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A PRACTITIONER'S REFLECTIONS: THE ONGOING RELEVANCE OF THE PRO BONO RESPONSE TO 9/11

Ronald J. Tabak

INTRODUCTION

The *pro bono* response to the horrendous events of 9/11 is of ongoing importance. This is not simply because we could replicate or improve on that response in the event of another catastrophe. More importantly, what was and was not accomplished and by whom, plus the spillover effects of 9/11-related *pro bono* efforts, all have great significance to efforts to increase "regular" *pro bono* activities.

I. GREATLY INCREASED INVOLVEMENT OF NON-LITIGATORS

My experience in over 20 years as a *pro bono* coordinator is that lawyers who otherwise say they are too busy will leap to undertake *pro bono* matters if they are of compelling interest, the lawyers trust the case vetting process to weed out frivolous matters, and they are persuaded that the training, mentoring, and exemplar materials will enable them to do effective legal work. The response to 9/11, and what has happened even after there are no longer new 9/11-related matters, strongly reinforce this conclusion.

The 9/11 catastrophe caused a great many lawyers who never, or never since their earliest years of practice, had shown interest in *pro bono* to jump at opportunities to help. Noticeable among them were non-litigators, who as a group have historically done substantially less *pro bono*, in terms of number of matters and number of hours, than their litigation colleagues.

What changed after 9/11? First, the 9/11 attacks led many lawyers to consider it crucial that they use their talents to help alleviate the situation. Second, the scheduling of relevant training sessions, the available of knowledgeable mentors, and the availability on www.probono.net of substantive information, legal memoranda, and exemplar documents greatly eased the usual concern about mishandling *pro bono* matters. Indeed, the usual fear of the unknown is the biggest single reason why more lawyers do not do *pro bono* work. That fear has only intensified as the legal profession has become more and more specialized. Fortunately, the post-

9/11 training and mentoring efforts overcame these fears among many lawyers, particularly non-litigators.

The increased involvement of non-litigators in *pro bono* has continued. At my firm, for example, the participation by non-litigators in *pro bono* has increased each year, and by 2003 had reached the same level that litigators had reached a few years earlier. While the litigation involvement has gone even higher in the interim, the gap between litigation and non-litigation participation rates in *pro bono* is the smallest in my experience. While other factors partially explain this, a major reason is the positive experience that so many non-litigators had in dealing with 9/11-related matters. Success in doing *pro bono* work breeds willingness to undertake additional *pro bono* work and improves the reputation of *pro bono* amongst other lawyers.

II. LEGAL AREAS OF GREATEST SUCCESS

In terms of what was and was not accomplished, this differed significantly by types of legal needs and types of population involved.

A great deal was accomplished with regard to death certificates, trusts and estates matters, applications to the 9/11 fund, and many legal issues facing small businesses.

The availability of trainings, training materials, and mentors experienced in the subject areas was crucial to the success of efforts in these areas. For example, although most law firms have relatively small (if any) trust and estates practices, the lawyers who do have expertise in trusts and estates made themselves available to an extraordinary extent after 9/11, both to provide representation directly themselves, and to provide guidance and oversight to colleagues who had no experience in these areas.

Without such mentors, the post-9/11 “facilitator” effort would have failed miserably, because there would have been many types of legal needs that could not be addressed effectively. As noted under my next heading, there still were several areas of largely unmet legal needs. But the situation would have been far worse without the training, mentoring and website materials that were available.

Moreover, the presence of Legal Aid lawyers at the Disaster Assistance Service was enormously important to facilitators. The relatively brief training of facilitators was insufficient to enable them to spot all significant legal issues arising from the facts with which they were being presented, and they were unlikely to know what to

do about many of these legal problems. The Legal Aid attorneys, available for on-the-spot mentoring, enabled many facilitators to function effectively.

These experiences have great ongoing relevance. For example, the availability at legal clinics of experienced legal services attorneys greatly enhances the impact of *pro bono* lawyers. The latter cannot be expected after relatively minimal training to deal with complex issues or to recognize that the client's ostensible problem may really only be the "tip of an iceberg". But working together with legal services lawyers, the *pro bono* lawyers can accomplish a great deal. The *pro bono* lawyers can find out the underlying facts, then consult with legal services attorneys about problematic areas, and then provide appropriate advice or referrals.

III. LEGAL AREAS IN WHICH PRO BONO REMAINS CHRONICALLY LESS EFFECTIVE

The biggest area of unfilled legal needs after 9/11 was landlord/tenant. This was not surprising to any experienced *pro bono* coordinator, but it was disappointing nonetheless. Landlord/tenant work has always been poor people's greatest area of need for legal services. Yet, there has been a disconnect between this need and the *pro bono* services provided. This is due to these factors: landlord/tenant matters are substantially more complex than most other *pro bono* matters; it takes a mentor so much time to help a *pro bono* lawyer prepare for a landlord/tenant matter that it would be easier for the mentor to handle the case without a *pro bono* lawyer unless the latter will thereafter handle several additional landlord/tenant cases; and most of them do not ever return.

To some extent, these usual problems were ameliorated by the use of mediation and preferential court scheduling in some 9/11 landlord/tenant matters. But there was substantially less training and mentoring available than needed. And relatively few *pro bono* lawyers were willing to undertake 9/11-related landlord/tenant matters of individuals and small businesses.

Absent recognition of a legal right to counsel in landlord/tenant matters (as there is for child custody matters and criminal cases), the most cost-effective measure is to greatly increase funding for legal services staff lawyers to handle these cases.

Another area of substantial unmet legal needs was immigration. . In stark contrast to political asylum, there is not an extensive history of *pro bono* training and mentoring on immigration matters. There now is, fortunately for those who manage to find it, a library

of materials on immigration law within the *www.probono.net* political asylum area library. But there is no Pro Bono Net area devoted to immigration. But if there are manuals on how to handle immigration matters, most *pro bono* coordinators do not know about them. And such trainings as there have been since 9/11 on immigration for *pro bono* lawyers have mostly been on specialized sub-topics like habeas corpus proceedings for immigrants facing deportation. Those trainings have been designed mainly for immigration lawyers. Yet, particularly in the wake of anti-foreigner bias following 9/11, there has been a great increase in the number of “regular” lawyers who are interested in handling immigration matters but lack the training and mentoring necessary to undertake such representation.

A third area of concern is civil rights. Many “regular” lawyers, particularly those who encountered hostility after 9/11 because of their ethnic backgrounds, expressed interest in representing people whose civil rights have been violated by anti-Arab or anti-Asian discrimination. Unfortunately, notwithstanding an extremely well attended training on this subject that my firm hosted soon after 9/11, most of those who were trained were never hooked up with clients. If that were so because few had been discriminated against, that would not be cause for concern. But in reality, there are inadequate mechanisms for people who encounter such discrimination to learn about their legal rights and about how they might find lawyers who, with the proper training and mentoring, could represent them. This is an even greater problem for non-citizens, who, even more so after 9/11 than before, are often extremely wary of approaching anyone outside their immediate circle of friends and family for help.

What is needed is an intensive outreach effort to find those whose civil rights have been violated, plus extensive training and mentoring for those who have not before handled civil rights matters. Unlike many other areas of law, civil rights does not have a site on Pro Bono Net. That is not for lack of effort by Pro Bono Net and my law firm. Unfortunately, the huge amount of technical work we did has been completely undermined by the fact that thus far no civil rights legal group has been willing to put together materials designed to help *pro bono* lawyers (as opposed to full-time civil rights lawyers) to handle civil rights cases. And even if training materials were available and panels of knowledgeable civil rights lawyer mentors existed, there still would be a pressing need

for an organization to take the initiative to interface between victims of civil rights violations and *pro bono* coordinators.

A fourth problematic area concerns small business people, who are sometimes referred to as “micro-entrepreneurs”. Some efforts to pair such business people with *pro bono* lawyers have been wildly successful. But most *pro bono* coordinators continue to find it extremely difficult to match their attorneys who wish to represent small business people with suitable clients. This is *not* because there are few potential clients who need the services that these lawyers could provide. Rather, it is due to potential clients’ lack of awareness of how non-litigation lawyering could help them, and of how to get connected to *pro bono* counsel.

This same problem undermined, to a significant extent, the post-9/11 efforts to help small business people whose businesses were ruined or endangered by the catastrophe. Despite extensive efforts to locate such business people and to make them aware of the availability of legal help, many never came forward to get the *pro bono* help that would have been readily provided.

IV. GREATER COORDINATION AMONGST PRO BONO COORDINATORS

The extraordinary amount of 9/11-related *pro bono* work could never have been undertaken had it not been for the tremendous cooperation of *pro bono* coordinators at different law firms, at public interest legal groups, at bar associations, and at Pro Bono Net. By working together, these coordinators assembled and disseminated training materials, legal analyses, and exemplars that no one of their organizations could have prepared or circulated. Moreover, their brainstorming and organized efforts led to great enhancements in outreach to potential clients, and in the intake of potential matters.

This cooperative effort has expanded much further since the hectic months that followed 9/11. In 2003 and 2004, a New York *pro bono* coordinators’ listserv has been created; *pro bono* coordinators have held half-day meetings to discuss matters of mutual interest with each other and with lawyers from public interest law groups; and *pro bono* coordinators have begun interfacing with law school public interest advisors, to come up with mechanisms by which law students will get much greater insights about the particular types of *pro bono* that individual firms are most likely to undertake.

CONCLUSION

The post-9/11 experience showed that, given matters that interest them, and with proper training and mentoring, many more lawyers will do *pro bono* work. Initial concern that the spike in *pro bono* after 9/11 would reverse itself once the number of 9/11-related matters declined has disappeared. To the contrary, *pro bono* activity at most of the large law firms in the New York area continued to increase in 2002 and 2003.

Initiatives similar to those that have led to great increases in some areas of *pro bono* work could be successful in at least some other subject areas. What is needed is the same type of laser-like focus on these areas as was applied after 9/11 to so much of what needed to be done in the wake of that horror.