idealism of younger lawyers and veteran lawyers, giving them time and opportunity to engage in meaningful pro bono work and public service.” Further, ABA President-Elect Karen Mathis has initiated a Second Season of Service Initiative to support lawyers departing from practice while also encouraging them to participate in public service activities during their retirement.

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5 ABA Resolution, August 1976
6 ABA Resolution, August 1988
7 ABA Resolution, August 1995
When President-Elect Mathis announced her Second Season initiative to the House of Delegates at the 2005 Annual Meeting, she cited statistics suggesting that beginning in the near future as many as 40,000 lawyers per year could move from “active practice into active retirement.” If adopted by the House of Delegates, the Recommendation will encourage state bar associations and other licensing entities to adopt practice rules that remove some of the barriers to volunteering that currently exist for current and future retired lawyers as well as those who are younger but no longer in active practice, while protecting the public and the profession from unlicensed practitioners. This in turn will promote the concept of “active retirement” while expanding the pool of volunteers available to meet the legal needs of low and moderate income persons. Finally, in so doing, it will further the American Bar Association’s long tradition of commitment to justice and public service.

Respectfully submitted,

Larry S. McDevitt, Chair
Commission on Law and Aging
August, 2006
GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations

Submitting Entity:  Commission on Law and Aging.

Submitted By:  Larry McDevitt, Chair

1. **Summary of Recommendation(s).**

   Proposed recommendation offers encouragement and support for state licensure rules that facilitate volunteering by retired and otherwise inactive lawyers, while leaving the substance and implementation of such rules to the discretion of the licensing entity. Recommendation recognizes the value in efforts by retired and otherwise inactive lawyers who seek to volunteer by providing legal services to low income persons. In so doing, it furthers the Association’s long tradition of commitment to justice and public service.

2. **Approval by Submitting Entity.**

   Approved by Commission on Law and Aging on April 28, 2006.

   At the time of submission, the following entities had also agreed to cosponsor the recommendation: the Senior Lawyers Division, the Commission on the Renaissance of Idealism in the Legal Profession, and the Standing Committee on Pro Bono and Public Service.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   Lawyers engaged in the practice of law have basic professional responsibility to provide pro bono or reduced fee services on such issues as poverty and civil rights law. August, 1976.

   All attorneys should devote a reasonable amount of time, but in no event less that 50 hours per year, to pro bono and other public service activities; law firms and corporate employers are urged to promote and support the involvement of partners and associates in pro bono and public service activities; law schools are encouraged to adopt a policy under which they would request law firms recruiting on campus to provide a written statement of their policies, if any, concerning the involvement of their attorneys in such activities. August, 1988.
Expansion of pro bono legal services by practicing lawyers is a critical priority; bar associations are encouraged to develop effective and innovative strategies to promote pro bono service and to allocate sufficient resources to ensure that strategies can be effectively implemented, and to coordinate development of these strategies with legal services providers and pro bono programs. August, 1995.

This recommendation would build upon existing policies and further the Association’s commitment to justice and public service.

5. **What urgency exists which requires action at this meeting of the House?**

The population is aging and the pool of lawyers nearing or reaching retirement age is expanding. Significant numbers of other members of the profession are not engaged in the active practice of law. States and other jurisdictions have begun to encourage these retired or inactive lawyers to engage in volunteer work. If this recommendation is adopted by the House, the Association will be on record as a leader in these efforts.

6. **Status of Legislation.** (If applicable.)

Not applicable.

7. **Cost to the Association.** (Both direct and indirect costs.)

None.

8. **Disclosure of Interest.** (If applicable.)

None.

9. **Referrals.**

Standing Committee on Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Pro Bono and Public Service
Commission on Domestic Violence
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Mental and Physical Disability Law
Commission on Women in the Profession
Section of Administrative Law and Regulatory Practice
Section of Business Law
Section of Family Law
Health Law Section
Section of Individual Rights and Responsibilities
Section of Labor and Employment Law
Section of Real Property, Probate and Trust Law
Section of State and Local Government Law
Section of Taxation
Tort, Trial and Insurance Practice Section
Government and Public Sector Lawyers Division
Senior Lawyers Division
Young Lawyers Division
National Conference of Administrative Law Judiciary
Each State and Territorial Bar Member Representative in the House

10. **Contact Person.**

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    Fax: 202-662-8698
    Email: sabatinoc@staff.abanet.org

11. **Contact Person.** (Who will present the report to the House)

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    (828) 257-2767 FAX
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