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Rendering Legal Assistance to Similarly Situated Individuals

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REPORT OF THE WORKING GROUP ON RENDERING LEGAL ASSISTANCE TO SIMILARLY SITUATED INDIVIDUALS

INTRODUCTION

THIS Working Group[1] examined ways in which low-income individuals may address legal problems, interests, and objectives that they have in common, and also examined the role of lawyers in providing assistance to low-income individuals when they act with or for the benefit of others. The Group discussed these questions with respect to various kinds of advocacy. With respect to litigation, the Group examined: (1) class actions; (2) the representation of multiple low-income plaintiffs; and (3) "impact" litigation brought on behalf of an individual or entity with the intent to benefit also others similarly-situated. The Group examined the collective action of low-income individuals through formal entities and informal associations and considered how lawyers may assist such entities not only in litigation, but also in transactional and other non-litigation contexts. The Group also discussed administrative and legislative advocacy, and the role of lawyers in community education.

The Group's discussions reflected agreement on several basic premises. First, in many situations, low-income individuals and communities can be served most effectively and efficiently through some form of collective advocacy. Second, lawyers should fully inform their clients (and prospective clients) about the available options for pursuing the client's interests and/or the interests of similarly-situated others, and should assist clients in taking advantage of those legal and non-legal strategies that will be most effective in a particular situation. Third, lawyers serving low-income persons and communities should not be subjected to restrictions on professional practice that bar them from using advocacy tools such as class-action litigation. The Group developed recommendations that elaborated on these premises.

Also, the Group identified some important contextual factors in developing guidelines for legal assistance to similarly-situated individuals. First, public-interest lawyers work in conditions of scarcity. Ethical and professional issues cannot be resolved by the assumption that unrepresented persons or groups can obtain another lawyer. Second, individuals who are "similarly situated" in one respect are always differently situated in other respects (e.g., clients may have common

1. Group Leader: Bruce A. Green. Authors: Bruce A. Green and Martha Matthews. Participants: Susan D. Bennett, John Bouman, John O. Calmore, Catherine Carr, Gill Deford, Adrian Holder, Phyllis J. Holmen, Bruce G. Iwasaki, Jeremy Lane, Nancy Morawetz, Ann Southworth, and Kathleen A. Sullivan. The Group is grateful to Kathleen Bailie for recording the Group's discussions and providing a variety of assistance.

interests as tenants in a building, but different interests as members of different ethnic, occupational, and age groups). Third, it is important to distinguish situations in which there exist organizations within the client community that may be able to serve as a "group client," from situations in which there is no preexisting organization that could speak for a number of similarly situated persons.

I. IDENTIFICATION OF ISSUES

The Group's discussions drew on work undertaken prior to the conference. First, the Group benefited from articles written in connection with the conference, especially those by John Calmore[2] and Ann Southworth,[3] who were members of the Group, and by Peter Margulies,[4] a conference participant. The Group proceeded against the background of previously published articles relating to the delivery of legal assistance to similarly situated individuals,[5] including several by working-group members and other conference participants.[6] Finally,

2. John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 Fordham L. Rev. 1927 (1999).

3. Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449 (1999).

4. Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L. Rev. 2339 (1999).

5. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Literature*, 85 Yale L.J. 470 (1976) (discussing the attorney-client relationship in the context of the school-desegregation movement); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825, 826-31 (1992) (exploring the limitations of the term "client" in light of the complexities of modern legal practice and the implications those limitations have for rules governing the attorney-client relationship); William B. Rubenstein, *Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623 (1997) (exploring alternatives to the individualist model for the procedures and ethics of group litigation); Tracy N. Zlock, Note, *The Native American Tribe as a Client: An Ethical Analysis*, 10 Geo. J. Legal Ethics 159 (1996) (discussing the impact that the motivations of Native American tribes for litigating have upon the attorney-client relationship); *see generally Bibliography to the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 Fordham L. Rev. 2731, 2731-37 (1999) (listing additional articles).

6. *See, e.g.*, Susan B. Bennett, *On Long-Haul Lawyering*, 25 Fordham Urb. L.J. 711 (1998) (discussing clinical practice in "community and economic development law"); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103 (1992) (exploring "conflicts between the themes of group participation and individual autonomy in the context of public interest lawyers' representation of groups"); Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1 (1984) (discussing restrictions imposed upon the Legal Services Corporation in the context of the debate between "law reform advocates" and "legal access defenders"); Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 Fordham L. Rev. 1435 (1996) (critically evaluating structural-reform litigation on behalf of children and discussing its unique implications for the ethical duty of representation);

the Group participated in an e-mail exchange in the weeks leading up to the conference to identify issues for discussion.

II. Choice Among Procedural Options

What role should lawyers perform to enable low-income clients to determine whether to work with or for others who have common legal problems, interests, or goals? What should lawyers do to help their clients identify available advocacy strategies, decide which strategies would best address their objectives, and take advantage of these strategies? The Group's discussion reflected the understanding that the decision whether to employ a strategy that would benefit other similarly situated persons is a decision for the client or prospective client to make after receiving full, competent advice from the lawyer. That advice should ordinarily include advice about: (1) all available means of achieving an objective; (2) their advantages and disadvantages from the perspective of the client's individual interests and objectives; and (3) their advantages and disadvantages from the perspective of other similarly situated individuals. To be able to render such advice, lawyers should educate themselves about the full range of potential advocacy strategies—including litigation, legislative and administrative advocacy, and non-legal strategies such as organizing.

At times, however, individual lawyers or law offices may be unable to assist the client in a manner involving collective action because of restrictions imposed in connection with funding, limitations on the lawyer's expertise or resources, or for other reasons. For example, law offices receiving Legal Services Corporation ("LSC") funds are presently barred from undertaking class-action representation and are restricted in their ability to engage in administrative and legislative advocacy. How should the lawyer respond in such situations? For example, how should it be decided whether to pursue a law-reform goal through a declaratory-judgement action on behalf of a single plaintiff, when a class action would be more likely to ensure complete relief? Is the answer different depending on whether other lawyers are available to undertake a class action? Several group members suggested that, in some situations, lawyers should help the client or prospective client obtain other counsel who could render the assistance that may best achieve the client's objectives.

Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 Ohio St. L.J. 1 (1993) (seeking for class-action settlements "a norm of what it means to be an adequate and fair representative in a context of differing class interests and complex distributional judgments"); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982) (examining problems for the attorney-client relationship in the context of "class actions seeking structural reforms in public and private institutions"); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 Wis. L. Rev. 1121 (discussing ways other than litigation in which civil-rights and poverty lawyers serve communities).

III. Impact Litigation and Class Actions

How should lawyers litigating on behalf of low-income clients balance the legal needs, interests, and objectives of individual clients against those of other similarly-situated members of the community? Group members suggested that the answer may vary depending on whether the lawyer represents individuals or entities on the one hand, or a class, on the other. In individual and entity litigation, it was suggested, concerns about the best interests of the community may influence the lawyer's decision at the outset regarding which individuals or organizations to represent. Further, once a lawyer undertakes to represent individuals or entities in "impact" litigation, it is appropriate to counsel the client(s) about how their decisions (e.g., settlement decisions) will affect others. In the end, however, the lawyer ultimately must act in accordance with the clients' directions and consistently with their objectives, and may not undermine those objectives to serve other interests. This differs from class actions, in which the "client" is the class and, thus, the lawyer's principal responsibility is to the class, not to the named representatives. These generalizations, however, served mainly as a starting point for many further questions raised by the Group's discussion.

A. *Impact Litigation*

In "impact" litigation on behalf of individual or entity clients, how should the interests of non-clients be considered when the defendant addresses the problems of the clients, but not of other persons with similar problems? Suppose, for example, that a government agency is sending notices in English to non-English-speaking persons. If a lawyer, representing Spanish-speaking clients, threatens litigation, and the agency offers to provide Spanish notices, must the lawyer consider the needs of community members who speak other languages? Or, suppose that in a case where multiple clients have a common benefits problem, an agency offers to grant benefits to the individual clients but not correct the underlying policy that caused the denial of benefits. How should the lawyer respond? Does threatening to bring a class action, rather than individual litigation, impose a greater responsibility to consider the interests of similarly situated persons?

B. *Class Actions*

In class actions, how should the lawyer take account of the different situations of named plaintiffs and other class members? For example, the defendant may seek to "buy off" the named plaintiffs. To what extent can this be dealt with through disclosure and consent prior to litigation (i.e., by ensuring that the named plaintiffs understand that they have a fiduciary relationship with unnamed class members)? On the other hand, may a lawyer for the class agree to, or seek, favorable

treatment for named plaintiffs? For example, in a case where the class members will receive benefits after a notice-and-claim process, is it permissible to request immediate payment for the named individuals?

How should the lawyer for a class take account of different objectives of class members, or of interests of community members outside the class (e.g., when deciding whether and on what terms to settle, or what provisions to insist on in a final judgment order)? The named plaintiffs often do not have sufficient knowledge, confidence, or inclination to specify a position for the class as a whole. Further, is it appropriate to engage in class-action practice at all in the absence of an organized client group who could serve as class representatives? To what extent should the lawyer seek input from others in addition to the named plaintiffs? How should the lawyer proceed when the decisions of the class representatives are contrary to the interests of the class as the lawyer sees them? What should the lawyer do when representing a class in seeking system-wide changes when there is a rival group with convincing arguments that some other resolution is better? What if the class nominally includes the rival group? How far does the lawyer have to go in accommodating the dissident part of the class, and what if the dissident part is more numerous than the part of the class aligned with the lawyer?

What considerations should influence the lawyer in defining the scope of a class when there are no obvious reasons why one sub-group or another should be excluded or included? First, how should a lawyer identify the reach of a class in terms of geography in cases where the class members could be anywhere from within one judicial district to nationwide? Should lawyers who can bring class actions view themselves as having an obligation to shape classes more broadly because of the likelihood that no one else will bring a parallel case? Second, how should the lawyer decide how far back in time the class action should go? To what extent should lawyers try to get relief for everyone who has been harmed, even if this creates logistical problems and/or raises additional legal issues that might detract from advocacy on the main substantive issues?

C. *Resource Limitations*

Certain types of representation, including class actions, are labor intensive. A commitment of resources to a case that may initially be sound may come to seem questionable in light of changes in the law, in agency practices, or other changes over time that make success less likely or the need for relief less compelling. Is it ever legitimate to reevaluate the wisdom of proceeding and, without the clients' consent, terminate the representation? If terminating the representation is permissible, does the lawyer have an obligation to help the client find substitute counsel? In individual and entity representation, it may be possible to design retainer agreements to anticipate some of these

problems (e.g., by stating that the lawyer agrees only to trial-level representation, not to undertake an appeal), but it would be difficult to anticipate every possible contingency in a retainer agreement. Moreover, in the class-action context, such limitations in retainer agreements are problematic.

The Group agreed that before undertaking impact or class-action litigation, lawyers should carefully evaluate their ability to handle all aspects of the case, including appeals and post-judgment or post-settlement monitoring of compliance—especially in the class-action context—because of the binding nature of judgments on all class members.[7] Even where the lawyer could withdraw from the representation consistently with the rules of professional conduct, a lawyer representing a class or a group should give serious consideration before doing so, in light of the risk that members of the class or group will be disadvantaged or that their reasonable expectations will be disappointed.[8] At the same time, the Group supported the permissibility of terminating representation at certain stages in light of limited resources and diminishing benefits from continuing the representation.[9]

IV. Administrative and Legislative Advocacy

Lawyers may render important service through administrative or legislative advocacy on behalf of low-income clients, entities, and communities. Such advocacy can legitimately be done on behalf of individual clients, as part of a lawyer's work with a coalition, or in the lawyer's personal capacity. The Working Group developed recommendations on this important aspect of advocacy for similarly situated persons.

The Group's discussion also identified various questions that may be encountered by lawyers engaged in this work on behalf of a client. When the client has various objectives, how should it be determined which objectives the lawyer shall serve in administrative and legislative advocacy? For example, there may be a question whether it is better to make incremental progress in meeting clients' immediate needs, or to refrain from taking incremental steps so as to better position the advocate for long-term success. For example, foregoing a short-term legislative victory might be essential to maintain alliances that would be crucial later on larger issues. Although the Group did not develop specific recommendations on these questions, several members expressed the need for lawyers to counsel clients about these alternatives and to defer to clients' direction. A related question was raised about how, in administrative or legislative advocacy,

7. *See Recommendations of the Conference on the Delivery of Legal Services to Low-Income People*, 67 Fordham L. Rev. 1751, Recommendation 8, at 1755 (1999) [hereinafter *Recommendations*].

8. *See id.* Recommendation 12, at 1756.

9. *See id.* Recommendation 13, at 1756.

lawyers should decide what to do when an immediate decision must be made and there is no opportunity to confer with the client. Group members suggested that lawyers should try to anticipate this possibility in discussions with clients to enhance their ability to act in accordance with the client's general direction or authorization.

The Group also discussed situations in which lawyers engage in administrative and legislative advocacy in their personal capacity, rather than on a client's behalf. There was broad agreement that lawyers who have developed experience and expertise in the course of serving low-income clients and communities should be encouraged to work in their individual capacity to improve the law and legal processes relevant to the clients they serve. However, to maintain client loyalty and to avoid confusion and misunderstanding, lawyers should take care to clarify when they are working in their personal capacity and when they are representing clients, and should not pursue objectives in their personal capacity that conflict with those they are seeking on behalf of a client.

How should lawyers engaging in administrative or legislative advocacy in their personal capacity handle competing objectives or trade-offs? How should lawyers respond to a legislative proposal that might help some members of the client community and harm others? When acting as an individual rather than representing a client, these decisions and trade-offs are for the lawyer to make. But, to make these decisions wisely, the lawyer should strive to develop and employ the kinds of knowledge identified in the Group's recommendations on competence.[10]

Finally, the Group addressed the question of how lawyers in offices that receive LSC funding should respond to restrictions on administrative and legislative advocacy, consistent with the understanding, embodied in ABA Model Rule 6.1[11] and elsewhere in the professional norms,[12] that lawyers should aspire to participate in activities for improving the law and the legal system. The Group discussed pro bono representation (i.e., representation of clients by lawyers who work in LSC programs, outside of work hours) as at least a partial answer to this question. When lawyers in LSC programs identify ways of improving the law or legal processes but are restricted from using program resources to bring these issues to the attention of administrative officials and lawmakers, they should consider whether they have a

10. *See id.* Recommendation 6, at 1754.

11. Model Rules of Professional Conduct Rule 6.1 (1998). The rule provides that lawyers should aspire to provide pro bono publico legal services, which may include "participation in activities for improving the law, the legal system or the legal profession." *Id.*

12. *See, e.g.*, Model Code of Professional Responsibility EC 8-9 (1980) (stating 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").

professional responsibility to do so on a pro bono basis. Legal-services programs should not discourage individual lawyers from undertaking such pro bono representation.

V. Representing Entities and Associations

Lawyers serving low-income communities undertake transactional work of various kinds on behalf of entities and associations (such as public-housing tenant councils, neighborhood-based businesses that employ public-housing residents as part of their mission, and nonprofit organizations that provide day care, transitional housing, etc.). Lawyers may render important service by helping nonprofit agencies incorporate, drafting legal documents for them, and providing legal advice.

The Group identified various questions for lawyers undertaking this work. When lawyers render services of this nature, how can they become sufficiently attuned to local needs and the local political context? How should they deal with situations in which different organizational clients compete with each other—for example, by applying for the same grants or loans, bidding for the same contracts, or taking different positions on political issues? To what extent should these situations be addressed by retainer agreements in which the entities consent to the lawyer's representation of multiple entities, and to what extent by limitations on the legal services rendered? With the informed consent of each competing agency, may a lawyer assist more than one competing agency by counseling it or reviewing or drafting documents, as long as the lawyer preserves each agency's confidences and does not advocate on behalf of one against the other? To what extent can the lawyer serve as an "intermediary" among community organizations that are committed to sharing information, pooling resources, and cooperating in seeking grants or contracts and policy advocacy? What advice should the lawyer provide to ensure that entity clients understand and consent to whatever permissible arrangements are made?

Further, how should lawyers address differences among members of an organization, or between the organization's leadership and members of the group it purports to serve? When lawyers assist in the formation of an organization, what assistance should they provide to enable it to address these kinds of differences if they arise? And when such differences do arise, what role should the lawyer play in helping the entity address and resolve them?

Rule 1.13 of the ABA Model Rules of Professional Conduct provides guidance to lawyers representing entities.[13] Under this rule, the lawyer's obligation is generally to give advice to the group's leader-

13. *See* Model Rules of Professional Conduct Rule 1.13.

ship and to defer to its decisions on the entity's behalf.[14] But what should a lawyer do when it appears that an entity's leadership may be suppressing minority viewpoints or acting contrary to the interests of some of its members?[15] While it may usually be appropriate for lawyers to urge organizational leadership to allow the expression of divergent views and to try to accommodate diverse interests within the group, this may not be invariably true. Not all organizations function democratically. Also, it is important that lawyers avoid undermining community organizations' leadership. To be able to advise the entity competently about its internal deliberations and decisionmaking, a lawyer must understand the group's history, how it functions, and its internal dynamics. While it may be appropriate, drawing on this knowledge, to counsel the group's leadership on how to handle dissenting viewpoints, it would generally be inappropriate to undercut the leadership by, for example, meeting and working with dissenting group members. Further, while a lawyer can legitimately assist an entity in resolving disagreements, lawyers generally should not take sides in an intra-group disagreement or intervene directly. In extreme cases, such as where the lawyer believes that the leadership's decision is inconsistent with the entity's objectives, that it violates the organization's agreed-upon decisionmaking processes, or harms the interests of persons the organization purports to represent, the lawyer may consider withdrawing from the representation.

VI. LAWYERS AND ORGANIZING

To what extent does a lawyer's representation of low-income individuals or groups conflict with the lawyer's possible role as an "organizer"? For example, organizing efforts might be best served by taking on a large issue with a small chance of success, while proper legal counseling would include advice about settlement and other compromise options. This tension can arise not only when a lawyer personally engages in organizing, but also when lawyers work closely with community organizers. Several group members expressed the view that, because of these potential conflicts, a lawyer should not simultaneously serve as an organizer and as a legal representative. Also, lawyers do not necessarily possess the skills needed to be effective organizers.

VII. ASSURING THE QUALITY OF REPRESENTATION OF SIMILARLY SITUATED PERSONS

What knowledge should a lawyer develop to serve similarly situated persons in low-income communities effectively, whether in the context of class actions or impact litigation, administrative or legislative advo-

14. *See id.*
15. *See* Ellmann, *supra* note 6.

cacy, representation of entities, or other collective action? The Group reached a consensus that, when undertaking representation intended to benefit a group of low-income persons, the lawyer must not only have relevant legal skills, but also knowledge about the community being served in order to provide competent, high-quality representation. The Group identified a non-exclusive list of specific steps that lawyers might undertake to develop the requisite knowledge. Reflecting the insights of Professor Calmore's article,[16] the Group agreed that the lawyer should strive to understand the origin and dynamics of racial, gender, and economic inequality in the client community. One of the Group's recommendations, that lawyers should strive to "establish working partnerships and coordinate advocacy with others who work with client groups,"[17] was further elaborated in a recommendation on building coalitions and collaborative relationships.[18]

VIII. Building and Participating in Coalitions

The Group discussed ways in which lawyers may participate in coalitions and build relationships across professions, and the benefits of doing so in meeting the legal needs of similarly situated persons. Coalitions and collaborative relationships allow lawyers to exchange information, skills, and strategies with others. For example, housing policy advocates can work with lawyers to develop or reform programs to house the homeless. Also, coalitions and professional collaborations provide efficient mechanisms for disseminating information within the community and educating community members. For example, a collaboration between a community-college student organization and legal-services lawyers in New York is currently enabling college students to be trained to represent themselves or assist others in administrative hearings on public-benefits claims. Coalitions may also further lawyers' efforts to reform the law or legal processes. For example, public-interest lawyers and unions in New York are working together to improve workfare policies and to organize workfare workers.

The Group developed a recommendation that lawyers participating in the delivery of legal services to low-income clients participate in coalitions and collaborative professional relationships. Additionally, the Group identified some questions that may arise for lawyers who participate in, or represent, coalitions. Coalitions sometimes face conflict among competing objectives. For example, when pursuing several law-reform goals, they may have an opportunity to advance one goal by relinquishing another. The long-term interest of the community may be best served by preserving a strong coalition whose mem-

16. *See* Calmore, *supra* note 2.
17. *See Recommendations*, *supra* note 7, Recommendation 6(e), at 1754.
18. *See id.* Recommendation 19, at 1758.

bers sacrifice for each other, yet the short-term interests of particular constituents may be best served by pressing forward on the goals that affect them most. Lawyers working with coalitions may also find that there are tensions between the interests of the community that the lawyer generally serves and the particular goals of the coalition. An example was given of a coalition that includes, as a strong constituent, a licensed day-care providers' organization. If a state agency announces funding available for rate increases, the coalition might take the position that the rate increase should only go to licensed providers. If the client community mostly uses unlicensed care, however, the coalition's position may be inconsistent with the interests of many community members.

CONCLUSION

Based on the above discussion, the Group developed recommendations on rendering legal assistance to similarly situated persons.[19] These recommendations include discussion of the benefits of collective representation, and practical guidance on how lawyers should: gain the competence necessary to represent similarly-situated persons; resolve problems that may arise in class-action litigation and representation of client groups; participate in coalitions and build collaborative relationships; and handle conflicts of interests within and among client groups. The Group also recommended changes in the law to remove restrictions on professional practice (such as those imposed in connection with LSC funding) that impede lawyers' use of class-action litigation, legislative and administrative advocacy, and other tools of collective representation.

19. *See id.* Recommendations 1–24, at 1752-59.