RESOLVED, That the American Bar Association urges corporate counsel to facilitate the provision of pro bono legal services by outside counsel to persons of limited means in need of assistance with consumer credit, home mortgage and bankruptcy and other legal matters related thereto by causing the corporation to waive positional conflicts of interest, provided that such waivers are appropriate and consistent with applicable rules of professional conduct.
REPORT

I. Introduction

Law firm mergers, financial services industry consolidation and the current economic crisis have created a legal “perfect storm”, in which more and more people of limited means need legal assistance in mortgage and other financial matters and fewer private attorneys are able to provide pro bono representation due to client conflicts. This Recommendation recognizes how corporate counsel can impact the provision of pro bono legal services to the poor, and urges them to obtain waivers of certain positional conflicts in order to facilitate outside counsel’s representation of persons of limited means in financial and mortgage matters.

On an ongoing basis, 80 percent of the legal needs of the poor in this country go unmet. In this time of economic distress, this number is on the rise, for a variety of reasons. Over and above the endemic lack of access to legal services, the foreclosure crisis and record unemployment figures have pushed tens of thousands more middle class Americans into poverty as they try to save their homes and keep their heads above water. The current economy has increased greatly the number of poor and low-income persons in need of legal assistance especially with such matters as consumer credit, personal bankruptcy, and mortgage delinquency and foreclosure.

Many of the most qualified and skilled lawyers with financial services expertise are disqualified from assisting because they work at law firms which count banks, credit card companies and mortgage companies among their clients. Those law firms are rightly concerned that they represent entities whose positional interests may conflict with a pro bono client’s. As a consequence, the talented and enthusiastic volunteer attorneys employed at those firms are often unable to provide pro bono assistance to poor or low-income persons with matters that relate to financial services. Many of these firms otherwise have a strong pro bono culture and are eager to answer the call to service. This disqualification can be cured by an appropriate waiver of positional conflict.

This Recommendation recognizes that there are many times when positional conflict is not appropriately waived. If a position litigated in a pro bono action would create a new legal precedent adverse to an institutional client's practice, for example, a positional waiver may not be appropriate. But in the far more common setting where, for example, an attorney counsels a client on financial matters, helps a client negotiate out of financial difficulty, assists in a personal bankruptcy filing, or enforces rights under well settled law, no hint of real conflict exists. In that circumstance, this Recommendation asks corporate counsel to waive positional conflict, to allow their outside counsel to assist pro bono clients who are desperate for the legal assistance these lawyers can provide.

Through the granting of positional waivers, corporate counsel for financial institutions are in the unique position of being able to facilitate pro bono assistance provided by outside law firms. Moreover, because corporate counsel have always been active partners in the provision of pro bono help to America's poor, there is every reason to believe that they will eagerly assist the delivery of legal services in this important way.
II. Background

A. The Ranks of the Poor are Rising

In its 2005 study (updated in 2007), *Documenting the Justice Gap in America*, the Legal Services Corporation (“LSC”) found that for every client seeking legal assistance from an LSC-funded legal aid program, at least one client seeking assistance was turned away due to a lack of organizational resources sufficient to assist.\(^1\) Additionally, state-based studies of the justice gap have found that from 60 to 90 percent of people who need, but cannot afford, legal assistance never receive it.\(^2\) Legal services agencies have never been able to fully meet the legal needs of qualifying clients, and increasingly rely on the services of volunteer lawyers to fill the gap. This service gap is increasing as the number of Americans at or around the poverty level goes up.

The number of poor in this country is on the rise. As the Census Bureau noted:

- the number of unemployed persons increased 12.5 million in February 2009, bringing the country’s unemployment rate to 8.1 percent, a 3.3 percent increase over the last 12 months;
- the number of families receiving Temporary Assistance to Needy Families, after declining for several periods, jumped over 0.6 percent between February and September 2008; and
- the number of persons receiving state-based family support jumped over 8 percent between February and September 2008.

Official indicators point to an increasing number of poor in this country, all of whom have legal needs. This is borne out in the traffic seen by legal aid organizations. Legal Aid of Orange County (CA), for example, notes a jump in hotline holding time from eight minutes to 45 minutes between 2008 and the present. In the first quarter of 2009, the Tulsa office of Legal Aid Services of Oklahoma showed an 18 percent increase in requests for assistance.

B. The Financial Resources of Legal Services Programs are Dwindling

Legal aid organizations are less able than ever to meet the legal demands of this growing number of poor, and not just due to the higher demand for legal services. Faced with large deficits, state legislatures are reducing funding for legal services. In New York, for instance, civil legal assistance groups are anticipating only 70 percent of the state funding they received during 2007-2008.

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1 Legal Services Corp., *Documenting the Justice Gap in America* 4 (2d ed. 2007).
Add to this the pressure of reduced IOLTA funding. In a period of generous interest rates, interest on lawyers’ trust accounts provided an excellent source of funding for legal aid programs. This ceased abruptly in 2008 with steep cuts in interest rates. In Texas, for example, the drop in interest rates has contributed to an estimated legal aid funding shortfall of almost $37 million for the next two years. In Massachusetts, IOLTA-funded grants to legal assistance organizations have been cut by 40 percent because of a 54 percent drop in IOLTA revenues.

C. Mortgage and Personal Finance Problems have become an Epidemic

Although people of limited means need assistance with a variety of legal matters, studies have shown that requests for assistance with consumer-related matters run high, second only to family matters. Persons of limited means need assistance with personal bankruptcy, mortgage foreclosure and debt collection defense and other consumer matters. The need for help with bankruptcy filings continues to increase. In 2008, debtors filed over one-half million Chapter 7 non-business bankruptcy cases – 43 percent more than in 2007. Consumer bankruptcy experts expect this number to be even higher in 2009. In the first quarter of 2009, the Tulsa office of Legal Aid Services of Oklahoma showed a 32 percent increase in requests for bankruptcy assistance over the same period in 2008. Unfortunately, while the need for pro bono bankruptcy representation has increased sharply in recent years, the challenges faced by pro bono counsel have also sharply increased, due to, among other factors, provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L.109-8 (BAPCPA) that increased the complexity of a consumer bankruptcy case and the legal liability and regulatory burdens placed upon bankruptcy lawyers representing debtors. The ABA and numerous state and local bars continue to urge Congress to repeal these provisions in the BAPCPA.

A similarly great challenge for the legal aid community is the number of persons of limited means needing assistance with foreclosure-related matters. These matters range from mortgage renegotiation and equity stripping recovery to full-blown mortgage foreclosure defense. The Center for Responsible Lending projects 2.4 million foreclosures in 2009 alone and over eight million foreclosures over the next four years. There simply is not enough free or low-cost legal help for these homeowners. The Legal Aid Society of Greater Cincinnati indicates the number of foreclosure assistance calls received year-to-date is nearly triple the number received in 2008. In Florida, over 25,000 people have called the Florida Bar Foundation’s foreclosure help hotline since it was set up last June. In Illinois, a foreclosure assistance help line that connects people with resources and has received more than 8,000 calls since the start of 2009.

There is a major gap between homeowners in need of pro bono foreclosure legal assistance and the number of attorneys available to provide it. Without legal help many homeowners attempt to renegotiate a mortgage themselves or represent themselves pro se in a foreclosure proceeding. Homeowners seeking to renegotiate the terms of a mortgage or to defend themselves in a foreclosure action have only a small chance of success. Debtors of limited means often proceed pro se, running a high risk that their filing will be dismissed for a failure to complete the petition or a schedule accurately, or by failing to comply with an administrative requirement. These are areas of the law where specialized legal assistance is desperately needed.
III. These Appropriate Conflict Waivers Can Aid the Provision of Legal Services to the Poor

This Recommendation does not propose that a lawyer, law firm or corporate law department take any action inconsistent with the rules of professional conduct to which they are subject. Lawyers and law firms that provide legal services to the poor must do so in conformance with applicable rules of professional conduct, and as appropriate to serve client needs.

Nor is this Recommendation intended to impose requirements on volunteer lawyers or law firms to pressure corporate clients into waiving conflicts. Rather, the Recommendation recognizes that many positional conflicts, which are scrupulously recognized by law firms, can be appropriately waived by clients. The bulk of the pro bono work needed in this arena poses no actual client conflict: advising pro bono clients on how to renegotiate a debt or a mortgage; enforcing well-settled disclosure obligations; helping clients fill out necessary forms or schedules.

As Norman W. Spaulding wrote ten years ago in The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico, 50 Stan. L. Rev. 1395, 1399 (1998) “... the specter of positional conflicts has a very real effect on lawyers’ autonomy in selecting pro bono work and thus a dramatic impact on the distribution of public interest legal services.” This resolution seeks to limit the shadow cast by that specter, thereby facilitating needed pro bono assistance in appropriate cases.

Many large financial institutions have already given conflict waivers. Several large companies in the financial services sector have agreed to waive conflicts in order to permit their outside counsel to provide pro bono legal assistance to distressed homeowners in the context of a New York City-based mortgage foreclosure pro bono assistance project. In the bankruptcy assistance context, The Bank of America and other large financial institutions waived conflicts relating to outstanding consumer debt in order to permit volunteer lawyers to provide debtors with consumer bankruptcy assistance. This resolution reinforces those efforts by urging corporate counsel to free up law firm volunteers to provide assistance with consumer credit, home mortgage, bankruptcy and other related legal matters, only where appropriate and consistent with rules of professional conduct.

IV. Recommendation

Beyond peradventure, lawyers must be scrupulous to avoid client conflicts, and this Recommendation recognizes that. Indeed, its premise is that lawyers will zealously guard against such conflicts, even where they are remote or theoretical, unless client waivers are provided. The result is that the law firms who represent financial institutions, and who are therefore best situated to help the poor avoid mortgage or financial catastrophe, are precluded from providing pro bono help, even though they want to. This Recommendation addresses that


concern, in a manner which will solve the lion's share of the legal need, in those instances where waiver of positional conflict is ethical and appropriate. In the spirit of pro bono and ethical dealing – the pillars of our profession – we seek your support for this Recommendation.

Respectfully submitted,

Mark I. Schickman, Chair
Standing Committee on Pro Bono and Public Service
August 2009
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Pro Bono and Public Service

Submitted By: Mark I. Schickman, Chair

1. **Summary of Recommendation(s).** The Recommendation urges corporate counsel to cause positional conflict waivers to be granted in areas related to mortgage foreclosure, bankruptcy and consumer finance, to reduce the number of pro bono matters declined by outside counsel due to conflicts, so long as such waivers are appropriate and consistent with applicable rules of professional conduct.

2. **Approval by Submitting Entity.** The recommendation was approved by the Committee at its meeting of January 30, 2009.

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?** A number of Association policies support the delivery of legal services to address the unmet legal needs of low income persons affected by adverse economic conditions. None specifically addresses the waiver of positional conflicts of interest, or the context of the pending financial crisis.

5. **What urgency exists which required action at this meeting of the House?** The current economic crisis has caused an overwhelming number of projected foreclosures and consumer bankruptcies which call for greater numbers of lawyers to offer pro bono assistance. The Recommendation will serve to increase that number by causing positional conflicts to be waived by corporate clients when appropriate and ethical to do so.

6. **Status of Legislation.** Not applicable.

7. **Cost to the Association.** (If applicable.) None.

8. **Disclosure of Interest.** (If applicable.) Not applicable.

9. **Referrals.** On February 6, 2009, the proposed Recommendation and Report were referred to the Chairs and Directors of the following ABA entities and other interested parties: Standing Committee on Ethics and Professional Responsibility; Standing Committee on Client Protection; Standing Committee on Legal Aid and Indigent Defendants; Standing Committee on the Delivery of Legal Services; Forum on Affordable Housing; Commission on Homelessness and Poverty; Commission on Interest on Lawyers Trust Accounts; Section of Business Law; Section of Litigation; Section of Real Property, Trust and Estate Law; Young Lawyers Division; National Legal Aid and Defender Association; Association of Corporate Counsel; The Bar Association of San Francisco; The Association of the Bar of the City of New York.
10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present the Report to the House.)  Mark I. Schickman, Chair,  
Standing Committee on Pro Bono and Public Service.
EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Recommendation urges corporate counsel to work with the corporation and outside counsel to waive certain limited positional conflicts in areas related to mortgage, bankruptcy and consumer finance in order to reduce the number of pro bono matters declined by outside counsel due to conflicts, so long as the waivers are not inconsistent with applicable rules of professional conduct.

2. Summary of the Issue that the Resolution Addresses

The Recommendation addresses the issue of volunteer law firms rejecting pro bono matters in areas related to mortgage, bankruptcy and consumer finance due to apparent or perceived positional conflicts by urging corporate counsel to obtain waivers of positional conflicts where appropriate and ethical.

3. Please Explain How the Proposed Policy Position will Address the Issue

The Recommendation will address the issue by the ABA request that corporate clients waive conflict in areas related to mortgage, bankruptcy and consumer finance, where appropriate and consistent with rules of professional conduct.

4. Summary of Minority Views

No minority views have been expressed to the Standing Committee.