

THE CASE AGAINST: “JUST SAY NO ... TO MANDATORY PRO BONO”

As a self-designated “*pro bono* junkie,” I am firmly convinced that *pro bono* service not only benefits the client who receives legal assistance, but also improves the professional life of the *pro bono* lawyer and the work environment of the institution which employs that lawyer. I strongly believe that *pro bono* service is the cornerstone of our professional identity – the element that makes the practice of law a higher calling and a profession, not merely a business.

I am, sadly, aware that the public and its leaders do not accept the concept that ensuring equal access to justice, regardless of economic condition or other hardship, is a public responsibility. Through my bar and community service activities, I am all too familiar with the cuts that have devastated Federally-funded legal services programs. And I have read the studies which report that a majority of practicing lawyers are not engaged in *pro bono* service.

Despite my belief in the efficacy of *pro bono*, the increasingly desperate need for additional legal assistance, and the apparent failure of voluntary *pro bono* efforts, I strongly oppose the imposition of mandatory *pro bono* programs. Some oppose mandatory *pro bono* because they believe it is unconstitutional, imposing involuntary servitude or an unwarranted tax on lawyers. I oppose it for one simple reason – mandatory *pro bono* will not work.

In discussing the pros and cons of mandatory *pro bono*, it is important, first, to define it. I use the term mandatory *pro bono* to refer to those proposals which condition a lawyer’s ability to continue to practice law on the fulfillment of a quantifiable public service obligation, which include a reporting requirement, and which contain an enforcement mechanism, implicating the lawyer’s licensure, for those who fail to meet their *pro bono* obligation. There are a number of techniques that I would term “voluntary *pro bono* plus” which I strongly support, but which are not mandatory *pro bono* proposals. These include making *pro bono* service a condition of membership in a voluntary bar, aspirational resolutions or ethics rules, a *pro bono* requirement imposed by an employer on a lawyer or by a law school on a law student. None of these programs, however, deprives a lawyer of her or his livelihood for failure to meet the bar or entity’s *pro bono* expectation and are, therefore, not truly mandatory in nature.

First and most importantly, mandatory *pro bono* is administratively unworkable. Existing *pro bono* programs, using the donated time of willing volunteers, find their resources and staff stretched to the limit as they coordinate the *pro bono* services of less than one-fifth of the bar. Mandatory *pro bono* would not only increase the number of attorneys such programs would be required to manage; it would also dramatically increase the administrative complexity of that process in all respects, including persuading lawyers doing *pro bono* against their will to handle a case and maintaining records that must be absolutely accurate since those records will be used as the basis for sanctions. Is the bar prepared to divert additional resources to the massive task of administering the *pro bono* service of every lawyer in the jurisdiction? Should the bar focus on investigating and disciplining lawyers who do not comply with mandatory *pro bono* requirements at a time when the disciplinary system is already overburdened and unable to deal with more serious violations?

What kind of service will *pro bono* clients receive? The argument can be made that attorneys, forced to provide service, may do so in a grudging manner that discourages clients from continuing to press

their legal claims. Lawyers doing *pro bono* against their will are less likely to seek out the training and support they need to handle specialized poverty law cases. Will the passage of a mandatory *pro bono* policy improve the public's perception of the legal profession? The public wrangling which inevitably accompanies the debate over mandatory *pro bono* will, if anything, reinforce the public's negative stereotypes of lawyers. Headlines reading "lawyers forced to work for free" will not convince nay-sayers that this is a profession devoted to service.

Mandatory *pro bono* is also politically unpalatable. A review of the fate of prior mandatory *pro bono* proposals demonstrates that mandatory *pro bono* is not a politically viable concept. In every instance in which a national, state or local bar association or a court has formulated a mandatory *pro bono* edict, that action has generated a firestorm of protest. In every instance, most recently in Nevada, the mandatory nature of the proposal is watered down, stripped of sanctions, and, finally, abandoned. Even legislative initiatives, theoretically less subject to political pressure from opponents in the bar, have ultimately languished and failed.

Even if these practical and political difficulties can be overcome, it is my contention that the resulting program will not be worth the battle. If and when a mandatory proposal is adopted, it will, as the result of inevitable compromises, contain a definition of *pro bono* so broad and an hourly requirement so minimal that virtually all lawyers will find themselves already in compliance. The mandatory program may even damage or lessen existing *pro bono* efforts through a political backlash, a cheapened definition of *pro bono* service, or a sense of complacency that the bar has done its part, when, in fact, there has been no appreciable increase in the provision of legal services.

Proponents of mandatory *pro bono* would better serve their goals by increasing the resources available for legal services and by making voluntary *pro bono* efforts as effective as possible. The bar has not gone far enough in creating incentives for participation in *pro bono* service. Bar associations can and should experiment with *pro bono* reporting, as several are doing. In reviewing candidates for higher office in the bar or on the bench, bar associations could adopt a "zero tolerance" stance -- i.e., a policy that lawyer who has not actively participated in *pro bono* work should not be selected to run. Law firms can become much more serious about rewarding *pro bono* service in making decisions about advancement and compensation. Bars could provide special benefits (free CLE, reduced membership fees) to the most active *pro bono* lawyers. Judges can help recruit *pro bono* lawyers, participate in awards ceremonies, and arrange their dockets to minimize waiting time for lawyers who are representing clients on a *pro bono* basis. Law schools should offer every student the opportunity to make *pro bono* work part of their professional identity as early and often as possible. Legal publications should increase their coverage of *pro bono* work.

All of us need to work much harder to make voluntary *pro bono* systems function effectively before we consider scrapping them for a mandatory system that offers an illusory promise of greater good.

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