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COMMENTS REGARDING THE RECOMMENDATIONS OF THE FORDHAM CONFERENCE ON ETHICAL ISSUES IN THE DELIVERY OF LEGAL SERVICES

*Don Saunders**

ON behalf of the National Legal Aid and Defender Association ("NLADA"), I would like to compliment the organizers of the Fordham conference on professionalism and ethics in legal services practice for the development of an excellent event. Your many months of intricate planning resulted in a well designed, thought-provoking conference which mixed well the thinking of an outstanding group of experts from a variety of fields. The written background materials produced for the event provide a wealth of valuable information on some of the most important issues of professionalism and ethics currently emerging in the practice of poverty law.

NLADA is working closely with our members, a broad community of advocates and stakeholders concerned with equal justice, as they struggle to develop efficient and effective state-based delivery systems. They struggle on a daily basis with many of the ethical and professionalism issues that formed the substance of the Fordham conference.

Many of the conference topics recognize or anticipate the growing number of ethical and professionalism issues currently facing providers and planners. For example, the effective use of nonlawyers, as well as collaborations with other human services organizations to address client needs holistically, are clearly trends throughout the country. The *nonlawyer* working group's focus on eliminating court-based barriers to assisting pro se litigants and, in general, simplifying court procedures is a particularly helpful one.[1] We also support that group's encouragement of collaborations with other types of professionals and the reduction of ethical impediments to such collaborations.[2] Obviously, adequate training, supervision, and regulatory accountability of nonlawyers is critical. Without supervision and accountability we face significant problems with unauthorized practice of law statutes as well as the proliferation of incompetent nonlawyer practice. This would create an obstacle to effectively accomplishing the goals of increased service and collaboration.

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1. *See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 Fordham L. Rev. 1751, Recommendations 25–33, at 1759-65 (1999) [hereinafter *Recommendations*].

2. *Id.* Recommendations 34–38, at 1766-68.

The working group on *limited legal assistance* dealt with the development of unbundled services that provide less than full legal representation.[3] The ethical issues raised by these limited service tools must be addressed. While a healthy debate has focused on the appropriate role of limited assistance techniques within the overall system of civil legal assistance, a general consensus is developing that, if used to supplement a system capable of providing full service representation or law reform activities when necessary, these new technologies and delivery techniques allow many more people to be helped in substantive ways. The category of brief service and advice has always represented a high percentage of the caseload of most legal services programs. Expanding the quality and reach of these services is an important component to reaching a significant portion of the large number of the client-eligible population currently unserved by even the best delivery systems.

The *limited legal assistance* working group recognizes the effect of the changing nature of the practice of law on legal services providers.[4] The recommendations of this group are particularly important to developing new approaches to the rules of ethics in response to these changes. We must find ways to protect the legitimate client interests associated with areas such as conflicts, confidentiality, competence, scope of representation, and the other areas identified by the group, while not undercutting the opportunities presented for serving clients through websites, hotlines, community education, pro se mechanisms, and other forms of unbundled legal services. As these recommendations are further refined, it is important that this thinking be made available to the Ethics 2000 process and other relevant venues.

The recommendations of the *client and matter selection* group reiterate the importance of ensuring that every state has the capacity to address the full range of legal services necessary to the client community.[5] NLADA strongly supports this view and has been involved in the promotion of this concept in every state over the past few years. Developing the necessary, unrestricted financial resources and using the private bar more effectively in these efforts are cornerstones of this process. We support the recommendations related to enhanced client access and clear client and community-based priority setting. The concern expressed about the Legal Service Corporation ("LSC") board composition requirements should be addressed in light of the political history of the function and role of boards and LSC grantees.

The overall recommendations of the *private practitioners* group are likewise important.[6] We have worked in close partnership with the ABA, state and local bars, the Pro Bono Institute, private attorneys,

3. *See id.* Recommendations 58–62, at 1775-78.
4. *See id.* Recommendations 47–51, at 1774-75.
5. *See id.* Recommendations 65–67, at 1778.
6. *See id.* Recommendations 85–107, at 1785-90.

and pro bono managers to increase the involvement of private lawyers in meeting the legal needs of poor people. As evidenced by the ABA's Legal Needs Survey, private practitioners are already a crucial component of the legal services delivery system in every state.[7] Strengthening the relationship between legal services staff programs and private attorneys is recognized as a basic component of every state planning process for civil legal services.

We particularly support the concept of promoting pro bono work as an essential component of professionalism, as suggested by the recommendation that states adopt Model Rule 6.1, as well as the promotion of more incentives to increase private lawyers' involvement.[8] Developing methods to add more effectively the talent and experience of the increasing number of retired lawyers is another excellent proposal.[9]

As with the *limited legal assistance* group, the ethical issues identified by the group (i.e., competence as related to limited legal assistance, the nature of the attorney-client relationship, positional conflicts, etc.)[10] need further refinement. Where unnecessary barriers do exist within the Model Rules, alternatives should be developed and made available to the Ethics 2000 process and other appropriate venues.

We likewise agree strongly with the vision of the *law school* group on the role of law schools both as providers of legal services and as an important means to instill public service as a key tenet of professionalism for future generations of lawyers.[11] Developing models of pro bono practice in private settings and making it possible for graduates to enter public interest practice more easily are very important issues.

A number of the recommendations of this group regarding law school responsibilities and opportunities to increase public service are mirrored by the work to date of a commission of the Association of American Law Schools addressing similar topics.[12] The work of this commission provides a practical avenue for supporters of this group's report to seek to implement the findings within the law school environment.

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7. Consortium on Legal Services and the Public, American Bar Ass'n, Legal Needs and Civil Justice: A Survey of Americans 7 (1994).

8. *See Recommendations*, *supra* note 1, Recommendations 85–86, at 1785. Model Rule 6.1 states that lawyers "should aspire to render . . . pro bono publico legal services . . . ." Model Rules of Professional Conduct Rule 6.1 (1998). This rule lists specific requirements that lawyers should meet in fulfilling this responsibility. *See id.*

9. *See Recommendations*, *supra* note 1, Recommendation 105, at 1790.

10. *See id.* Recommendations 91–102, at 1787-89.

11. *See id.* at 1791.

12. *See* Association of American Law Schools, Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities (forthcoming 1999) (draft report, Dec. 30, 1998) (on file with the author).

While NLADA supports many of the conference recommendations, we must express strong reservations about portions of the recommendations of the groups looking at *representing similarly situated persons*[13] and the *influence of third parties*.[14] We unequivocally support the vision of both groups regarding the right of poor persons, communities, and groups to a full range of services in every forum appropriate to their needs. Indeed, for decades NLADA has tirelessly advocated for those principles before the Congress, the Legal Services Corporation, the ABA and a number of other relevant entities. While we agree with and aggressively pursue the goals of educating public and private funders around the principles of full access to equal justice presented by these two groups, *we do not share their approach of suggesting that restrictions, particularly those placed on LSC funding, create "serious ethical dilemmas" for legal aid lawyers in the context of issues arising within a specific attorney-client relationship.*[15]

We agree that in certain, limited cases, ethical problems could arise after an attorney-client relationship is created. This is a particular danger under Model Rule 1.1 when the ability to raise challenges to a welfare reform provision or bring class actions becomes an unanticipated barrier to competent representation after representation begins.[16] Clearly, every restricted provider must be keenly aware of the potential ethical problems created by third party limitations and develop procedures to address them appropriately. Our view is that these problems can be adequately addressed under the current Model Rules.[17]

There are almost 3500 legal aid attorneys practicing in restricted offices across the country.[18] Another 60,000 private attorneys participate in LSC-sponsored PAI programs providing valuable legal assistance to clients and client communities.[19] These attorneys are providing essential, effective legal services on a wide range of legal needs crucial to the health of low-income communities. They are as creative in developing strategies and priorities within these restrictions as were their predecessors who worked in a better political climate. The fact that an LSC-funded entity cannot provide all the

13. *Recommendations*, *supra* note 1, Recommendations 1–24, at 1751-59.

14. *See id.* Recommendations 78–84, at 1781-84.

15. *Id.* Recommendations 1–2, 78, at 1752, 1781.

16. *See* Model Rules of Professional Conduct Rule 1.1 (1998).

17. Included in the materials prepared for the conference is a detailed article on this subject prepared by Alan W. Houseman, the Executive Director of the Center of Law and Social Policy and a long time leader in the legal services movement. *See* Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 Fordham L. Rev. 2187 (1999). Houseman serves in the capacity of general counsel for NLADA on matters relating to the Legal Services Corporation. The analysis of these issues presented in the Houseman paper reflects in detail the views of NLADA.

18. *See* Legal Services Corp., 1998 Legal Fact Book & Program Information 3 (n.d.).

19. *See id.*

services poor people need should not be confused with the quality or importance of the work undertaken now by legal aid lawyers. *NLADA rejects any suggestion that the mere fact of practicing in such a setting raises questions of professional ethics for the lawyers involved.*

The Model Rules of Professional Conduct do establish a strong and clear statement of the ideals of the profession with respect to what a client should expect from the system of justice and indicate that we should all be involved in ensuring that capacities exist to meet all of the ideals expressed in these two reports. It is not the legal services professional who falls short when clients' views are not adequately presented to policy-making bodies, or when group remedies cannot be pursued on behalf of a class of litigants—it is the system of justice itself. We strongly support the recommendations of education and advocacy before public and private funders as enumerated by the group.[20] These recommendations present an eloquent vision of what we all should be doing to ensure that a first rate system of justice exists in this country.

We disagree, however, with the assertion in the *representing similarly situated persons* group that questions the competence of a restricted lawyer's representation when the attorney is unable to provide all the legal services that a client community might need.[21] Those limitations certainly "contradict the mission of seeking equal justice,"[22] but that responsibility is better placed upon society, the justice system, and the public funders who insist upon funding such a limited vision of justice. Legal services lawyers are unquestionably providing competent services to the many clients and communities they serve.

Our concerns with the recommendations of the *third party influence* group are more serious.[23] While we share some concern that significant ethical dilemmas may develop when restrictions in the scope of representation are imposed *after* the client relationship has been established,[24] we reject the suggestion made in Recommendation 78(a).[25] We do not agree that there are ethical problems relating to independent professional judgment, competency, or scope of representation created by third party restrictions[26]—such as those placed on LSC recipients—so long as they are applied *prior* to the course of representation, and the client is fully informed of, and agrees to, the terms of the representation.

20. *See Recommendations*, *supra* note 1, Recommendations 83–84, at 1784.
21. *See id.* Recommendation 6, at 1754.
22. *See id.*
23. *See id.* Recommendations 78–84, at 1781-84.
24. *See id.* Recommendation 78(b), at 1781.
25. *See id.* Recommendation 78(a), at 1781.
26. *See id.*

The manner in which subsections (a) and (b) are constructed is confusing. I read the provisions of (a) as being applicable generally to the practice of law in an LSC-restricted environment, without regard to the question of informed client consent to a limited scope of representation in those cases where the restrictions might bear some relevance.[27] If this is not the intent of the group, that point should be clarified. How, for example, can an LSC-funded program determine the ethical implications of when its level of funding (which will always be grossly inadequate) will restrict the competency of the representation it provides?

Recommendation Eighty-one, regarding client consent, also creates serious practical problems within a legal services program.[28] As more and more programs develop limited legal assistance techniques such as hotlines, pro se clinics, and interactive websites, the need for informed client consent to the *limited legal assistance* being provided is key to the ethical construct being advanced by the limited legal assistance group.[29] Such consent is also an important issue in determining the ethical implications of the various restrictions placed on providers. Poor people, among others, face problems relating to access and affordability of legal services throughout the country. Calling into question the reliability of client consent in an LSC environment because such consent might appear involuntary due to a lack of alternatives (which may or may not exist) raises unnecessary, yet serious, problems in complying with ethical standards.

NLADA shares completely the vision of the justice system embodied in these two sets of recommendations. We are full partners in the efforts to educate funders, to lobby Congress and other state legislatures about the folly of these restrictions, and to assist states in developing systems of civil justice which provide access to all the means of representation critical to low-income people.

We and our members, however, work every day with the realities of what key funders of the justice system are willing and unwilling to fund. As more and more state legislatures are being approached to provide the enhanced public support so necessary to underpin the system, programs are operating in an even more complex political environment. All too often, public funding comes with unfortunate restrictions on what the money can be used for. Few state legislatures are likely to be influenced by ethical pronouncements regarding the viability of a given set of restrictions. We have been engaged extensively in lobbying Congress around LSC restrictions, and it is clear to us that the 106th Congress will also not be so influenced.

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27. *See id.*

28. *See id.* Recommendation 81, at 1782-83.

29. *See id.* Recommendations 85–107, at 1785-90.

We all need to be heavily involved in educating the public and seeking support from the courts, legislators at every level, and private funders so that we may reach our common vision. Many good suggestions about how to pursue these goals are contained in these two reports. To approach these issues from an ethical perspective, however, provides little help in these efforts. The Model Rules now support our vision of what the justice system should provide clients without making it impossible to maximize the availability of important legal services within the confines of today's political realities. We should pursue the broader goal through different means.

Again, we thank the organizers for an outstanding job in addressing a huge set of timely and important issues. NLADA looks forward to working with Fordham and many of the participants as we aggressively pursue the goal shared by everyone at the conference—a better system of justice.