

Dialogue

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Expanding Pro Bono: The Judiciary's Power to Open Doors

by The Honorable Judith Billings and Jenny M. McMahon

The judiciary has a special responsibility to insure access to justice. To fulfill this responsibility, judges are becoming actively involved in the effort to bridge the rapidly growing gap between the legal needs of those who cannot afford civil legal services and the resources available to meet those needs.

As leaders in the community and in the legal system, judges are opening doors by exerting their unique influence to increase participation in pro bono work. They are encouraging the involvement of more pro bono lawyers, making administrative accommodations for pro bono and forging alliances with community leaders to develop methods for increasing access to the courts.

This article examines various strategies judges can use to promote involvement in pro bono and the ethical standards that must govern their conduct.

Ethical Standards

In fulfilling their responsibility to improve access to justice, judges must abide by their ethical obligations and strive to maintain confidence in our legal system. A model code of ethical standards for the judiciary is contained in the ABA's Model Code of Judicial Conduct (the "Model Code"), which was adopted by the ABA House of Delegates on August 16, 1972, and revised in 1990.

As of October 1997, twenty jurisdictions had adopted codes of judicial conduct based

(continued on page 2)



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Open Doors

(continued from page 1)

on the 1990 Model Code, although none of them are identical to the Model Code. Interpretations of the Model Code's Canons vary from jurisdiction to jurisdiction and therefore, an accurate determination of what is ethical conduct for a judge can only be made by reviewing the advisory opinions in a given jurisdiction.

Ethical opinions on judicial conduct related specifically to pro bono involvement are sparse, reflective of the Model Code's permissive view of judges' civic and charitable activities. In fact, the term "pro bono" is not mentioned in the Model Code at all. Based on the application of Canons 2, 3 and 4, however, involvement in pro bono activities is acceptable if it does not compromise a judge's impartiality, demean the judicial office, or interfere with the proper performance of judicial duties.

Recruiting

Judges are participating directly and indirectly in the recruitment of pro bono attorneys. In general, the Model Code supports such activities, since it encourages judges to promote the improvement of the legal system and the administration of justice. The Commentary to Canon 4B states that given a judge's unique position "as a judicial officer and person specially learned in the law," it is appropriate for a judge to "contribute to the improvement of the law, the legal system and the administration of justice." It states that a judge "is encouraged" to make such contributions, independently or through a bar association, judicial conference or other organization

dedicated to the improvement of the law.

Judges are especially well-suited for direct recruitment of pro bono program volunteers. In many jurisdictions, judges sign letters urging members of the bar to join a program, which is a particularly effective strategy for increasing the numbers of pro bono program volunteers. In addition, they are:

- sending periodic reminders to encourage attorneys to participate in volunteer attorney panels;
- writing editorials, opinion pieces or articles for newspapers, magazines or bar publications on the need for volunteer attorneys and on the aspirational standard of Model Rule 6.1 of the Rules of Professional Conduct;
- making presentations on the need for volunteers when speaking at various events, including swearing-in ceremonies and bar association annual meetings; and
- assisting in the recruitment of law firms, corporate law departments or government law offices, by making individual presentations to them.

A Maryland advisory opinion states that judges may personally solicit attorneys to provide pro bono assistance to indigent parties in child custody cases by letter, by placing ads in the local bar newspaper and by making appearances at group meetings. *Maryland Judicial Ethics Handbook Opinion 124, 10/22/96.*

Judges are indirectly participating in recruitment by providing information to assist others in their recruiting efforts; serving in an advisory capacity to pro bono programs; attending recruitment sessions for legal services organizations; developing or assisting in the development of written policies that encourage pro bono

(continued on page 4)

Open Doors

(continued from page 2)

activity by court personnel, thereby helping to increase the pool of potential program volunteers; and developing bench resolutions calling for pro bono involvement by local attorneys.

Such recruiting efforts are made not only as a means of improving the legal system or administration of justice, but also in furtherance of a judge's fulfillment of other obligations articulated in the Model Code, such as the obligation to accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard or to dispose of all judicial matters promptly, efficiently and fairly. *Canon 3B*.

Canon 4G prohibits judges from acting as pro bono attorneys, as an Arizona advisory opinion confirms. *Arizona Supreme Court Judicial Ethics Advisory Committee Opinion 95-3, 3/20/95*. In addition, any judicial recruitment efforts must comply with Canon 2A, which calls on judges to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Recognition

Judicial recognition of an attorney's pro bono participation is a memorable event for a lawyer. As a result, this is another area where judges are making a difference. Judges are presenting pro bono recognition awards and speaking at recognition events. These activities encourage more involvement from current volunteers and aid in the recruitment of new volunteers. Judges also send

notes of appreciation to lawyers or law firms that provide outstanding service to pro bono clients.

A Missouri advisory panel held that it is permissible for members of the judiciary to publicly recognize those individuals who have provided exemplary pro bono services. *Missouri Commission on Retirement, Removal and Discipline, Opinion 157, 4/24/91*. Any type of positive publicity through volunteer recognition potentially strengthens pro bono programs by garnering financial support from new sources and paving the way for the development of new partnerships and programs.

Accommodations

More and more, judges have designed innovative procedural and scheduling accommodations to facilitate volunteer service by pro bono attorneys. These efforts conserve volunteers' time, minimize inconvenience to them and provide recognition for their efforts. The methods employed must be designed to allow judges to:

- maintain their integrity and impartiality (*Canon 2A*)
- insure that every person who has a legal interest in a proceeding or that person's lawyer has the right to be heard according to law (*Canon 3B(7)*)
- dispose of all matters promptly, efficiently and fairly (*Canon 3B(8)*).

Judges use a variety of accommodation strategies. For example, they hear pro bono cases first on the daily calendar; grant docket times close to times the pro bono attorneys are appearing on other matters; organize the calendar so that all matters from pro bono programs will be heard by the same judicial officer at the same time each week; set pro bono cases at specific, non-standard

times and at non-standard places; and allow pro bono attorneys to attend routine hearings by conference call.

Judges also are relying on the court system to encourage pro bono, by offering courthouse space for pro bono clinics, including notices on formal court forms about how indigent parties may obtain legal assistance and making volunteer attorneys available to provide information to pro per litigants. When judges encourage court personnel to be especially cooperative with volunteer attorneys, they are taking an extra step to insure that these accommodations have the desired effect of promoting pro bono service.

Service in an Advisory Capacity

Pro bono programs that communicate with members of the judiciary on a regular basis benefit significantly. For example, program managers or board members frequently write, visit or call judges to keep them informed about the programs and to solicit their input and assistance. Many times judges initiate this contact. Judges also contribute to pro bono programs through service as board members, which allows them to take part actively in developments and to be easily accessible to offer guidance and assistance.

Whether or not a judge's service as a board member violates judicial canons, however, remains an open question in most jurisdictions. Some judicial canons may be interpreted as prohibiting members of the judiciary from serving on governing bodies of legal services providers.

(continued on page 5)

Open Doors

(continued from page 4)

Under Canon 4A(1) for example, extra-judicial activities must not cast reasonable doubt on a judge's capacity to act impartially as a judge. Canon 4C(3) condones a judge's participation in "an educational, religious, charitable, fraternal or civic organization not conducted for profit," but Canon 4C(3)(a) prohibits service in organizations that "would ordinarily come before the judge" or that "will be engaged frequently in adversary proceedings" in that judge's jurisdiction.

Canon 4C(3) also provides that judges must not hold executive or director positions in organizations that are conducted for the economic or political advantage of their members. Under Canon 4A(1), extra-judicial activities must not cast reasonable doubt on a judge's capacity to act impartially as a judge.

A Washington advisory opinion states that a judge's service on a board for a county volunteer lawyer program was permissible (*Washington Ethics Advisory Committee Opinion 93-26, 11/22/93*) and withdrew its earlier, contrary opinion on a similar matter. *State of Washington Ethics Advisory Committee Opinion 93-16, 6/21/93*. The Committee acknowledged that its earlier opinion was based on the erroneous assumption that the judicial officer sitting on the board was acting as the employer for the volunteer attorneys appearing in court.

A Florida panel also held that such service by a judicial officer on a pro bono program board was permissible. *Florida Commit-*

tee on Standards of Conduct Governing Judges Opinion 86/16, 12/3/86.

Advisory opinions in other states, however, have held that judicial service on the board of a legal services program is prohibited. *New York Advisory Committee on Judicial Ethics, Opinion 88-130, 12/8/88*; *Massachusetts Committee on Judicial Ethics, Opinion 89-2, 3/6/89*; *California Committee on Judicial Ethics, Opinion 31, 1983*.

Even when board service is permissible, judges are prohibited from providing legal advice, despite an organization's civic or

earlier case involving a full-time judge.

Another New York opinion states that a full-time judge may serve on the board of directors of a legal referral project of the local bar association because members of the project would not appear in court or provide direct legal services, but would instead be involved in the screening of prospective clients for financial eligibility and refer clients to legal service agencies for assistance. *New York Advisory Committee on Judicial Ethics Opinion 91-121, 10/31/91*.

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charitable status, because under Canon 4G, a judge shall not practice law. Canons 2 and 3, which state that a judge must maintain impartiality, also apply. Further, a judge shall not participate in most fundraising activities of the governing body pursuant to Canon 4C(3)(b), as discussed below.

A New York advisory opinion states that a part-time village justice could serve as a board chair for a legal assistance corporation that represents indigent clients as long as his involvement was restricted to those activities deemed permissible by the state's judicial code of conduct. *New York Advisory Committee on Judicial Ethics Opinion 94-51, 6/16/94*. The advisory committee viewed the justice's part-time judicial status as significantly different from an

Training

Members of the judiciary often lend their valuable assistance in the training of volunteer attorneys and other judges. The training method selected must promote public confidence in the integrity and impartiality of the judiciary, pursuant to Canon 2A.

Judges assist pro bono programs by educating volunteer attorneys about both substantive and procedural matters and by acting as presenters at training events. They also serve as writers or editors of training materials and manuals designed for use by program volunteers and teach CLE classes addressing their particular areas of expertise.

It is helpful when the judges offer information during CLE events about the need for volunteer attorneys. They also disseminate this type of information at bar association meetings and meetings of judges.

Fundraising

Canon 4C(3)(b)(i) provides that judges must not participate

(continued on page 6)

Open Doors

(continued from page 5)

personally in the solicitation of funds or other fundraising activities except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority. A judge shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fundraising mechanism. *Canon 4C(3)(b)(iii)*.

For example, the use of an organization letterhead for fundraising is permissible if the letterhead lists only the judge's name and position in the organization and the judge's judicial designation may be listed if comparable designations are listed for other persons (*Commentary to Canon 4C(3)(b)*). A judge must not be a speaker or guest of honor at an organization's fundraising event but may attend such an event if otherwise consistent with the Model Code. *Commentary to Canon 4C(3)(b)*.

A Washington advisory opinion states that a judge was prohibited from chairing a legal aid pledge drive committee. *State of Washington Ethics Advisory Committee Opinion 94-8, 12/5/94*. Similarly, a Florida opinion states that a judge may not solicit funds from her fellow judges on behalf of a legal aid organization. *Florida Supreme Court Committee on Standards of Conduct Governing Judges Opinion 97-6, 3/18/97*. The Committee found that legal aid is not an organization devoted to the improvement of the law, the legal system, or the administration of justice, but rather it is in

the nature of a law firm that limits its representation to indigent clients. By engaging in direct fundraising for legal aid, the judge would have threatened the aura of impartiality that is essential to a fair judiciary. Although these opinions concern legal aid program fundraising, the general prohibition of Canon 4C(3)(b) is such that it is unlikely that the conclusion would be different if the fundraising were for a pro bono program.

Judicial Proactivity

As stated above, Canon 4C(3) provides that a judge is encouraged to contribute to the improvement of the law, the legal system and the administration of justice due to his or her unique position. Thus, judges are free to exercise a fair amount of creativity when attempting to open doors for persons of limited means who need increased access to justice. They need to keep the Model Code in mind and weigh the likelihood of a given method resulting in improvement to the law, the legal system or the administration of justice. They also must conclude that the method reflects impartiality in application and appearance.

Judges are undertaking a wide range of efforts on their own, including the initiation of programs; the development and implementation of proposals to deal with increasing numbers of pro per litigants; the study and recommendation of systemic changes that streamline legal services cases; consideration of methods for institutionalizing cooperative efforts; the development and implementation of methods for educating the judiciary about the issues facing the legal system as a result of the

significant loss of federal funding; the examination and implementation of ways to encourage increased pro bono; and working with pro bono programs to make clinics available at or near the courthouse for those who cannot otherwise afford counsel.

Judges also pass resolutions to reinforce the need for pro bono. This sort of action has a significant positive effect, due to the leadership role the judiciary plays in bringing about change. The Conference of Chief Justices adopted Resolution VII—Encouraging Pro Bono Services in Civil Matters, in February 1997, which endorses pro bono efforts by reaffirming the chief justices' commitment to pro bono and to the promotion of it in certain ways. The national leadership that this organization demonstrates invites judges throughout the country to join in the promotion of pro bono service.

Conclusion

The Model Code allows judges to seize opportunities to facilitate access to justice. Through the awareness and promotion of pro bono activities, judges are maximizing their capacity to bring about positive change. In the face of decreased funding, they are finding new ways to open doors for the poor and fulfilling their special responsibility as leaders in the community and in the legal system. As the work of the judiciary increases, so will the number of volunteer attorneys. The doors of justice, as a result, will open wider.

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