

May 29, 2008

The Honorable Ben Cardin
Committee on the Judiciary
United States Senate
Washington, D.C. 20005

Dear Senator Cardin:

On behalf of American Bar Association President William H. Neukom, I want to thank you again for your commitment to ensure access to justice for all persons and for convening last week's Judiciary Committee hearing to address the "justice gap" in America. The ABA looks forward to working with you, the Senate Committee on Health, Education, Labor & Pensions and the Senate Appropriations Committee to strengthen the Legal Services Corporation, which is the lynchpin in ensuring that low-income Americans have the assistance of a lawyer to help resolve basic legal issues, as well as to expand other avenues for providing legal services to those who need but cannot afford them.

We want to take this opportunity to provide more information in response to your exchanges with various witnesses that raised questions whether *pro bono* legal services might be federally mandated or required by the individual states as a way to help close the justice gap. Several witnesses, including the ABA's witness, Judge Lora Livingston, offered views that these options might not be legal, feasible or desirable.

As you well know, the ABA strongly encourages and supports *pro bono* and public service benefiting low-income individuals and organizations that serve the poor. The ABA, however, has examined and thoroughly debated mandatory *pro bono* and most recently rejected such a recommendation when the House of Delegates approved revisions to the Model Rules of Professional Conduct in 2002 [See Attachment 1]. Of course, the Model Rules are only recommendations; it remains up to each state supreme court to adopt rules of professional responsibility, license and regulate its own attorneys.

While some states have now instituted mandatory *pro bono* reporting requirements, they remain simply reporting requirements and do not mandate *pro bono* [See Attachment 2]. Only one state, New Jersey, imposes a modified type of mandatory *pro bono*: for over 20 years, New Jersey attorneys (including non-practicing attorneys) can be assigned one court-appointed case per year unless they are exempt as having provided 25 hours of voluntary service to an approved provider. This requirement is actually half the suggested 50 hours of *pro bono* service recommended by the ABA Model Rules. Nonetheless, even with the mandatory acceptance component and a significant state appropriation, a recent study shows that 99 percent of defendants in housing eviction cases in New Jersey go to court without a lawyer [People Without Lawyers: The Continuing Justice Gap in New Jersey, Legal Services of New Jersey, October 2006].

Letter to Senator Cardin
May 29, 2008
Page Two

Even with these participation requirements for the court-appointed system, these lawyers are not doing the types of work that will close the justice gap for this group of low-income clients.

Setting aside potential constitutional arguments, the ABA Standing Committee on *Pro Bono* and Public Service offers the following as among the reasons why mandatory *pro bono* would not constructively help solve the justice gap – and could actually be counterproductive:

- **Mandatory *pro bono* would detrimentally and disproportionately impact small firms, solo practitioners and newer lawyers.** While the larger firms that receive most attention could more easily absorb the impact and already are doing enormous amounts of *pro bono*, America's lawyers are not concentrated in large firms. Lawyers across the country are generally solo or small firm practitioners struggling to run small businesses, serve their clients, pay their student loans, and maintain some type of family life. For example, in Maryland 25% of the lawyers are solo practitioners, while another 25-30% are in small firms of 2 to 5 lawyers. Of the 3,700 law firms in Wisconsin, for example, the vast majority – 92% or about 3,400 – consist of 5 or fewer lawyers, and fully 79% or 2580 of those firms are solo practices. (At the same time, small firm and solo practitioners nonetheless are already voluntarily doing a significant amount of *pro bono* and public service.)
- **Mandatory *pro bono* would hurt lawyers' morale and reduce other altruistic inclinations.** For example, forcing lawyers to do *pro bono* work could result in decreased financial contributions to legal aid programs and bar foundation campaigns.
- **Mandatory *pro bono* would detrimentally impact the quality of service provided to low income clients.** If lawyers (including non-practicing lawyers) must accept cases involving poverty law issues or other matters that are outside of their usual practice or areas of expertise, there is an increased likelihood that they could not give these cases the same level of care they would give to their paying clients.

The ABA agrees with your basic proposition that *pro bono* service is an indispensable element for closing the justice gap. Yet we are also convinced that it can never alone meet the legal needs of the poor. We are pleased that the trend is clearly toward increased *pro bono* participation by: law firms that are now hiring *pro bono* partners and according both associates and partners credit for billable hours for *pro bono* work; law schools that are developing more *pro bono* projects and clinics per the ABA accreditation standards requiring *pro bono* efforts; bar associations that are promoting *pro bono* to their members; judges who are taking a more active role in promoting *pro bono* in their communities; and government attorneys who are doing more *pro bono* work. Currently, 26 state bar associations have staff dedicated to coordinate statewide *pro bono* activities. In addition, there are over 1,000 organized *pro bono* programs in the country, many of which are specialized to focus on certain needs and types of cases (like domestic violence victims, children involved in custody cases, or people living with HIV/AIDS).

Among other means of increasing *pro bono* participation nationwide, the Senate Judiciary Committee recently reported out S. 1515, the National Domestic Violence Volunteer Attorney Network Act, which would establish a national clearinghouse to provide *pro bono* representation

Letter to Senator Cardin
May 29, 2008
Page Three

to victims of domestic violence. The ABA closely worked with Senator Biden on this legislation and urges the Senate, and this Congress, to enact this legislation as soon as possible.

Thank you for your ongoing commitment to highlighting the justice gap in America, as well as for your long record of dedication and hard work – both in Maryland and in the Congress – aimed at closing that gap. The ABA looks forward to working with you in the months and years to come to close the justice gap by strengthening the Legal Services Corporation, by developing and expanding other governmental programs designed to accord access to free or reduced-cost legal services for those who need them, and by expanding opportunities for voluntary *pro bono* participation.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

Attachment 1

ABA MODEL RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

Policies - Voluntary Pro Bono Publico Service

ABA Model Rule 6.1	Table of State Ethics Rules	Standards for Pro Bono Programs	Emeritus Attorney Rules	Pro Bono Reporting	CLE Credit for Doing Pro Bono
--------------------	-----------------------------	---------------------------------	-------------------------	--------------------	-------------------------------

Every lawyer has a professional responsibility to provide legal services to those unable to pay. 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.

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

Comment

[1] Every lawyer, regardless of professional prominence or professional workload, 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.

[2] 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 lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] 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.

[4] 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 lawyers' 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.

[5] 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).

[6] 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 lawyer 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.

[7] Paragraph (b)(2) covers instances in which lawyers 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.

[8] 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.

[9] 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.

[10] 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.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule.

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

Model Code Comparison

There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

Attachment 2

Standing Committee on Pro Bono and Public Service

<http://www.abanet.org/legalservices/probono/>

The ABA Standing Committee on Pro Bono and Public Service is the national source of information, resources and assistance to support, facilitate, and expand the delivery of pro bono legal assistance. The Standing Committee and its project, the Center for *Pro Bono*, encourage lawyers to do pro bono work and help them connect with opportunities that meet their needs. Our programs, projects and services help pro bono programs, advocates and policymakers address the legal needs of the poor.

The Committee has been actively involved in the policy arena. Among its initiatives are ABA Model Rule 6.1 (adopted 1983, revised 1993) and the 1995 House Resolution urging bar associations to make the expansion of pro bono legal services a critical priority for the bar. In 1996, the Committee drafted and published Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means. In 1999, the Committee published *State Pro Bono Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding Pro Bono*, designed to assist in the planning and building of successful state legal services delivery systems. The Committee was also instrumental in the 1997 adoption of Conference of Chief Justices' Resolution VII, Encouraging Pro Bono Services in Civil Matters. In addition, the Committee provided input regarding the pro bono policy adopted by the U.S. Department of Justice in 1997, which has been implemented in federal agencies throughout the country. The Committee also drafted language for the ABA's Law School Accreditation Standards (1996) pertaining to pro bono work.

Direct Links of Note:

Pro Bono Policies and Rules -- Pro Bono Policies Across the Nation

<http://www.abanet.org/legalservices/probono/policies-rules.html>

Pro Bono Volunteer Opportunities

<http://www.abanet.org/legalservices/probono/volunteer.html>