



# *The Association of the Bar of the City of New York*

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**PRESIDENT**  
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Hon. Juanita Bing Newton  
Deputy Chief Admin. Judge for Justice Initiatives  
Office of Court Administration  
100 Centre Street, Room 549B  
New York, NY, 10013

Dear Judge Bing Newton:

We are pleased to provide the following comments on behalf of the Association of the Bar of the City of New York (the "Association") on the Report of the New York State Unified Court System issued in January 2004, entitled "The Future of Pro Bono in New York" (the "Report").

Equal access to the judicial system is fundamental to the principle of equal justice under law and to our entire legal system. Pro bono representation of those who are too poor to afford a lawyer is a critical component of the effort to achieve equal access to justice, which also includes adequate funding of legal services organizations and simplification and reform of judicial procedures. The Chief Judge, the Deputy Chief Administrative Judge for Justice Initiatives and all who participated in the Pro Bono Convocations deserve great praise for their commitment to equal justice and to fostering pro bono as one means to this end. The Association agrees with the majority of the findings and recommendations set forth in the Report and believes that the Report represents a significant step forward in the effort to increase the amount of pro bono legal work performed by members of the Bar in New York State.

### The Principal Findings

The Association endorses four of the five principal findings of the Convocations of Pro Bono that the Unified Court System held during the year 2002, namely (i) a need exists to increase pro bono services in New York State; (ii) a formal statewide initiative is necessary and desirable; (iii) all stakeholders should be involved in the statewide program that is developed to expand pro bono; and (iv) the Judiciary should have a significant role in the statewide program, but local leadership, design, implementation and control are essential. In particular, the Association endorses the concept of statewide coordination of pro bono efforts, with local committees developing action plans. We recommend that, in developing this program, the roles of the existing pro bono and legal services coordinating bodies should be taken into account. We also support the Judiciary's leadership role and court-based initiatives to facilitate court access for litigants with pro bono attorneys; the desirability of pilot projects to test the efficacy of discrete task ("unbundled") representation as a way to increase pro bono service; the development of materials for newly admitted attorneys and law students; and the collection of data about pro bono service. We have reservations regarding the fifth finding, that pro bono service should be voluntary, as we further discuss below.

### The Record

Part I of the Report sets forth the results of a comprehensive study of the amount and type of pro bono work performed by the lawyers of New York State. It documents that in 2002 fewer than half (46%) of New York State attorneys performed any qualifying pro bono work. Only 27% of attorneys performed more than 20 hours of work, the goal set forth in the April 1997 Pro

Bono Resolution of the Administrative Board of the Courts. Not only are these results disappointing, as the Report makes clear. More disturbing is the failure of a 14-year effort on the part of the courts, the organized Bar and committed individuals to increase the amount of pro bono work among the lawyers of our State.

As the 2004 Report indicates, it is the third in a series of studies of the amount and type of pro bono work engaged in by the members of the New York Bar. The first report was compiled by the Pro Bono Review Committee appointed in 1990 by former Chief Judge Wachtler. That Committee took two surveys of the amount of pro bono work being performed, in 1990 and 1992, and in its Final Report in 1994 found that the rate of participation for lawyers whose principal place of business was New York State had declined from 48.3% in 1990 to 47.1% in 1992. Those who provided services in excess of 20 hours of qualifying work increased, but only from 22.8% to 26%. A third survey was taken in 1997 by the Office of Court Administration and again found that only 47 percent of attorneys reported any qualifying pro bono service, with 27 percent reporting 20 or more hours of service. The last study, as indicated above, has almost identical results.

These studies show no improvement despite the concerted efforts of the Court and organized Bar to encourage pro bono service. The 2004 Report and Recommendations describes the 1990 Report of the Committee to Improve the Availability of Legal Services (commonly known as the "Marrero Commission"), the recommendations of the Pro Bono Review Committee in 1994, the 1997 resolution of the Administrative Board of the Courts urging attorneys to provide 20 hours of pro bono service annually and to support financially the work of

organizations that provide legal services to the poor, and the amendment to New York's Continuing Legal Education rules to allow CLE credit for the performance of pro bono work. Every attorney admitted in this State has been informed of the Administrative Board Resolution and the availability of CLE Credit, as has also received an eloquent appeal for pro bono work from the Chief Judge. As the 2004 Report now demonstrates, none of these initiatives has resulted in any improvement in the number of attorneys providing pro bono work or in the average number of hours of work performed.

At the same time, the need has increased. The 2004 Report recognizes that during part of the period during which the Reports were engendered, "New York experienced a dramatic increase in poverty." (p. 5, n. 13). Moreover, since the early 1990's, annual funding for civil legal services in New York has decreased by nearly \$40 million, principally as a result of decreases in federal Legal Services Corporation funding and in proceeds of the state Interest on Lawyers' Accounts ("IOLA") program. See Report to the Chief Judge, "Funding Civil Legal Services for the Poor," Legal Services Project, March 1998. Because of funding constraints, the number of legal services attorneys in the State has decreased substantially since the early 1990's, leading to a substantial decrease in the availability of civil legal services to the poor. Chief Judge Kaye stated when she appointed the Legal Services Project, "A justice system that allows disparities in justice based on the ability to pay is inconsistent with a fundamental principle of our free democratic society – equal justice for all." Yet the State Legislature failed to adopt any of the proposals of the Legal Services Project for the provision of additional funding for civil legal services to the poor.

## Specific Issues

### A. *Mandatory Pro Bono*

Our inability to endorse the finding of the Conventions that pro bono should be entirely voluntary does not stem from a belief that it is preferable as an ethical or practical matter to require either mandatory pro bono reporting or mandatory pro bono participation. Ideally, all pro bono would be voluntary. Part I of the Report demonstrates, however, that the present state of pro bono is so far from ideal that much more than encouragement is required in order for pro bono to play its appropriate role in providing equal access to justice to all.

The importance of providing equal access to justice, the magnitude of the need and the failure of past efforts to increase the participation of the private Bar requires a reexamination of the premise that all pro bono should be voluntary.

It is now time for action. This Association supported the recommendations of the Marrero Commission that pro bono work be made mandatory in New York State (or that attorneys have an option to contribute to a legal services organization instead). We have restated that position on several occasions, including in our Civil Justice Crisis Plan issued in 1996. See 51 Record of the Assn. of the Bar of the City of New York 708, 710 (Nov. 1996). We recognize, however, that this is a particularly controversial issue and that there is a great degree of resistance among members of the Bar -- including many members of the Association itself -- to a mandatory system.<sup>1</sup> Accordingly, in 1997 we proposed that the Chief Judge require members of the New York State Bar to report the extent of their pro bono commitments each year, as well as the

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<sup>1</sup> We also recognize that much preliminary work would be necessary to create the infrastructure that would support a system of mandatory pro bono.

amount of their monetary contributions to organizations providing legal services to the poor. See Proposal to Chief Judge for an Attorney Pro Bono Reporting Requirement, 52 Record of the Assn. of the Bar of the City of New York 367 (April 1997). A reporting requirement would permit the court to reaffirm its aspirations for members of the Bar and provide a more reliable, continuing flow of information to assess the scope and direction of voluntary commitments to legal services. It would involve every attorney in the process and encourage participation in pro bono work.

The Report details the success of the Florida courts in implementing a system of mandatory pro bono reporting and the fact that the Bar has accepted the system and there have been significant increases in pro bono activities since mandatory reporting was instituted as well as an increase in the amount of contributions by the Bar to support legal services. The Report recommends, on the basis of the Florida experience, that the new statewide Standing Committee on Pro Bono examine, in the first six months of its existence, the issue of individual pro bono reporting and recommend to the Chief Judge whether and how individual reporting should be accomplished in New York.

We recommend that instead of further study as to the advisability of mandatory pro bono reporting, the Standing Committee should be directed to develop procedures for the immediate implementation of mandatory pro bono reporting in New York. The Standing Committee could then assess the effects of mandatory pro bono reporting as it considers the question of mandatory pro bono. If mandatory reporting does not result in a significant increase in the percentage of lawyers performing pro bono work and in the overall amount of pro bono work performed, we

believe the record established to date justifies the imposition of mandatory pro bono despite its controversial nature.

B. *Scope of the Survey*

Volume I of the Report represents a comprehensive survey of current pro bono efforts in New York State and includes a wealth of useful information. We believe that the goals of the Report will be enhanced if future surveys did not limit the demographic information to age, years of practice, general type of practice and size of firm, but also included questions regarding the nature of the respondents' practice area. For example, if it turned out that 75% of lawyers with a predominately litigation-oriented practice engaged in pro bono work while only 35% of lawyers with a predominately transactional practice performed pro bono legal work, any resulting report would likely adopt very different recommendations than one based on survey results where the percentages are reversed. Similarly, if a survey reveals that a significant majority of the matrimonial bar performs pro bono work, any resulting report would appropriately examine how that practice area has managed to foster such a strong pro bono ethic.

This task will be greatly simplified if, as recommended above, a system of mandatory pro bono reporting is adopted because lawyers can be asked to report not just on the amount of time spent on pro bono but also on the nature of their respective practices. This additional information can only increase the effectiveness of the efforts recommended in the Report to stimulate and increase pro bono work in New York.

C. *Lessons Learned from Post-September 11 Initiatives*

Volume I of the Report notes that there has been no significant statewide increase in pro bono activity in recent years. Anecdotal evidence in New York City, however, supports the observation that since the September 11 attacks there has been a significant increase in pro bono work among lawyers from private firms working with established legal services organizations and that this increase has been sustained through the present day.

In the aftermath of the September 11 attacks, the Association created the Pro Bono Society to recognize members who had made an “outstanding” contribution of pro bono legal services in the past year. Outstanding has been defined as performing 100 or more hours of free legal services for individuals or entities who cannot afford to pay or in response to a civic emergency.<sup>2</sup> We believe that the Standing Committee should examine and incorporate those aspects of the September 11-related pro bono initiatives that have led to and sustained an increase in pro bono work.

The City Bar Fund, in collaboration with the NALP Foundation for Lawyer Career Research and Education and the Louis Stein Center for Law and Ethics at Fordham Law School, are publishing *Public Service In a Time of Crisis, a Report and Retrospective on the Legal Community's Response to the Events of September 11, 2001* (the 9/11 Report). The 9/11 Report documents the incredible outpouring of pro bono legal services to serve victims of the terrorist attacks and describes the keys to these efforts. These keys include: i) increasing legal services-

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<sup>2</sup> In 2001, 366 attorneys applied for membership in the Pro Bono Society, in 2002, 346 attorneys applied for membership.

private bar coordination; ii) increasing the amount of training, mentoring and case screening available in order to induce greater participation; iii) encouraging the partnering of legal providers with varying expertise; and iv) utilizing technology in the intake of new clients and to share information among lawyers providing pro bono legal services. Consideration of these important lessons learned from the Bar's response to the tragedy of September 11 can only increase the effectiveness of the proposed Standing Committee.

D. *Discrete Task or "Unbundled" Legal Services*

The Report recommends the establishment of pilot projects to test the efficacy of discrete task or "unbundled" legal services. Part of the Association's mission is to take a leadership role in finding new solutions to providing legal assistance to those who can not afford legal representation in New York City. Over the past decade, the Association's pro bono affiliate, the City Bar Fund, has been addressing the unmet legal needs of New York's underserved populations through alternative models that rely heavily on pro bono and assistance to the self-represented. In 1987, the City Bar Fund began to harness the resources of the legal profession to address the legal needs of the poor by developing a pro bono legal model. The model consists of recruitment and training of volunteer attorneys; providing opportunities in a range of subject areas; screening of cases; staff support; mentoring and evaluation. In 1997, the Center for Self-Help, Information, Education and Legal Defense (SHIELD) legal hotline was created to aid New Yorkers who could not afford legal assistance and were having increasing difficulty receiving assistance from the City's overburdened legal services offices.

One of the lessons the City Bar Fund has learned from developing a pro bono model is that while many attorneys are committed to providing pro bono services, they are unable to provide full representation in litigated matters due to the commitment of time and resources that such representation requires. To address this issue, the City Bar Fund has successfully experimented with “discrete task representation” or “unbundled services” as an alternative to traditional full-service representation and has received an Equal Justice Works Fellowship to explore where unbundling might be used as an alternative to full representation.

The Association believes that unbundling could be used to address unmet legal needs of low-income New Yorkers as well as those who could afford to hire attorneys. The Association's Legal Referral Service is exploring how to include a limited representation panel for referrals for clients who could afford to hire an attorney modeled on the successful limited scope representation referral panels set up by the King County Bar Association in Washington State and the Contra Costa County Bar Association's Legal Referral Service in California. Both the King County and Contra Costa Bar Associations offer unbundled legal services in three main areas of expertise in family law matters: i) advice and counsel; ii) limited court or administrative appearances, and iii) assistance with document preparation or pleadings. Complex issues are referred for full representation to other members of their respective Lawyer Referral Services. While these unbundled legal services were not specifically designed to meet the interests of only low-income clients, they can still serve as a useful model for pilot projects designed to test the efficacy of using unbundled services to meet the needs of such clients.

Like mandatory pro bono, this is a controversial topic that has not yet won widespread acceptance among the Bar, and which requires a re-examination of the governing ethical rules. The issue is also similar to mandatory pro bono in that, in a perfect world, it would not be necessary because there would be enough lawyers providing enough pro bono legal representation that every worthy individual and organization would have its needs met through the provision of traditional, full legal representation models. Unfortunately, as Volume I of the Report demonstrates in great detail, the world is not perfect and non-traditional means must be considered if we are to come closer to meeting the needs of the poor and others in New York State.

For this reason and based upon our first-hand experience, the Association supports the Report's recommendations regarding the establishment of additional pilot projects. We also note that the analysis of such projects will also necessarily require a close examination of the ethical rules implicated by discrete task representation. If it is determined that this is an effective method for addressing unmet pro bono needs, it will not enjoy success unless and until members of the Bar can be assured that they can participate in such non-traditional representation while still complying with the governing ethical rules.

E. *Increasing Visibility of and Funding for Legal Services Organizations*

It cannot be seriously disputed that existing legal services organizations represent one of the most effective ways to deliver legal services to the poor. They are staffed by committed lawyers and staff who have been trained specifically in the substantive legal areas most directly relevant to the issues facing New York States' neediest residents. In addition, these organizations frequently refer pro bono matters to members of the private bar and many of them additionally

provide assistance, support, training, mentoring and even malpractice coverage and other resources to private lawyers to whom they refer cases.

Nevertheless, according to Volume I of the report, fewer than 9.7% of the survey respondents reported receiving referrals from a legal services or legal aid program. This is particularly ironic given the fact that many of the reasons given by respondents for not participating in pro bono activities -- such as a lack of expertise, support, malpractice coverage, and appropriate projects -- can all be addressed by working through such an organization.

For these reasons, expanding the ability of legal services organizations to directly assist clients and increasing their visibility to members of the private bar seems like an efficient and effective way to increase the provision of legal services to those with the greatest unmet needs. This cannot be accomplished without increased funding for these organizations, many of whom are currently operating on shoestring budgets. An additional topic for the Standing Committee to examine, therefore should be methods to increase the visibility of and available funding for legal services organizations.

One way to accomplish this would be to require mandatory reporting of financial contributions to legal services organizations in addition to reporting actual pro bono work performed. While there are legitimate confidentiality concerns, these can be addressed by limiting the amount of information required. For example, rather than requiring disclosure of the total amount donated, lawyers could simply be required to indicate whether they contributed above a certain amount. Consideration should be given to whether this should be based upon a sliding scale according to income.

This is just one example of a method to increase both the visibility and funding of legal services organizations. Given the likelihood that increased funding and visibility will go a long way toward realizing the aspirations reflected in the Report, the Association recommends that this issue be given significant attention by the Standing Committee.

Conclusion

The Report is a commendable effort to address the tremendous unmet legal needs of the poor in New York State and everyone who has been involved with that project deserves our recognition and thanks. It represents a significant step forward in the efforts to increase pro bono participation among members of the New York Bar. We hope that the comments we have set forth above help contribute to this effort.

Very truly yours,

E. Leo Milonas