

ETHICS, ACCESS TO JUSTICE AND PRO BONO WORK: THE U.S. LEGAL PROFESSION

By Leo Milonas

Throughout the world, nations today face the unprecedented challenge of providing meaningful access to justice to all residents. It is incumbent upon us, as lawyers and bar leaders, to confront this unprecedented need, and to share ideas so that we may learn from each other's experiences.

Indeed I am impressed with the Defensoria Publica system that Brazil has developed, which represents a significant commitment from the state, in collaboration with private lawyers, to provide legal services to poor people. Your challenge now is how to compliment this system with still greater resources from the private bar.

In the United States pro bono has long been a part of the professional ethics of the lawyer. Model Rule of Professional Conduct 6.1 states that a lawyer should aspire to at least 50 hours per year of pro bono service. As United States Supreme Court Justice Benjamin Cardozo noted:

Membership in the bar is a privilege burdened with conditions [An attorney] is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and like the court itself, an instrument ... to advance the ends of justice.

In a profession dedicated to justice and the rule of law, lawyers should actively work to ensure access to justice for all.

Though pro bono has long been incorporated into our code of ethics, as a general matter this obligation has been self-enforcing, although discussions continue within the profession as to whether it should be made mandatory.

Yet, in spite of the exhortations of the Code of Professional Responsibility, that "every person in our society should have ready access to ... a lawyer of integrity and competence", it has been estimated that the United States meets less than 20% of the legal needs of the poor in our country. Neither state nor privately-funded programs and pro bono together come anywhere near providing full access to justice, a situation that should not exist in a democratic society.

As I mentioned earlier, though pro bono has long been an ethical obligation in the United States, it was largely left to each individual to implement without institutional support. However, this began to change in the 1970s, in part as a result of the development of public interest law. A mutuality of interest between law firms and the emergent public interest legal sector was recognized. Law firms sought to work on the challenging issues of social policy generated by public interest litigation; and public interest law centers had need of the legal skills and other resources that law firms

uniquely possessed. The 70s saw the institutionalization of pro bono within law firms through the creation of pro bono committees and policies. Similarly, public interest organizations sought to establish relationships with law firms to effectively incorporate pro bono work to advance their mission. Likewise bar associations sought to define appropriate areas for pro bono work and those who would be eligible for these services. The American Bar Association developed a broad definition of pro bono encompassing both work for individual clients and for NGOs that were addressing the needs of the poor and disadvantaged.

The 1980s and 90s in the United States witnessed a serious, steady and on-going decline in government funding for civil legal services for the poor, and significant restrictions on the work that these programs could do – measures which were vigorously fought by bar associations, including the New York City Bar and the ABA. The situation in the United States today with respect to government support for legal services for the poor is nothing less than a national disgrace. Bar associations in particular have sought to increase the amount of pro bono work being done and continue to pressure the government to reverse the funding trends of the past two decades.

As it stands now in the United States, government, whether federal, state or local, is required to fund the criminal defense of poor people. There is however no funded right to counsel in civil matters and only very limited governmental resources dedicated to providing counsel to the poor in civil matters no matter how serious the consequences. Indeed, even with regard to criminal defense, there is an on-going struggle to assure adequate funding as the amount of moneys paid by government is frequently insufficient to assure adequate counsel. We recognize that the challenge is not only to provide the poor with access to counsel but to provide access to adequately funded counsel, that is counsel with the resources to provide representation of a reasonable quality. In this context of inadequate governmental support, pro bono legal assistance and the financial support of the private sector for public interest and legal aid organizations has become a central means of addressing the crisis in access to justice in our country.

Last year, the 100 largest law firms in the United States provided in excess of 1.7 million hours of pro bono assistance, with many individual lawyers well exceeding the suggested 50 hours a year. Some of these matters entailed individual representation: in housing court; in administrative tribunals adjudicating entitlement to government benefits; in family court representing targets of domestic violence and children who were the victims of abuse or neglect. Other assistance was directed to NGOs, to strengthen them structurally, and to provide transactional assistance on projects they are developing such as micro-enterprises, community-run schools and health clinics, and the creation of housing for homeless families. Firms also work on significant litigation addressing critical social and political issues. Recently firms in New York City have addressed such issues as the inequities in New York State funding for public schools which discriminates against New York City children; the continued detention of alleged enemy combatants at the US Naval base at Guantanamo without access to lawyers or minimal due process; the failure of state and city government in New York to provide temporary shelter for homeless families or appropriate release planning, including housing, for people being

released from psychiatric centers; and special registration requirements for non-citizen residents who are Muslim.

There should be no room for confusion though; pro bono can never replace an adequately funded, well-staffed, government-supported legal services program for the poor and disadvantaged. But even if the situation in the United States was miraculously reversed tomorrow and our government was to generously fund legal aid, well-organized, vigorous pro bono programs would remain critical to the achievement of meaningful access to justice for all. In addition to the sheer numbers of individuals who require legal assistance, successful resolution of many of the social problems that NGOs are addressing will require the kind of expertise that lies within firms. Likewise events will occur that have never been anticipated that will demand the swift mobilization of legal assistance. This happened in New York with the events of September 11th and its aftermath. Similar situations can occur as the result of earthquakes, floods and other natural disasters. In these instances, pro bono assistance mobilized through bar associations and NGOs can generally provide the necessary help more quickly and effectively than government efforts.

As you contemplate how to incorporate pro bono assistance into your legal system, let me mention several new endeavors that we are developing and some problems to be aware of.

One of the most interesting new initiatives is the Task Force, which brings together lawyers from a number of law firms to work together on a particular problem or in a particular substantive area. Task Forces can be organized by NGOs or bar associations. Through the Task Force, lawyers can work together to develop an expertise in an area of public interest practice, provide support to each other and recruit new lawyers to their work. Some of the successful Task Forces in New York address issues of disability rights, sexual harassment on the job, domestic violence and discrimination against non-citizens post-September 11th. Task Forces can prepare training manuals and seminars for lawyers, brochures and presentations for the public, and public policy position papers for government agencies.

Another promising innovation is the facilitator model through which pro bono lawyers direct the provision of assistance to individuals who require a range of services. The New York City Bar Association used this model to provide assistance to the survivors and families of September 11th. Lawyers provide overall management of an individual's situation, handling some matters and referring others to those with more appropriate expertise. A similar approach was used by the San Francisco Bar in response to the need for assistance generated by the earthquake in the late 1990s. This model is not limited to disasters and can be effectively utilized to address the legal needs of individuals arising out of homelessness, domestic violence and juvenile delinquency among others.

Though I believe that pro bono programs in the United States form a necessary component of the delivery system to the poor, it would be remiss of me to fail to mention

some of the problems that we face. Because pro bono work falls outside those areas of law generally practiced by private firms, the quality and supervision of the work can present problems. While training and mentoring programs by NGOs and bar associations can help to address these problems, they remain concerns. Added to this are failures to maintain appropriate coordination and communication between the pro bono lawyer and both the client and the referring organization. This can lead to failure to handle the pro bono matter in a timely manner, and on occasion a failure to complete it. Lastly, tensions can develop between NGOs and law firms over issues such as ultimate control of the matter.

I have tried to present an honest picture of the situation in the United States. While pro bono should not be a means to relieve the state of its responsibility to fund access to justice, it is important for the legal profession to promote and provide pro bono opportunities. Attorneys, whatever their practice, must engage in the critical societal issues of their times. Democratic governance and the rule of law require no less. The benefits of such engagement are many as lawyers begin to understand the challenges of the disadvantaged. Many improvements in the laws and procedures in the United States have their genesis in the efforts of the private bar to assist the poor and disadvantaged, which draw attention to some of the greater deficiencies of our legal system. To have large numbers of the legal profession without direct contact with the problems of the poor will be detrimental to both society and the profession.