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## Representation by Private Lawyers

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# REPORT OF THE WORKING GROUP ON REPRESENTATION BY PRIVATE LAWYERS

## INTRODUCTION

THIS Group<sup>1</sup> considered the representation of low-income persons by private practitioners. It focused on several interrelated issues: the extent to which private practitioners deliver legal services to the poor, how to increase and improve the provision of such services, how to define and clarify the pro bono obligations of private lawyers, and how to resolve ambiguities and conflicts in the relationships among private lawyers, clients, and legal services organizations.<sup>2</sup>

The Group's conclusions were eventually reduced to twenty-three recommendations, which were agreed upon without dissent and later adopted without substantial changes by the plenary session.<sup>3</sup> This report is intended to provide some background to the discussion that led to these recommendations.

### I. REPRESENTATION OF LOW-INCOME PEOPLE BY PRIVATE PRACTITIONERS OUTSIDE AN ORGANIZED PROGRAM

The Group began by discussing the results of the ABA Comprehensive Legal Needs Study, which found that private attorneys *not* affiliated with organized pro bono or Judicare programs provided the majority of attorney aid to low-income people with a legal need.<sup>4</sup> For example, this study shows that, of the 21% of low-income people with a legal need who received help from a lawyer, 73% received such service from a private lawyer for a fee.<sup>5</sup> This far outweighs the service provided by legal service advocates and pro bono lawyers. While a number of the members of the Group were involved in conducting these studies and were familiar with the report's conclusions, many members of the Group were surprised by the report's conclusions. There was a general consensus that the legal community as a whole is

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1. Discussion Leader: Michael Hertz. Author: Evan Gourvitz. Recordors: Evan Gourvitz and Emily Alexander. Participants: John Arango, Terry Brooks, Mary Grein, Marc S. Galanter, Esther Lardent, John McKay, John Skilton, Joan Vermeulen, and David Weschler.

2. While several other issues (including co-counseling relationships, the advancement of costs, and the donation of fee awards) were discussed briefly, the Group chose not to elaborate on these matters, generally due to time constraints and/or overlap with other groups' agendas.

3. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *Fordham L. Rev.* 1751, Recommendations 85-107, at 1784-90. (1999) [hereinafter *Recommendations*].

4. See Algodones Associates, *American Bar Association Legal Needs Study* (last modified Oct. 9, 1998) <[http://www.algodonesassociates.com/~jarango/legal\\_services/assessing\\_needs/abalegal.htm](http://www.algodonesassociates.com/~jarango/legal_services/assessing_needs/abalegal.htm)> (summarizing ABA Comprehensive Legal Needs Study).

5. See *id.*

not aware of these findings or the possible implications for discussions regarding the future system for delivering legal services.

For example, some participants noted that when discussing private practitioners' contributions to delivering services to the poor, there is (and has been) far too much attention on pro bono, as opposed to private practitioners who deliver services for a fee. They asserted that any system that attempts to provide legal services for poor people must take account of the existing, informal network connecting low-income individuals with private practitioners. In addition, some participants noted that these findings suggest that the legal services community needed to spend more resources supporting and working with these private practitioners. The Group also discussed whether there were economic incentives that could be created that would increase the delivery of services by private practitioners to low-income clients, e.g., through use of "vouchers," fee-shifting statutes, etc.

Other members urged caution about the study's conclusions and the diversion of resources to support private practitioners. A couple of participants expressed concern about the quality of services being provided by private, fee-charging lawyers to low-income clients.

The Group reached a strong consensus that the existing studies do not delve deeply enough into the specifics of the services provided by private practitioners. More needs to be known about this part of the legal profession. As the recommendations reflect, representation of the poor by private, non-pro bono lawyers merits further study if organizations are to better take into account the services provided by these attorneys.<sup>6</sup>

## II. EVALUATING PRIVATE ATTORNEY INITIATIVES

The Group next addressed the fact that recipients of Legal Services Corporation funds are generally required by law to spend 12.5% of their grants on Private Attorney Involvement ("PAI"), which involves private attorneys in the delivery of legal assistance to eligible clients.<sup>7</sup> A couple of participants observed that this requirement is considered quite controversial in the Legal Services community.

Some participants stated that this 12.5% requirement appears to have increased the number of private attorneys doing pro bono work, as well as the amount of legal support for pro bono activities provided by the organized bar. However, others noted that many legal services organizations resent the rule because they believe that the money could be better and more efficiently spent on staff-based programs, because they believe that the private lawyers who participate in these initiatives lack the requisite specialized expertise, or for ideological reasons.

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6. See *Recommendations*, *supra* note 3, Recommendation 106, at 1790.

7. See 45 C.F.R. § 1614 (1997).

The Group agreed on one basic fact—there has been no comprehensive study of PAI since the early 1980s (shortly after the program was established) by LSC, the ABA, or any other organization. The Group agreed that a study was needed, with a view towards identifying the practices which most effectively serve the poor in their communities, and eventually incorporating these practices into new PAI regulations.<sup>8</sup>

Interestingly, during the plenary session, the Group's original recommendation drew comments that reflected a concern that any study of PAI must look at the efficiency of private attorney involvement as compared to other delivery mechanisms and that such study must be open to recommending a cutback in the 12.5% requirement or other revisions to the regulations to allow programs more discretion over use of such funds.

In response to these comments, the Group's original recommendation was revised. The original recommendation read as follows:

#### RECOMMENDATION 3: ENHANCING PAI INITIATIVES

##### *Background:*

Since 1981, LSC-funded programs have been required to allocate 12.5% of their funds for private attorney involvement (PAI). There is a recognition that the PAI requirement has contributed to a number of important developments, including improved relationships between the legal services community and private practitioners, enhanced support for legal services by the organized bar, and a significant increase in the number of private practitioners contributing services to low-income individuals and groups. There is also a concern that these PAI resources are being underutilized. No comprehensive study of the effectiveness of the PAI requirement has been conducted since 1982.

A study should be undertaken to assess the existing PAI programs with a view towards identifying and replicating the best practices (in both LSC and non-LSC-funded programs).

This language can be compared to the final Recommendation Eighty-Seven.<sup>9</sup> Despite these changes, it is important to note that any study of PAI must focus not solely on narrow, quantitative measurements of costs per case, etc., and also should account for the intangible benefits of PAI, e.g., the significant increase in the number of private practitioners who had been active in delivering legal services to low-income individuals and communities, better relations between the organized bar and legal services programs, etc.

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8. *See Recommendations, supra* note 3, Recommendation 87, at 1786.

9. *Id.*

## III. POSITIONAL CONFLICTS

The Group next addressed the issue of positional conflicts: situations in which a lawyer's advocacy of a legal argument on behalf of one client is directly contrary to or detrimental to that lawyer's position on behalf of a second client in an unrelated case. The Group reviewed recent writings on the impact of "positional conflicts" on pro bono programs.<sup>10</sup> These articles both assert that positional conflicts are used by firms to decline pro bono opportunities and constitute a significant hurdle for groups that are trying to place cases with firms. There is also a sense that positional conflicts constitute a barrier to particular types of cases, in particular high impact cases in areas where LSC-funded legal service programs are restricted.

What the literature shows is that the Model Rules actually define positional conflicts that would require a lawyer not to accept an assignment in an extremely narrow manner. There also was general consensus, in both the writings and within the Group, that the positional conflict rules under Model Rules are not well understood by lawyers and that business considerations are far more persuasive in the decision about whether to take on a particular case.

The Group struggled, however, to find consensus on how significant this obstacle is to placing pro bono assignments. There was a general consensus, reflected in the recommendations, that further study must be done to identify both (1) what substantive areas most often rise to positional concerns for firms and (2) what types of cases the legal services community is seeking to place with large firms.<sup>11</sup> Having studied these issues, the Group agreed that useful discussion could be had between law firms and legal services organizations about how to deal with concerns regarding positional conflicts.

Several other recommendations to these problems were debated and eventually adopted.<sup>12</sup> First, the Group agreed that private lawyers and legal services organizations should be educated about what is and is not considered an impermissible positional conflict under the Model Rules. There was a general sense in the group that many organizations have very poor understandings of what the Model Rules state in this regard. The Group also recommended that firms be encouraged to treat positional conflicts in the same manner regardless of whether they involve paying or pro bono clients. In addition, the Group recommended that language exhorting pro bono work "with-

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10. See generally Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *Fordham L. Rev.* 2279 (1999); Norman W. Spaulding, *The Prophet & The Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *Stan. L. Rev.* 1395 (1998).

11. Other than anecdotes, there is not a lot of data on where the gaps exist and how big the gaps are.

12. See *Recommendations*, *supra* note 3, Recommendations 98-102, at 1788-89.

out regard to the general interests or desires of clients or former clients," as in the old Model Code,<sup>13</sup> be added to the Model Rules.

The Group decided not to make recommendations that would have resulted in any sort of demand that law firms adopt formal policies regarding positional conflicts in relation to pro bono cases. For many participants, there was a concern that this sort of recommendation might lead to a process that could yield less, rather than more, flexibility by private practitioners and firms.

#### IV. DEMOGRAPHICS

The Group noted that certain demographic changes in the legal profession could lead to increased pro bono participation and different types of pro bono participation in the coming years. Participants suggested that, as the legal profession ages, and as older lawyers are phased out of or retire from their firms, such lawyers could serve as a significant resource for legal services and public interest organizations.

Participants came to quick agreement on this subject. The Group concluded that it would be worthwhile to develop reliable demographic projections on the aging of the legal profession, to survey lawyers to determine their late career expectations and plans, and to study the experience of legal services providers in utilizing older lawyers, all with the eventual goal of determining strategies for best using these attorneys as a resource.<sup>14</sup>

#### V. ENCOURAGING PRO BONO WORK

The Group then moved into a general discussion about how to encourage pro bono work by private lawyers, including a discussion of Model Rule 6.1. Participants noted that figures show that most attorneys fail to meet the fifty-hour-per-year goal suggested by the Model Rules.<sup>15</sup> Given the extensive process that led up to the adoption of Model Rule 6.1, the Group easily and quickly agreed not to tackle any significant changes to Model Rule 6.1. In particular, the Group decided that any effort by the Group to recommend the adoption of a mandatory pro bono requirement, or recommendations that would significantly modify Model Rule 6.1, could in fact backfire with the ABA and other bar associations.

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13. The Model Code stated that lawyers should seek reform "without regard to the general interests or desires of clients or former clients," Model Code of Professional Responsibility EC 8-1 (1981), and urged lawyers to "seek just laws regardless of positions that might have been previously taken when representing clients," Center for Prof'l Responsibility, American Bar Ass'n, Annotated Model Rules of Professional Conduct 482 (1996).

14. See *Recommendations, supra* note 3, Recommendations 104-07, at 1790.

15. See Model Rules of Professional Conduct Rule 6.1 (1998) ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

Several participants mentioned barriers to pro bono participation, such as private firms' emphasis on billable hours, the lack of information about non-litigation pro bono work, the problem of matching private lawyer interests to pro bono need, and the belief (characterized as the "missionary trap") that pro bono work requires a certain ideological stance.

Eventually, the Group agreed on a number of suggestions for overcoming these barriers: encourage states to adopt and support some version of Model Rule 6.1 (which urges fifty hours of pro bono service annually),<sup>16</sup> suggest that all segments of the bar promote pro bono work (for example, by treating pro bono hours in the same way as billable hours),<sup>17</sup> study and encourage private practitioner financial support for legal services organizations,<sup>18</sup> and promote the use of technology to build bridges between private practitioners and public interest groups.<sup>19</sup>

## VI. THE ATTORNEY-CLIENT RELATIONSHIP

The Group considered the ethical implications of different pro bono referral scenarios. In particular, the Group attempted to identify whether there are any barriers embedded in the ethical rules that, if changed, might facilitate the amount of work undertaken by private practitioners. The discussion led the Group into something of a morass.

What became clear in the discussion is that (1) there are a large number of scenarios regarding referrals that could be discussed and (2) that there are a number of ethical rules that are implicated. Because of the various different permutations and the significant number of ethical considerations, the Group concluded that it could not make specific recommendations regarding specific rules or specific scenarios.

What did become clear during the Group's discussions was the nature of the relationship among client, legal services organization, and pro bono lawyer are often left very ambiguous. For example, the Group discussed whether a referral created an attorney-client relationship between the referring organization and the client. One participant, for example, said that his organization acted as if a full attorney-client relationship existed from a client's initial interview until the resolution of his or her case. The pro bono lawyer and the referring organization served as co-counsel on cases. Another participant said that her organization believed its relationship with its clients ended upon referral of that client to a pro bono lawyer. Nevertheless,

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16. See *Recommendations*, *supra* note 3, Recommendation 85, at 1785.

17. See *id.* Recommendation 86, at 1785.

18. See *id.* Recommendation 88, at 1786.

19. See *id.* Recommendations 89-90, at 1786-87.

this second organization acted as if it had obligations to supervise the pro bono lawyers and was entitled to receive reports of progress on the case from the pro bono lawyers. Obviously such reporting raises issues under the ethical rules regarding client confidences.

The Group also addressed the nature of the relationship between the referring organization and the pro bono attorney. Participants debated whether private practitioners and legal services organizations working together on a case could or should be considered a "firm" for purposes of imputed disqualification under the Model Rules.<sup>20</sup> In addition, the discussion confronted the relationship between the pro bono attorney and the client, considering whether pro bono attorneys should have the right to "give back" a case for reasons other than those specified in the Model Rules,<sup>21</sup> and whether a firm should have any sort of obligation to continue a pro bono case after the supervising attorney has left the firm.

Several participants noted that legal services organizations want to remain involved in a referred case to maintain quality control and to address malpractice concerns; others in the Group argued that the referring organization (unless it remained as co-counsel) did not have any obligation to supervise the volunteer lawyer or any right to receive reports that would jeopardize the protection of attorney-client communications.

This discussion also led to some frank discussions regarding the issue of competence. Certain participants in the Group felt strongly that most volunteer lawyers simply were not qualified, without close supervision, to practice complex poverty law. Others felt that this concern was exaggerated and that in the delivery system where eighty percent of people with legal needs are unable to have a lawyer, close supervision of volunteer lawyers was wasteful.

The Group concluded that further study of these complex issues was warranted. It agreed that legal services organizations should have internally-consistent policies on all of these matters, which should be made clear to both private attorneys and clients. The Group suggested that the Model Rules governing conflict do not, and should not, treat legal services organizations and pro bono lawyers working together as a single "firm," and that private attorneys and firms should be encouraged to follow the same rules for withdrawing from (or "giving back") a pro bono case that they would use in any other case.<sup>22</sup>

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20. See, e.g., Model Rules of Professional Conduct Rule 1.10 (1998) (explaining imputed disqualification).

21. See, e.g., *id.* Rule 1.16 (dealing with declining or terminating representation).

22. See *Recommendations*, *supra* note 3, Recommendations 94-97, at 1788.



## VII. COMPETENCE

Throughout the conference, the Group repeatedly confronted the issue of attorney competence. Participants noted that private attorneys might not have the experience necessary to handle complex poverty law matters.

Some participants suggested that supervision by referring organizations might be helpful, or even ethically necessary. Others observed that such supervision can be the source of a great deal of resentment, both by the organization attorney who believes his or her skills are not properly acknowledged and appreciated, and by the private attorney who may not want or need the supervision.

In addition, participants argued that the definition of competent representation used in Model Rule 1.1 seemed to be based on a traditional, "full service" model of representation, and did not give enough consideration to partial or short-term representation, which might be appropriate for certain pro bono services such as brief advice, hotlines, and clinics.<sup>23</sup>

Eventually, the Group decided that private firms should take steps to ensure that they have the knowledge necessary to take on a given pro bono case, and that legal services organizations should make enough support and training available to provide that knowledge. The Group also agreed that Model Rule 1.1 should be studied and reassessed to see if it sufficiently takes account of the limited forms of representation which are common to pro bono situations.<sup>24</sup>

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23. See Model Rules of Professional Conduct Rule 1.1.

24. See *id.* Recommendations 91-93, at 1787.