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THE LAWYER AS PUBLIC CITIZEN: MEETING THE PRO BONO CHALLENGE

Irma S. Russell*

I. INTRODUCTION

The first statement of the American Bar Association's ("ABA") Model Rules of Professional Conduct identifies the lawyer as a public citizen: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹ The lawyer's role as a *public* citizen is the heart of the lawyer's obligation to the legal system and to individual clients. Likewise, this role is the heart of the lawyer's pro bono obligation. The seriousness of the legal profession about fulfilling this "special responsibility for the quality of justice" is debatable, however. The placement of this statement as the first sentence of the Preamble suggests that the concept is a foundational or "core" principle of the legal profession. Nevertheless, the rule on pro bono services has never been made a mandatory, enforceable obligation. This article explores the lawyer's duty as a public citizen in the context of the lawyer's duty to provide services for the public benefit (*pro bono publico*).

The calling of lawyers to provide pro bono services is the focus of renewed interest because of the ABA's recent amendment to Model Rule 6.1 as part of the revision of the Model Rules of Professional Conduct ("Model Rules"). Last year, the ABA completed the first comprehensive revision of the Model Rules since 1983.² In this revision, the ABA articulated with greater clarity and force the specific duty of providing legal services to those unable to pay.³ The ABA Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission," studied the ABA Model Rules of Professional Conduct for over four years before presenting its proposed revisions to the American Bar Association House of Delegates.⁴ On February 5, 2002, after debating and amending the proposal, the ABA House of Delegates passed Report 401, adopting the first comprehensive revision of the Model Rules in nearly two decades.⁵

The states regulate lawyers practicing within their jurisdictions.⁶ For this reason, the Model Rules lack the force of law and impose no direct obligations on any lawyer. Rather, the Rules present the vision of lawyer responsibility

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¹ MODEL RULES OF PROF'L CONDUCT, pmbL., ¶ 1 (2002) [hereinafter MODEL RULES].

² See *id.* at 4.

³ See *id.* at R. 6.1.

⁴ See *id.* at xv-xvii.

⁵ *Id.* at viii. The ABA amended the Model Rules at least thirty times between the adoption of the Rules in 1983 and the comprehensive revision of the Rules completed in 2002. *Id.* at xv.

⁶ See MODEL RULES, *supra* note 1, at R. 6.1.

endorsed by the largest organization of lawyers in the country,⁷ providing a model for states to look to in making their own rules to govern lawyers. The Preface to the Model Rules notes this role: "For more than ninety years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession."⁸ In this way, the Model Rules provide a forum to debate and refine the rules and the policies that inform the rules, sharpening the language and rationale for regulating lawyers. Moreover, the creation of a model that is respected among the states increases the likelihood of a consistent regulatory approach among the states:⁹

One of the primary reasons behind the decision to revisit the Model Rules was the growing disparity in state ethics codes. . . . [T]here were many significant differences among the state versions that resulted in an undesirable lack of uniformity – a problem that had been exacerbated by the approximately 30 amendments to the Model Rules between 1983 and 1997.¹⁰

As revised in 2002, Model Rule 6.1, entitled "Voluntary Pro Bono Publico Service," provides:

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 that 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

⁷ The ABA represents over 400,000 member-lawyers in the United States. Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 240 (2003) (noting that the ABA is the "largest most significant lawyers organization").

⁸ MODEL RULES, *supra* note 1, at vii.

⁹ See MODEL RULES, *supra* note 4, at xv.

¹⁰ *Id.* States are now beginning the process of studying and adopting the revised rules. For example, North Carolina and Delaware have adopted comprehensive amendments to their rules based on the Model Rules. The North Carolina rules are accessible at http://www.nccbar.com/home/proposed_rules.asp (last visited Sept. 5, 2003). The Delaware rules can be found at <http://courts.state.de.us/supreme> (last visited Sept. 5, 2003).

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.¹¹

The provision sets forth in a clear and detailed manner the avenues for fulfilling the lawyer's pro bono responsibility. It indicates that rendering service at a substantially reduced rate rather than for free and providing legal services to public service organizations are both acceptable ways of meeting the obligation of pro bono service. The entire revision to the text of the rule is the addition of the first sentence, which makes clear that pro bono service is a professional responsibility of each lawyer without regard to the type of work the lawyer undertakes in practice. "Every lawyer has a professional responsibility to provide legal services to those unable to pay."¹²

Although Model Rule 6.1 articulates a responsibility of every lawyer, it does not create a basis for disciplinary action against any lawyer. The rule does not state a mandatory rule, and only mandatory rules provide a basis for enforcement against a lawyer in a disciplinary action.¹³ To leave no doubt in the matter, Comment 12 to Model Rule 6.1 expressly states that the rule is not a basis for enforcement: "The responsibility set forth in this Rule is not intended to be enforced through disciplinary process."¹⁴

Although the rule does not create a duty enforceable in disciplinary proceedings, the new sentence in the rule is of great importance. It makes clear that every lawyer must provide pro bono services to meet his commitment to his role as a public citizen.¹⁵ It leaves no doubt that providing pro bono service is a matter of a lawyer's professional duty rather than merely a personal choice. In clarifying this point, the revised rule puts the obligation of pro bono service on a

¹¹ MODEL RULES, *supra* note 1, at R. 6.1.

¹² *Id.*

¹³ The Preamble to the Model Rules explains the use of mandatory or imperatives to establish its regulatory regime:

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.

MODEL RULES, *supra* note 1, at pmb1., ¶ 14.

¹⁴ *Id.* at R. 6.1.

¹⁵ *Id.* at cmt. 9 (stating, "[b]ecause the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer").

new footing. It challenges every lawyer to make legal services available to individuals who cannot afford to pay, and it challenges the ABA to find new ways to encourage lawyer pro bono service. The purpose of the UMKC Law Review's "Innovations in Pro Bono Practice" Symposium is to provide a forum for new ideas relating to fulfilling this goal.

II. THE HISTORY OF THE LAWYER'S PRO BONO RESPONSIBILITY

The idea that lawyers should provide legal services to those who are unable to pay for their services is not new.¹⁶ The notion that lawyers have special duties to society and to those unable to pay has existed since Roman times, though perhaps never in a well-defined form.¹⁷ The existence of a system of justice having professional representation of disputants (and thus, the legal profession), is justified by the overarching societal benefits of the legal system. The Preamble to the Model Rules of Professional Conduct speaks, albeit indirectly, to this point. It reiterates the importance of the lawyer's role in serving the public interest in several different provisions, noting the lawyer's role is "vital" to the "preservation of society."¹⁸ The Preamble also explains the responsibility of lawyers to society: "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."¹⁹ The Preamble specifically describes the lawyer's role as a "public citizen." It notes:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . [A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.²⁰

This point ties the lawyer's obligation as a public citizen to the duty to provide pro bono services. Clearly the existence of the legal system benefits society, providing an orderly and peaceful means for resolving disputes. It also benefits lawyers by providing their livelihood. The system does not help members unable to pay their way, however, and arguably may even disadvantage the poor within the system by creating a forum that they cannot effectively access.

¹⁶ See Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91 (2002) (chronicling the noblesse oblige tradition of America and the systems of law that the American system grew from and urging that the states adopt an annual reporting requirement).

¹⁷ *Id.* at 96-101.

¹⁸ MODEL RULES, *supra* note 1, at pmb1., ¶ 12.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 6.

III. THE ETHICS 2000 VIEW OF THE LAWYER'S PRO BONO RESPONSIBILITY

The Ethics 2000 Commission noted that at the time of the passage of the revisions, a change in the system for provision of pro bono representation was necessary.²¹ “[T]he system for mobilizing lawyers to provide pro bono legal service is not adequate to the task at hand.”²² Although the Commission considered making the provision of pro bono legal services a mandatory duty, it rejected this course of action.²³ “The Commission invited and considered extensive comment about the possibility of modifying Rule 6.1 to require all lawyers to provide pro bono legal services.”²⁴ The Commission’s Reporter noted that the Commission rejected the opportunity to declare a mandatory duty to provide pro bono services:

After considerable reflection . . . the Commission has concluded that amending Rule 6.1 to require all lawyers to provide pro bono legal service is not an appropriate response to the problem. Rather, the Commission encourages the ABA to heighten its efforts to find more appropriate and effective means to increase the voluntary participation of lawyers in the provision of legal services to persons of limited means.²⁵

Although the Reporter’s Explanation of Changes makes clear that the Commission considered and specifically rejected a mandatory rule, it does not give specific reasons for its conclusion that “requir[ing] all lawyers to provide pro bono legal service is not an appropriate response.”²⁶ It may be that the Commission recognized that the quality of forced legal services is unlikely to be reliable. Lawyers forced to undertake a pro bono representation are not as likely to provide effective services as those who undertake the work voluntarily.²⁷ It is

²¹ MODEL RULES, *supra* note 1, at R. 6.1, Reporter’s Explanation of Changes.

²² *Id.* In her article *Balanced Lives for Lawyers*, Deborah L. Rhode speculates that the high level of dissatisfaction of many young lawyers with the career choice of the law is related to the constraints that make it difficult for lawyers to contribute to society. See Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 *FORDHAM L. REV.* 2207 (2002). Rhode notes that inadequacy of pro bono system disadvantages not only the needy but also lawyers, the legal profession, and society. “Inadequate pro bono policies deprive needy individuals of crucial services and practitioners of opportunities to express the values that led them to law in the first instance.” *Id.* at 2209. She suggests that the problem has worsened during recent years. “Over the past decade, when these firms’ revenues grew by over fifty percent, their average pro bono hours decreased by one-third. . . . [M]ost employers have increased billable hour expectations, and reduced their willingness to count pro bono work fully in meeting hourly quotas.” *Id.* at 2215.

²³ See Rhode, *supra* note 22, at 2215.

²⁴ MODEL RULES, *supra* note 1, at R. 6.1, Reporter’s Explanation of Changes.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See B. George Ballman, Jr., Note, *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?*, 7 *GEO. J. LEGAL ETHICS* 1139 (1994) (arguing against mandatory pro bono for civil indigents on the basis that such a system amounts to involuntary servitude).

also likely that individuals who receive pro bono services expect a willing as well as a zealous representative and believe they benefit most when lawyers voluntarily enter the attorney-client relationship.²⁸ While the Commission rejected a mandatory rule, it emphasized the need and obligation for pro bono services.²⁹ It called on the ABA to help find new ways to increase lawyer involvement in pro bono services.³⁰

The duty of pro bono publico is no less real because failure to comply does not mandate discipline. Both the system of legal ethics and the larger U.S. system of justice depend on voluntary compliance. Just as the lawyer urges voluntary compliance to his clients as integral to the rule of law, he must take seriously his own obligations to society and to the profession. "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."³¹ For this reason as well as concerns about the quality of forced representation, it seems appropriate that the duty of pro bono service is couched in terms of voluntary compliance.

IV. THE ROLE OF LAW FIRMS IN THE PROVISION OF PRO BONO SERVICES

Revised Model Rule 6.1 also added a new comment, focusing on the role of law firms in the provision of pro bono legal services. Comment 11 to Rule 6.1 states, "Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule."³² The need for law firm involvement in the decision and implementation of pro bono services is clear. Without law firm commitment, the ability of lawyers to make time in their work life for pro bono services is limited. Aspirations of the Commission or promises of enhanced pro bono services by bar leaders are unlikely to deliver real change in this area unless law firms recognize the need for lawyers to allocate significant time for pro bono work. Making time for projects that do not pay the bills can be challenging for the lawyers and firms because both depend on billable time to finance the enterprise of the firm. Certainly law firms have a commitment to serve the needs of existing clients and to make the firm a viable and continuing enterprise. As associations of professionals who benefit from the legal system, they also have an obligation to society and to individuals who cannot afford to secure those benefits.³³

²⁸ *Id.* at 1163-64.

²⁹ *See id.* at 1157-70.

³⁰ *See id.*

³¹ *See* MODEL RULES, *supra* note 1, at pmb1., ¶ 16.

³² *Id.* at R. 6.1 cmt. 11.

³³ One might argue that the fact that the legal system provides a livelihood to lawyers does not inevitably lead to the conclusion that lawyers owe a duty to those who cannot pay for their services. After all, the need for food gives rise to the livelihood for bakers and chefs. This need does not mean, however, that every baker and chef must provide food for those unable to pay. Distinctions

V. AVENUES FOR SERVICE: NO EXCUSES

The avenues for fulfilling the obligation of public service are various.³⁴ Model Rule 6.1 makes clear that lawyers can fulfill the responsibility through individual representations of people who cannot afford to pay. Local bar associations and public clinics provide a contact between lawyers willing to provide pro bono services and clients who need those services.³⁵ Lawyers who lack experience in the types of representation at issue may need to learn new areas of law, such as immigration law, landlord-tenant law, and domestic or child custody law, in order to personally provide pro bono services. The question of how to best prepare lawyers to serve the needs of pro bono clients deserves support by law schools and CLE providers. Some lawyers may also choose to fund representations by other lawyers in those areas rather than taking time to learn new areas themselves. Some law firms hire attorneys who have expertise and professional interest in the areas of law often needed in pro bono representation. In this way, lawyers of the firm can meet their pro bono responsibilities jointly while funding legal representations by an expert.³⁶ Comment 9 to Model Rule 6.1 endorses the alternative of providing financial support for pro bono representation by other lawyers, stating:

[T]here 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.³⁷

Lawyers can also fulfill their pro bono responsibility by funding nonprofit public interest groups that exist to serve the public interest. For example, the

can be drawn between the categories of lawyer and baker, of course. The need for food exists as a result of the natural world and circumstances, not by the creation of the trade of bakers and chefs. By contrast, the existence of the legal system is a societal construct, imposed on all in the society and arguably benefiting only those who can afford lawyers. Another distinction rests on the meaning of a professional's role in society. See Maute, *supra* note 16, at 96-98. Regardless, the legal profession has rejected this argument as a matter of policy both traditionally and in Model Rule 6.1.

³⁴ See, e.g., Christian Hammond, Comment, *The Supreme Court's Decision in Legal Services Corporation v. Velazquez and the Analysis Under the Unconstitutional Conditions Doctrine*, 79 DENV. U. L. REV. 157-59 (2001) (explaining of The Legal Services Corporation Act of 1974 and the grant program administered under the act).

³⁵ For example, the Missouri Volunteer Attorney Project has helped locate lawyers who provide pro bono services for over twenty years. See Legal Aid of Western Missouri, *Volunteer Attorney Project*, available at <http://www.lawmo.org/vap1.htm> (last visited Sept. 1, 2003).

³⁶ See Terry Carter, *Building a Pro Bono Base: Dedicating Resources Proves to be Good for Firms and Clients*, 89 A.B.A. J. 30 (2003) (reporting examples of firms hiring pro bono attorneys).

³⁷ MODEL RULES, *supra* note 1, R. 6.1 cmt. 9.

ABA Fund for Justice and Education ("FJE") presents a way for lawyers to donate money to meet their obligation of public service.³⁸ FJE provides services to those unable to pay in the areas of immigration, domestic violence, children, homelessness, and other issues.³⁹

VI. CONCLUSION

Fulfilling the role of "public citizen" involves more than refraining from violating the mandatory rules of the legal profession. An affirmative commitment to the social goal of a just society is imperative to an ordered society and a society in which lawyers are actively engaged. The norms applicable to lawyers must do more than constrain conduct that is contrary to the public good. Lawyers and the legal profession must act affirmatively to meet the needs of clients and society. The lawyer's role of "public citizen" requires dedication to the principle of the rule of law and to the concept of a just society. Part of this concept is the duty to help provide legal services to those unable to pay.

This symposium seeks to respond to the challenge of the Ethics 2000 Commission to enhance pro bono services. Most lawyers serve their clients and the public interest, effectively balancing the duties owed to each.⁴⁰ Many provide pro bono services willingly and enthusiastically. This fact does not obviate the need for professional standards to identify the duty of pro bono representation resting on each individual lawyer. Model Rule 6.1 on pro bono service articulates this role. Moreover, it challenges lawyers – as public citizens – to envision and implement the means for accomplishing this important goal.

³⁸ ABA Fund for Justice and Education, *available at* www.abanet.org/fje (last visited Sept. 7, 2003).

³⁹ *Id.*

⁴⁰ "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES, *supra* note 1, pmb1., ¶ 11.