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The Robert L. Levine Distinguished Lecture, Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor

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The Robert L. Levine Distinguished Lecture, Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor

Cover Page Footnote

I am grateful to Dean William Treanor for inviting me to be the Levine Lecturer, having witnessed his extraordinary leadership of the Law School, to which I can attest as an outside member of the Fordham Law School accreditation review committee. Fordham Law School, with its special concern for law and justice, is ideally suited to host these proceedings. All of us involved in these proceedings are grateful to then Fordham Professor Matthew Diller for his careful guardianship of our efforts and to the Fordham Law Review editors for all of their work. I very much appreciate the contribution of Fordham Law students who took notes in our breakout sessions that followed the panel discussion of the Levine Lecture. Helen Herman was very helpful in organizing the outreach efforts for the Levine Lecture. Rosaly Ozbelt, then a Cardozo law student, was simply extraordinary in serving as the project's executive assistance; we are grateful to the Fragomen law firm for bringing Rosaly to this project and for its role in providing us with administrative support.

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**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE**

**DEEPENING THE LEGAL PROFESSION'S PRO
BONO COMMITMENT TO THE
IMMIGRANT POOR**

*Hon. Robert A. Katzmann**

U.S. Court of Appeals for the Second Circuit

CONTEXT

In February 2007, I had the privilege of delivering the Orison Marden Lecture of the Association of the Bar of the City of New York,¹ at the invitation of the public-spirited Peter Eikenberry. For my subject, I chose to discuss the legal profession and the unmet legal needs of the immigrant poor. As a judge on the U.S. Court of Appeals for the Second Circuit, whose dockets had swelled dramatically with immigration cases, I had become deeply concerned about the all too frequent inadequate representation of immigrants. For immigrants, the stakes are high—whether they can stay in this country, whether they will be separated from their families. I noted the need for competent counsel in the earliest stages of the immigration process, warning that the fates of immigrants “are all but sealed” when they are victimized by notarios. I sought to highlight the glaring lack of access to the legal system for indigent immigrants in the

* I am grateful to Dean William Treanor for inviting me to be the Levine Lecturer, having witnessed his extraordinary leadership of the Law School, to which I can attest as an outside member of the Fordham Law School accreditation review committee. Fordham Law School, with its special concern for law and justice, is ideally suited to host these proceedings. All of us involved in these proceedings are grateful to then Fordham Professor Matthew Diller for his careful guardianship of our efforts, and to the *Fordham Law Review* editors for all of their work. I very much appreciate the contributions of Fordham Law students who took notes in our breakout sessions that followed the panel discussion of the Levine Lecture. Helen Herman was very helpful in organizing the outreach efforts for the Levine Lecture. Rosaly Kozbelt, then a Cardozo law student, was simply extraordinary in serving as the project's executive assistant; we are grateful to the Fragomen law firm for bringing Rosaly to the project and for its role in providing us with administrative support.

1. Robert A. Katzmann, Circuit Judge, U.S. Court of Appeals for the Second Circuit, Orison S. Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor (Feb. 28, 2007), in 62 REC. ASS'N B. CITY N.Y. 287 (2007). A footnoted version appears in Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008) [hereinafter *The Marden Lecture*].

United States. Only forty percent of indigent immigrants have legal representation, while studies show that immigrants with legal representation have a significantly better chance of securing relief than those without.

The lecture commented on the professional responsibility and obligation lawyers have to serve the immigrant poor, observing that, apart from concerns about ensuring the fair administration of justice, we would do well to remember that most of us come from an immigrant past and that immigrants have contributed vitally to every facet of societal life. I, myself, am the son of an immigrant who fled Nazi persecution, and the grandson of immigrants from Russia. I can still hear their voices and accents, and know well how much they loved this country and of their hopes that their children and grandchildren would thrive in this land of freedom and opportunity. The Marden Lecture underscored how vitally important legal assistance is for vulnerable groups such as immigrants and refugees, who often face an unknown language, legal system, and culture, and come to the United States in search of security and a better life. I urged the legal profession to “do more both to improve the quality of paid [counsel] and to expand pro bono assistance,”² remarking that “justice should not depend on the income level of immigrants.”³ And when the legal profession engages in such activity, we honor the memory of our ancestors who came to these shores to realize the American dream.

Reviewing the valuable pro bono work already undertaken by a variety of entities, the Marden Lecture issued a challenge and agenda for further activity by nonprofit organizations, bar associations, large law firms, law school clinics, corporate counsel, the immigration bar, foundations, senior lawyers and retirees, government, providers of continuing education and training, the judiciary, the media, and think tanks.

Activity in the period following the Marden Lecture has been encouraging, although the unmet legal needs of the immigrant poor are largely unfulfilled. For instance, the American Bar Association Commission on Immigration, which has sponsored so much good work, issued a call to potential volunteers to increase pro bono recruitment and to strengthen and support existing networks of attorneys who already serve this vulnerable population of immigrants.⁴ At the August 2008 annual meeting of the American Bar Association, a morning session was devoted to the problems of immigrant representation and an afternoon gathering brought together the relevant organizations and potential funders. Applesseed issued a report, *Assembly Line Injustice: Blueprint To Reform*

2. Katzmann, *The Marden Lecture*, *supra* note 1, at 20.

3. *Id.* at 5.

4. See ABA Commission on Immigration, <http://www.abanet.org/publicserv/immigration/probono.shtml> (last visited Oct. 9, 2009).

America's Immigration Courts.⁵ The Pro Bono Institute, which has always played a leadership role in providing representation for those unable to pay for legal services, reinforced its message of increasing pro bono assistance in immigration cases.⁶ The *Georgetown Journal of Legal Ethics* published a symposium with commentaries on the Marden Lecture, offering further views about how to increase competent pro bono counsel.⁷ Law schools have become more involved in their clinical programs; indeed, Cardozo Law School created an immigration clinic. There has been renewed attention given to the Varick Street Detention Facility. Some of us involved in this project met with the New York State Judicial Institute on Professionalism in the Law, at the invitation of its chair Paul Saunders, to discuss the problems of inadequate counsel. In our circuit, the Federal Bar Council undertook a series of continuing legal education programs on asylum representation, and its newsletter has examined various issues affecting representation.⁸ And the media have devoted increasing attention to the plight of immigrants who lack representation with penetrating accounts by Nina Bernstein⁹ and Julia Preston,¹⁰ among others, with fine daily reporting of cases by Mark Hamblett.¹¹

THE STUDY GROUP

All this positive activity notwithstanding, there is still a vast unmet need; indeed, I am reminded of the words of the old prayer: the sea is so wide and my boat is so small. Peter Eikenberry, who, as I indicated, invited me to present the 2007 Marden Lecture, approached me in the following

5. APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS (2009), available at <http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>.

6. See Esther F. Lardent, *The Role of Major Law Firms in Addressing the Unmet Legal Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 49, 54 (2008).

7. See generally Robert E. Juceam, *The Role of Corporations and In-House Counsel*, 21 GEO. J. LEGAL ETHICS 31 (2008); Katzmann, *The Marden Lecture*, supra note 1; Daniel M. Kowalski, *Things To Do While Waiting for the Revolution*, 21 GEO. J. LEGAL ETHICS 37 (2008); Steven Lang, *Creating Incentives and Facilitating Access: Improving the Level and Quality of Pro Bono Representation Before EOIR*, 21 GEO. J. LEGAL ETHICS 41 (2008); Lardent, supra note 6; Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55 (2008).

8. See, e.g., Rosaly Kozbelt, *Immigration Law: Due Process at Varick Street*, FED. B. COUNCIL NEWS, Dec./Jan./Feb. 2009, at 14.

9. Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1; Nina Bernstein, *Immigrant Detainee Dies, and a Life Is Buried, Too*, N.Y. TIMES, Apr. 3, 2009, at A1; Nina Bernstein, *Piecing Together a Life That U.S. Immigration Refused To See*, N.Y. TIMES, July 6, 2009, at A1.

10. Julia Preston, *A New Strategy on Illicit Work by Immigrants*, N.Y. TIMES, July 3, 2009, at A1; Julia Preston, *Immigration Judges Found Under Strain*, N.Y. TIMES, July 11, 2009, at A11; Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, at A1.

11. See, e.g., Mark Hamblett, *Circuit Sees Exception to Immigration Review Bar*, N.Y. L.J., Sept. 8, 2008, at 1; Mark Hamblett, *Court Finds Aliens May Challenge Government Inaction on Residency*, N.Y. L.J., Apr. 10, 2009, at 1.

months and, thoughtfully as always, asked if I might find it useful to convene a group of interested lawyers to think about how to increase pro bono assistance in the Second Circuit. I was delighted with the suggestion and consulted the indefatigable Robert Juceam for his views. What began initially as a small group of lawyers, joined by Judge Denny Chin of the U.S. District Court for the Southern District of New York, soon swelled to some fifty lawyers, from private practice, large firms and small, from nonprofit groups, legal services providers, government, and academia, who have been willing to give generously of their time, despite their many commitments, to work together to develop a process for thought and action. As a measure of the study group's dedication, we meet at 7:45 a.m. in the courthouse, and attendance is uniformly high. It has for me been inspiring to observe the commitment of the lawyers to work through difficult issues in the interests of the fair and effective administration of justice. Our study group, referred to by its members as the Katzmann study group, has focused substantively on three areas: (1) how to substantially increase the availability of competent pro bono counsel to represent immigrants in immigration matters; (2) an examination of modes of service delivery with the objective of supporting and promoting effective mechanisms; and (3) how to reduce ineffective or fraudulent counsel. In approaching these issues, the study group has sought to play a useful role in a variety of ways.

First, it has been a forum for inquiry and discussion, bringing together a wide range of lawyers, interests, and organizations. The mere fact of our existence has fostered a sense of community and has heightened consciousness of the challenges to be faced and opportunities to be realized. As a consequence, there has been an intensified focus on expanding representation for nondetained and detained persons in New York. The group has used its convening capacity to host a discussion with Dr. Dora Schriro, special advisor on detention and removal operations in Immigration and Customs Enforcement (ICE) to Department of Homeland Security Secretary Janet Napolitano.

Second, it has spawned ideas for consideration and implementation by governmental actors and bar groups. For instance, stimulated by our discussions, I met with Department of Justice officials, including Attorney General Eric Holder, and also with Leon Fresco of Senator Charles Schumer's office, to advance the idea of and promote support for creating a pro bono legal orientation program in New York under the auspices of the U.S. Department of Justice's Executive Office for Immigration Review, and expanding existing programs nationwide. Indeed, under the leadership of Senator Schumer, efforts are now underway to provide such services.¹² To offer another example, Peter Vigeland, a member of our study group and

12. Press Release, Senator Charles E. Schumer, *Schumer Announces Principles for Comprehensive Immigration Reform Bill in Works in Senate* (June 24, 2009), available at http://schumer.senate.gov/new_website/record.cfm?id=314990.

chair of the Public Service Committee of the Federal Bar Council, with the support of Federal Bar Council President Robert Giuffra, organized a standing-room only meeting of lawyers interested in becoming involved in providing pro bono support.

Third, as will be described below, the study group has undertaken reports, drawing upon the dedicated work of study group members working pro bono. Fourth, the absence of a rigid bureaucratic structure has enabled the study group to move quickly to address emerging needs and opportunities. For instance, recognizing the opportunities arising from the availability of deferred and furloughed law firm associates in the Spring of 2009 as a consequence of the economic downturn, the study group hosted a meeting of legal service providers at Cardozo Law School in April 2009 at the invitation of Dean David Rudenstine, and led by study group member clinical law professor Peter Markowitz. That session was convened to assist legal service providers and community-based organizations in placing, integrating, and training deferred and furloughed law firm associates. In September 2009, a week long training session for deferred associates took place at Cardozo Law School, at the principal direction of study group member Thomas Shea of the New York Immigration Coalition. Consistent with our recommendations, in October 2009, Mayor Bloomberg announced that the City will partner with private law firms to dispatch deferred legal associates to immigrant communities in need of quality legal assistance and representation. The City will allocate \$2 million to support a team of supervising attorneys who will provide ongoing training and technical assistance to associates in immigration law. And, more generally, we have worked with New York City Corporation Counsel Michael Cardozo in furthering the city's pro bono initiatives.

THE LEVINE LECTURE

The Levine Lecture at Fordham is prototypical of the study group's approach. In the nine months leading up to the Fordham forum, study group members, aided by an indispensable executive assistant, Rosaly Kozbelt, a Cardozo Law student, met to conceive of a program that would bring attention to the challenges ahead. We determined that we would begin with a panel discussion, highlighting the thinking to date of the various task forces we created. Our feeling was that attention to the problems identified is greater than ever, as the lack of governmental resources makes it all the more important that the legal profession do its part to facilitate access to competent counsel. And these difficult economic times, with each day bringing more news of layoffs in large law firms, underscore the need to ensure that law firms not lose sight of their pro bono obligations, especially to the immigrant poor. As important as the panel discussion was the audience. And with the wonderful support of Fordham Law School, we invited a broad range of persons in the law firm community, government, legal services providers, academia, and the media.

We asked that they participate in the breakout sessions that would follow the opening panel.

We began with a discussion among some key governmental decision makers—Assistant Chief Immigration Judge Sarah Burr, Board of Immigration Appeals Chairman Juan Osuna, and New York City Deputy Mayor for Legal Affairs Carol Robles-Roman. Then we heard from an impressive group of lawyers in our study group: Robert Juceam, Lewis Liman, William Kuntz, and Michael Patrick from private practice; JoJo Annobil from Legal Aid; and Peter Markowitz from Cardozo Law School. Following that panel discussion, Judge Denny Chin offered some words about his personal experiences as a prelude to the next part of the program, consisting of breakout sessions that provided for more in-depth discussion as to the areas of inquiry discussed in the panel discussion. Finally, following the breakout sessions, we returned for a presentation of reports of the breakout sessions, moderated by Peter Eikenberry.

As I said at the Fordham forum, we did not conceive of the day's event as simply a one day convocation, but a process of which the Fordham event was an important part—a process that seeks to bring together a community of concerned lawyers, to exchange ideas and to think systematically about how better to facilitate adequate representation, and to think about practical solutions. What we sought to do at Fordham represented not the culmination of our work, but a work in progress, with the hope of attracting greater interest and support from the bar and decision makers. What made the session special is that we brought together key actors who have something to say about the implementation of proposed solutions.

Nina Bernstein of the *New York Times* put it this way:

What started as a lecture to the city's bar association two years ago and quietly evolved into a 7:45 a.m. "study group," has turned into a movement that filled an amphitheater at Fordham Law School on Wednesday afternoon, drawing high-powered lawyers, judges, academics and city officials who talked bluntly about a dysfunctional system and brainstormed into the night.¹³

TASK FORCE REPORTS

In the months following the Fordham Levine forum, the ideas expressed have been considered by our study group, most specifically, three subcommittees, whose reports are published in this volume. I note that I had no role in the drafting or consideration of the reports.

Subcommittee One, chaired by Robert Juceam and Lewis Liman, is entitled "Increasing Pro Bono Activity." In its report, drafted by Jennifer Colyer, Robert Juceam, Lewis Liman, and Sarah Russell, the subcommittee

13. Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009, at A21.

tackles such questions as how to increase pro bono activity of law firms, bar associations, legal aid organizations, nonprofits, corporations, law school clinics, training and continuing legal education providers, and city and state government. It explores the role that foundations and other funders might play.

Subcommittee Two, “Enhancing Mechanisms for Service Delivery,” is chaired by Claudia Slovinsky and Jojo Annobil, and has been examining existing legal services, the barriers to the delivery of those services, and what might be done to improve the delivery of effective pro bono and affordable legal services to immigrants in removal proceedings. The subcommittee report, focused on removal proceedings in New York City, is in two parts. One, authored on behalf of the subcommittee by Jojo Annobil, addresses the delivery of services for nondetained persons; the other, crafted on the subcommittee’s behalf by Peter Markowitz, is concerned with the delivery of services for detained individuals. Each offers a range of recommendations for the legal community, the government, and the judiciary to assess.

Subcommittee Three, “Addressing Inadequate Representation,” is chaired by Dr. William Kuntz and Michael Patrick, and has been concentrating on how to combat fraudulent activities by unscrupulous nonlawyers and inadequately trained lawyers who take advantage of immigrants. The report, written by Careen Shannon on behalf of the subcommittee, examines the nature of the problem by offering the story of an immigrant family who was victimized by unscrupulous providers, provides data about matters before the Department of Justice, discusses what constitutes the unauthorized practice of law, describes who is permitted under federal regulations to represent foreign nationals’ immigration proceedings, discusses what constitutes ineffective assistance of counsel in the immigration context, and suggests possible ways to address inadequate legal representation of immigrants.

Rounding out the volume is an essay by Immigration Judge Noel Brennan, who offers her perspectives from the field about the problems of inadequate counsel and the need for improved lawyering. Judge Chin, himself an immigrant, closes with a personal testament about what is at stake in immigration proceedings and the benefits of an inclusive society.

The concerted involvement of lawyers in this pro bono immigration representation effort gives hope that greater attention will be paid. The need for such focus will not end in the wake of legislative changes to the immigration system, whatever form those changes might take. In any new regime, new legal questions will arise, requiring the commitment of lawyers. Without competent counsel, paid or pro bono, the fair and effective administration of justice will not be realized.

Notes & Observations