

A Workable Plan for Mandatory Pro Bono

You've heard the joke before. Jones calls her three best friends — a doctor, an engineer, and a lawyer — to her death bed. She gives each of them \$10,000 and says: "We've stuck with each other through thick and thin. So that you can remember the loyalty of our friendship, I'm asking each of you to throw this \$10,000 into the open grave at my funeral, to be buried with me."

After Jones's funeral the three bereaved friends meet for a somber drink. Finally the doctor breaks the melancholy silence and says, "I've got to get something off my chest. I brought the \$10,000 to the burial, but when the moment came I couldn't do it — I threw in an empty envelope." The engineer, relieved, says, "Thank heaven you said that! I did the same thing." The lawyer looks at them aghast and says, "I'm ashamed of you! Where's your conscience? I tossed in a check for the whole amount."

When the early drafts of the new ABA code of ethics were privately circulated in 1979, it became widely known that they contained a requirement that each lawyer perform 40 hours a year of "pro bono" — free public interest — work. The requirement was quickly dropped in the face of intense opposition on the part of the bar; it was replaced, in the first discussion draft, by a requirement that lawyers perform *some* pro bono work each year (amount unspecified). Even this met with severe opposition. As it finally stands, Rule 6.1 commends pro bono work but requires none.

The ABA House of Delegates, it seems, tossed in a check for the whole amount. (It could be worse: the engineers and doctors haven't even written the checks.)

The ABA response is symptomatic of the problem of pro bono. Nobody denies that pro bono work is morally commendable. Nobody doubts that there are worthy clients who will never obtain needed representation unless some lawyer is willing to do it for free. A pro bono obligation has been advocated across the political spectrum as an essential response by the bar to the plight of the under-represented poor. Like the weather, everyone talks about mandatory pro bono.

There are reasons for doing nothing about it; objections both moral and practical have been raised to the pro bono obligation. The main moral objection is that it would be unfair to compel lawyers to provide a service that is really the entire community's responsibility. The practical objections I have heard lawyers raise are these:

(1) Mandatory pro bono is inequitable and regressive, falling with a heavy hand upon the economically marginal practitioner and the harried associate, neither of whom has forty hours a year to spare.

(2) It would lead to incompetent law practice: a specialist in corporate tax is not qualified to handle tenants' rights or welfare or child-custody cases.

(3) Enforcing it would require an elephantine bureaucracy to read and assess half-a-million pro bono reports a year; the reports themselves might at any rate be better candidates for submission to a short-story contest than to a committee of the bar.

(4) It is probably false that a pro bono obligation would lead to more poor people being represented: instead it would result in more lawyers giving self-promoting speeches to church groups and lodge meetings, and more free legal work being done for in-laws and attorneys' country clubs.

I want to propose a plan that would meet *all* of these objections.

The Coupon Plan

The basic idea of the plan is this: A poor person with a legal problem goes to an office established by the bar (the "Pro Bono Office") with documentation of his or her poverty status. The Pro Bono Office has a list of practicing attorneys; it gives the poor person the names of (say) two attorneys — in case the client has an objection to the first — and a coupon worth one hour of consultation. If the attorney and client decide that there is a real legal problem requiring representation, the attorney contacts the Pro Bono Office and the client is issued additional coupons to "pay" the attorney for the number of hours the representation is estimated to require. To avoid padding, there is a fixed schedule of hours for certain standard categories of typical cases; if a case turns out to need more time, the attorney sends a simple form to the Pro Bono Office, describing the complication and requesting additional coupons. At the end of each year, an attorney simply sends in forty hours' worth of coupons to the office, and the pro bono obligation is discharged.

If an attorney does not have forty hours' worth of coupons, he or she must "buy" the shortfall at a reasonable hourly rate slightly below rates charged by attorneys at that level of the profession. The proceeds are used to finance the Pro Bono Office. Let me call this the *Buyout Feature* of the plan.

The Buyout Feature serves other functions as well. Some cases require more than forty hours. If that occurs, an attorney has four options. First, the attorney can simply finish the case because it is a good thing to do. Second, he or she can proceed with the case and obtain credit against future years' pro bono. Third, if the client is agreeable and

the representation would not be prejudiced by doing so, the case can be transferred to another attorney for the latter's pro bono. Last, the attorney can proceed with the case and obtain compensation from the "buyout" fund at its slightly deflated rate.

Three other features of the Coupon Plan are very important.

First is the *Graduation Feature*: certain categories of lawyers are partly or wholly exempt from the pro bono obligation. For example, one might require no pro bono of an attorney in the first five years of practice, or of practice in a new locale; associates in large law firms might be

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given a reduction in their obligation until they make partner or leave the firm. And any attorney should be able to be excused from pro bono if he or she can document severe financial or health problems.

Next is the *Substitution Feature*. Some lawyers should not be required to represent individual poverty clients. Attorneys working on a pro bono basis on public-interest cases that do not involve poverty clients can obtain coupons for this work (though the bar would have to limit and specify the class of such cases that would qualify). Judges or government attorneys who might have conflict-of-interest problems if they represented private clients can obtain their coupons for law-reform activities or educational activities, particularly one kind of educational activity which I shall call Continuing Legal Education in Pro Bono (CLEPB).

CLEPB is part of the *Education Feature* of the Coupon Plan. Attorneys can, and initially must, discharge a portion of their pro bono obligation by obtaining training in areas of poor people's law. Such continuing education could take place in various formats. Seminars could be conducted by full-time poverty lawyers in order to discharge their pro bono obligations. Attorneys could help out in legal aid offices and obtain their CLEPB training "on the job." Or a CLEPB legal aid office could be established on the model of law school clinical programs, with full-time poverty law "teachers."

These features of the pro bono plan resolve all the practical problems I enumerated earlier. (1) The Graduation and Substitution Features eliminate the problem of inequity. (2) The Education Feature eliminates or at least alleviates the problem of incompetence. (3) The simplicity of the monitoring and coupon distribution systems would make a bureaucracy manageable. (4) The fact that coupons may be obtained only from poor clients, selected substitutions, and CLEPB programs guarantees that pro bono work will reach the poor population and not the country club.

The Moral Objection

No doubt it is morally worthy to engage *willingly* in pro bono work. Many people argue, however, that it is morally impermissible to *require* lawyers to engage in it. They do not deny that the community has the obligation to offer all its citizens meaningful access to justice, and the right to obtain from its members the means to do so. But they argue that if the community wants to meet the legal needs of the poor, it should use tax money to fund legal aid or compensate private attorneys. That way the entire community bears the cost of meeting a community need. A pro bono obligation conscripts lawyers to work below their market rate and is thus an unfair "conscription tax" to supply the poor with legal representation. "No representation without compensation — it's unjust taxation!" is the argument.

This is a powerful argument, and the obvious reply, "The community can't afford the market rate," merely invites the obvious counter, "It has no right to demand services for free." Wouldn't it be wrong for the community to require grocers to feed the hungry "pro bono," if it is unwilling to tax itself to feed the hungry?

Nor will it suffice to argue (as some courts have) that the lawyer's license is a grant of the state, to which the state may attach a pro bono string (or any other string it desires). Grocers are also licensed, yet it would be morally pernicious to palm off an obligation of the whole community — to feed its hungry — onto the grocers, as a con-



Drawing by Joe Azar

dition of licensure. Grocers run their businesses to make their livings, and it is iniquitous to treat the license needed to make one's living as a mere perk granted by the state under whatever conditions it chooses to impose.

Yet this argument from the grocer analogy reveals the analogy's shortcomings. The grocery business could exist without state participation; the state's licensing function is used only to regulate the business for consumer protection. Lawyers, by contrast, retail a commodity manufactured by the state: law. They have, moreover, been granted a monopoly on it — not only through regulations forbidding nonlawyers from practicing law (which the bar

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zealously enforces despite their lack of support from the consumers they ostensibly protect), but through-and-through. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted to be intelligible to the legally trained. Court regulations, and indeed the adversary system itself, are predicated on the monopoly of lawyers.

This is the difference between the lawyer and the grocer: the lawyer's lucrative monopoly would not exist without the community; the monopoly, as well as the product it monopolizes, is an artifice of the community. The community has made the law to make the lawyer indispensable. The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose.

For the system of law-retailing has a legitimate purpose, and indeed only one: equal justice under law. Without equal justice under law, the system has no legitimacy, and the legal profession's lucrative monopoly on retailing law should be broken.

For law practice is not a victimless pastime. It is an adversarial profession, and those who can't afford it are often damaged by those who can. One day in housing court, watching lawyers winning default judgments or evictions against poor people who may have had a defense if only they had a lawyer, can convince anyone of that. Even an office practice that on the face of it has no adversaries may harm the poor. When lawyers secure wide-ranging legal advantages for their clients, they help to set up a network of power and privilege from which the poor are excluded; and this exclusion itself intensifies the pariah status of the poor.

This is a second way in which the grocer analogy breaks down. The grocer does not make the hungry worse off by selling to the cash customer; grocery-retailing is not an adversarial profession. But law-retailing is.

These, then, are the moral sources of the lawyer's pro

bono obligation (more precisely: of the community's right to impose a pro bono obligation on lawyers when it is necessary). It should be seen as a reshaping of the lawyer's professional role (1) to fulfill the very social purpose that gives the role its point, that makes it worth the community's while to create it; and (2) to guard against third-party harms created by the business-as-usual of that role inflicted upon the unrepresented.

Conclusion

The Coupon Plan can make a big difference in the legal fates of our least fortunate citizens. There are over thirty million poor people in the United States today, over twenty million adults. At an extremely conservative estimate, they each encounter one legal problem per year; as one welfare rights lawyer put it, poor people are constantly bumping into sharp legal things as they move from one bureaucracy to another. How are these 20 million legal problems to be addressed? If half the bar performs its forty hours a year of pro bono service, we would get 12 million hours of legal aid. It would make a sizeable dent in the problem.

At present, the bar is not shouldering its burden. As the Legal Services Corporation has fallen on hard times, a few responsible law firms and many individual lawyers have stepped up their pro bono efforts. But overall it is becoming more difficult, not less, to find attorneys willing to take on pro bono cases.

Why is this? Recently newspaper columnist Ellen Goodman wrote that where in years past we sympathized with the poor as victims, we now seem to regard them merely as losers. "In our political landscape," Goodman writes, "we may ask the government to lend a hand to victims, but not to waste handouts on losers. The 'needy' may elicit guilt and help from more affluent neighbors. But losers get only scorn. . . . We used to call this blaming the victim. Now we call it winning."

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I would hate to think this is true, for if it is it shows a meanness of spirit that is unworthy of a civilized nation. There is no better way for the bar to commit itself to equal justice under law *for all*, and thus to a concept of community richer and more generous than the Society of Winners and Losers, than to take upon itself an effective pro bono obligation.

— David Luban

This is a shorter version of an article by David Luban that will be appearing in a forthcoming issue of the Michigan Bar Journal.