

MEMORANDUM REGARDING ASPIRATIONAL STATEMENTS  
GOVERNING THE CONDUCT OF NEW YORK LAWYERS IN PRO BONO MATTERS

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Updated May 2004

Over the past century, lawyers and bar associations in the United States have cultivated a strong tradition of providing pro bono legal services. Pro bono legal services are generally considered to be legal services rendered at little or no fee (1) to persons of limited means or (2) to organizations organized primarily to provide services to persons of limited means. Derived from the Latin term *pro bono publico*, or “for the public good,” aspirational statements regarding pro bono legal services have today become a generally accepted part of the ethical guidelines informing the conduct of attorneys in most U.S. jurisdictions.

Although beyond the scope of this brief memorandum, the U.S. pro bono tradition has emerged in response to numerous factors including: (1) an adversarial, common law system that significantly disadvantaged a party without representation, making the question of legal counsel essential to fairness; (2) a well established tradition of using the courts to advance social causes, whether liberal or conservative, which can be particularly effective in a precedent-based judicial system; (3) highly developed bar associations bringing lawyers together to discuss matters of importance to the profession and the administration of justice; and (4) the near

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absence of governmental support to the legal expenses of the poor in connection with non-criminal legal assistance – in other words, the existence of a large unattended need for legal representation. Had any of these factors not been present, it is likely that the U.S. pro bono tradition would have failed to develop to the same degree.

In most, if not all, civil law jurisdictions, some of the historical reasons for the development of the pro bono tradition in the United States are absent. With an inquisitorial judicial system, judges take a more active role in bringing about justice and are the ultimate arbiter of fairness in the process, relying less on the contribution of the advocates. Many civil law traditions mandate public service by students during their legal training or immediately following their legal training. There is no such generally applicable mandatory requirement in the United States, although some law schools are debating instituting mandatory public service, and some may have done so.

Brazil is most notable in terms of jurisdictions with conditions that differ significantly from those in the United States. In Brazil, since 1950, the federal and state governments have provided paid counsel for poor persons in both criminal and civil matters. This obligation of the government and right of the Brazilian people was enshrined in the Brazilian Federal Constitution promulgated in 1988. In part, as a result of this constitutional right to counsel and the method by which the government compensates lawyers representing poor clients, the Brazilian ethical rules governing the legal profession actually discourage lawyers from undertaking matters in the public interest on a non-fee basis. The degree of Brazil's commitment to the provision of legal services to the poor is an example for the Americas, especially for the United States, where despite of the wealth of American society, the legal needs of the poor are left unattended.

Despite these differences, it is likely that civil law jurisdictions, including Brazil, would also benefit from a more active commitment to pro bono services by its practicing lawyers, providing greater access to justice and an important balance to the exercise of governmental authority or to the lack of its exercise. In addition to the principal advantage of providing representation to people who might not otherwise have counsel (which is admittedly less applicable in Brazil), pro bono services afford numerous other advantages including the following: (1) involving firms and lawyers with greater resources in the representation of the poor, (2) avoiding the isolation of lawyers representing the poor, (3) enabling the most reputed of the bar to participate in high impact public interest matters, and (4) last, but not least, sensitizing private lawyers to the needs of the poor and disadvantaged. The bar association is perhaps uniquely placed to serve as a forum for discussing these matters and implementing structures to enable interested lawyers to provide pro bono services.

A significant number of bar associations within the United States have adopted rules and policies encouraging their members to increase the time that they commit to pro bono matters. This brief memorandum summarizes the aspirational statements that are applicable to New York lawyers. The experience in the United States may be relevant to lawyers in other countries who are examining our profession's response to the legal needs of the poor and disadvantaged.

A. American Bar Association: Model Rule 6.1.

In an effort to close the gap between the need and availability of quality pro bono legal services, the American Bar Association (“ABA”) adopted Model Rule 6.1 in 1983. The Model Rules are not binding upon any U.S. lawyer but reflect the considered recommendation of the ABA and are frequently influential in the development of state rules and ethical guidelines. In its original version, Model Rule 6.1 stated that lawyers “should render public interest legal

service,” defining public interest legal service as “service in activities for improving the law, the legal system or the legal profession,” and encouraging lawyers to provide “financial support for organizations that provide legal services to persons of limited means.” See [www.abanet.org/legalservices/pbpages/pbstateethicsrules.html](http://www.abanet.org/legalservices/pbpages/pbstateethicsrules.html). In 1993, the ABA amended Model Rule 6.1 to read as follows:

*Rule 6.1 Voluntary Pro Bono Public Service*

A lawyer should aspire to render at least (50) hours of legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without a fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Id. This amended text narrowed the definition of qualified pro bono services in order to promote pro bono legal representation of low-income persons and groups that serve low-income persons by excluding other unpaid legal services from the definition of pro bono. Another notable revision to Model Rule 6.1 was the inclusion of a quantified aspirational goal. The amended Model Rule *recommended* that each individual attorney dedicate at least *fifty* hours toward pro

bono services annually. In addition, it encouraged attorneys to provide financial support to organizations that render legal services to persons of limited means. The aspirational statement did not, however, specify the amount of financial support that attorneys should provide to legal aid organizations on an annual basis. Model Rule 6.1 has not been amended since 1993.

1. State Bar Associations Adhering to Revised ABA Model Rule 6.1

Currently, only five state bar associations have adopted the revised version of Model Rule 6.1, Colorado, Georgia, Minnesota, Mississippi and Montana. The State Bar of Georgia, however incorporated some limiting language into its version of Model Rule 6.1 prior its adoption, adding that “[n]o reporting rules or requirements may be imposed without specific permission of the Supreme Court granted through amendments to these [r]ules,” and that “[t]here is no disciplinary penalty for violation of this rule.” See [www.gabar.org/grpc61.htm](http://www.gabar.org/grpc61.htm). The Montana Bar Association added similar language to its version of Model Rule 6.1, establishing that its pro bono rule is not intended to be enforced through any disciplinary process.

Like the ABA, none of these state bar associations quantified the recommended financial support that each of its members was to donate to organizations providing pro bono legal representation.

2. State Bar Associations Adhering to Rules Similar to the Amended Version Of Model Rule 6.1

To date, nine state bar associations have enacted rules similar to the ABA’s amended version of Model Rule 6.1. Below is a brief summary of the policies adopted by these state bar associations:

*Arizona*: aspirational statement establishes a *voluntary* annual goal of fifty pro bono hours per attorney; does not quantify financial contribution that its members should give to non-profit organizations providing legal services; allows for the carryover of excessive hours from one year to the next.

Florida: aspirational statement *recommends* that its members perform twenty pro bono hours annually; provides that attorneys can contribute \$350 to legal aid organizations as an alternative to performing pro bono services; its pro bono policy excuses certain members from providing pro bono services and establishes a reporting requirement; implements a circuit pro bono committee system.

Hawaii: aspirational statement *encourages* members to perform fifty annual pro bono hours, twenty-five of which should come in the form of direct legal representation of individuals unable to afford legal services from an attorney and the other twenty-five hours should be focused upon providing direct legal services to organizations that provide legal representation to those unable to afford it or organizations that contribute to the public good.

Kentucky: aspirational statement establishes fifty hours of pro bono services as a *recommended* annual minimum; does not quantify financial support that attorneys should provide to non-profit organizations providing legal representation but it strongly encourages such support; includes optional reporting and recognition awards.

Massachusetts: aspirational statement *recommends* twenty-five hours of annual pro bono hours; encourages \$250 contribution or 1% of annual taxable professional income to non-profit organizations that provide legal representation.

Nevada: aspirational statement *encourages* members to provide twenty annual hours of legal services at no fee or sixty annual hours at a reduced fee; provides \$500 annual contribution to legal aid organizations as an alternative to performance of pro bono work; includes voluntary pro bono plan.

New Mexico: aspirational statement establishes fifty annual pro bono hours as a *recommended* minimum; provides as an alternative to pro bono services the option of contributing \$350 annually to legal aid organizations.

Utah: aspirational statement *recommends* thirty-six annual hours of pro bono legal representation; provides as an alternative the option of contributing \$360 to legal aid organizations; includes voluntary reporting.

Virginia: *recommends* that attorneys dedicate 2% of their professional time to pro bono matters; does not quantify suggested annual financial contribution to organizations providing pro bono legal representation but recommends it as an alternative.

### 3. State Bar Associations Adhering To Original Version Of Model Rule 6.1

Currently, twenty-three state bar associations have adopted Model Rule 6.1 in its original

form.<sup>1</sup> Consequently, these states' pro bono policies do not contain aspirational statements that include a recommended annual minimum of pro bono hours for their members nor do they quantify the financial contributions that their members should give to organizations providing free legal services.

There are also five state bar associations that have adopted pro bono policies that are similar to the ABA's original version of Model Rule 6.1.<sup>2</sup> Like the original version of Model Rule 6.1, the pro bono policies adhered to by these state bar associations do not establish a recommended annual minimum of pro bono hours for its membership nor do they quantify the annual financial contributions that their members should contribute to organizations providing free legal services.

B. Bar Associations With Other Pro Bono Policies.

The bar associations that have implemented their own pro bono policies rather than adopting the Model Rule 6.1 are California, Washington, D.C., New York, Ohio, Oregon, Texas and Vermont. Below is a brief summary of the pro bono policies adhered to by these bar associations.

*California:* aspirational statement establishes fifty annual pro bono hours as recommended minimum for its membership; does not quantify annual financial contribution that its members should give to non-profit organizations providing legal services.

*Washington, D.C.:* aspirational statement urges attorneys to render fifty annual hours of pro bono services in addition to taking on one court-appointed pro bono

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<sup>1</sup> These bar associations include the state bar associations from the states of Alabama, Alaska, Arkansas, Connecticut, Delaware, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Missouri, New Hampshire, New Jersey, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, Wisconsin and Wyoming.

<sup>2</sup> These state bar associations are those from Iowa, Maine, Nebraska, South Dakota, and Tennessee.

case per year; recommends that its members annually contribute \$400 to not-for-profit providers of legal services or 1% of their annual income.

New York: aspirational statement recommends a minimum of twenty pro bono hours; does not quantify recommended financial contributions that its members should give to not-for-profit legal service providers but urges attorneys to contribute financially; adopts a definition of what qualifies as pro bono service that is narrower than the one implemented by most bar associations; definition adopted in New York limits services that qualify as pro bono work to:

- services provided to individuals who cannot afford legal representation;
- services aimed at improving the administration of justice or increasing the availability and quality of legal services to poor persons; and
- legal services provided to organizations whose primary purpose is to address the needs of poor persons.

Ohio: aspirational statement provides that attorneys should render twenty hours of pro bono services annually or take on two pro bono cases per year; does not quantify the amount of financial contributions that its members should give to organizations providing free legal services.

Oregon: aspirational statement establishes eighty annual pro bono hours as the recommended minimum; of these eighty hours, twenty to forty should be dedicated to representing individuals unable to afford legal representation or two pro bono cases per year; does not quantify annual financial contributions that should be given to non-profit legal aid providers but suggests a contribution comparable to eighty hours of legal services as an acceptable alternative.

Texas: aspirational statement recommends a minimum of fifty annual pro bono hours; does not quantify the annual financial support that its members should provide to non-profit groups.

Vermont: aspirational statement suggests that its members perform fifty annual hours of pro bono service; does not quantify the financial contribution that its members should provide to non-profit legal aid providers.

### C. Pro Bono Policy of New York State.

The most recent concerted effort to address the gap between the need for and availability of pro bono services in New York came in April of 1988 when Chief Judge Sol Wachtler created the Committee to Improve the Availability of Legal Services. This Committee conducted a thorough review of alternative means through which to address the unmet need for

legal services among the neediest New York residents. See Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York, at 3 (1990). The Committee recommended that all New York bar associations adopt pro bono policies containing aspirational statements that require attorneys to perform a *mandatory* minimum of forty hours of qualifying pro bono legal services every two years. Id. at 9-10.

In defining qualifying pro bono services, the Committee limited its definition to services:

- 1) rendered in civil matters to persons who cannot afford to pay counsel, and also legal services in criminal matters for which there is no government obligation to provide funds for legal representation;
- 2) related to improvement of the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to poor persons; and
- 3) provided to charitable, public interest organizations on matters which are designed predominantly to address the needs of poor persons.

Id. at 10. The Committee's proposal also allowed attorneys to credit for four years any excess pro bono services rendered within a given period towards the fulfillment of their pro bono requirement for the subsequent period. See Id.<sup>3</sup>

The Committee's proposal of a mandatory pro bono requirement, was strongly criticized by the New York State Bar Association and local bar associations from most of the major counties throughout New York State. The primary objection to the Committee's proposal did not relate to its recommended number of annual pro bono hours or its definition of what

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<sup>3</sup> In addition, the Committee's mandatory pro bono proposal exempted only attorneys who were not required to pay a fee pursuant to Section 118.1, a New York Code of Rules and Regulations that exempts retired attorneys and judges from fee payments. See id. Consequently, the Committee's proposal subjected attorneys for the government, corporate attorneys and legal aid attorneys to its proposed mandatory pro bono

constituted qualified pro bono legal services; rather it focused upon the mandatory nature of the proposal. Critics argued that the legal profession should not be forced to shoulder the responsibility of ensuring that everyone has equal access to justice. The argument was that this was a duty placed upon all of society, not just the legal profession. Another criticism suggested that a rule that forced attorneys to render pro bono services would actually hurt the groups it aimed to protect, because attorneys providing such services would be indifferent to the needs of their pro bono clients—something, critics of the proposal claimed, that could not be said of attorneys providing pro bono legal representation on a voluntary basis.

Due to the degree of opposition to mandatory pro bono services, the New York State Bar Association rejected the Committee's proposal. It should be noted, however, that the Association of the Bar of the City of New York supported the Committee's concept of mandatory pro bono services despite reserving comment on the particulars of the Committee's proposal. See id. at 7. It should also be noted that most legal aid providers supported the Committee's proposal. These organizations included the Legal Aid Society, the Council of New York Law Associates, Community Action for Legal Services, New York Lawyers for the Public Interest and Volunteers of Legal Service, Inc. In addition, the vast majority of newspaper editorials commenting upon the Committee's proposal favored the recommendations made within it.

The language adopted by the New York State Bar Association reads as follows:

The heart of the pro bono aspect of the State Bar Plan is aspirational. Every attorney should devote at least 20 hours per year to free services to the poor. Any attorney who does not do that, for whatever reasons, should recognize and honor a moral obligation to make a financial contribution, commensurate with his or her resources and the actual or imputed

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requirement. The mandatory pro bono requirement also applied to law school professors but exempted law school graduates who had yet to gain admission to the Bar.

opportunity cost of the time not so spent to an organization dedicated to providing legal services to the poor. See <http://www.nysba.org/public/probono/definition.htm>.

D. Toward a Joint Declaration of the Americas.

Over the last several years, lawyers in Latin America have shown increasing interest in the U.S. tradition of pro bono legal services. The Pro Bono Conferences held in Buenos Aires, Santiago and São Paulo between 2001 and 2003 are a manifestation of that interest. Much progress has been made. In Chile, the Fundación Pro Bono is comprised of many of the leading practitioners of Santiago and has recently hired its first full time staff person. In Buenos Aires, along with Dean Martin Bohmer of the University of Palermo School of Law, the Colegio de Abogados de la Ciudad de Buenos Aires is taking a leadership role in promoting pro bono efforts. In Brazil, Instituto Pro Bono, various organizations and several individuals are promoting the idea that pro bono work does not compete with the legal assistance provided by the Brazilian government, but is an important complement to governmental support. The challenge is to build upon these efforts.

One possibility would be to initiate a process of discussion between leading bar associations and law firms regarding a joint declaration of the Americas regarding pro bono legal services. This dialogue would seek to define a shared commitment from the leading bar associations and law firms of the hemisphere to acting for the public good.