

**A LAWYER'S PROFESSIONAL
RESPONSIBILITY TO
PERFORM PRO BONO SERVICES**

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I. INTRODUCTION

As lawyers, we have ethical and professional obligations commensurate with the privileges we enjoy in being licensed to practice law. Uncompensated legal services to the poor and underrepresented are one aspect of our public obligation. Providing pro bono services to the needy not only promotes our personal ethics and professionalism, it raises the stature of lawyers in the community. Too often, lawyers are viewed as self-interested and solely profit-oriented. Cultivating a pro bono practice, consistent with a lawyer’s abilities and means, combats that public perception and can provide very satisfying work, goodwill, and intangible rewards.

This paper discusses the ethical and professional responsibility requirements and goals with respect to pro bono work. It then discusses what exactly is considered to constitute pro bono services within those professional and ethical standards.

II. THE PROFESSIONAL STANDARDS FOR PRO BONO SERVICE

A. The American Bar Association Professional Responsibility Standard

In 1977, the American Bar Association (“ABA”) began studying the Model Code of Professional Responsibility (“Model Code”) for revision. After years of work on the Model Code, at its annual meeting in 1983, the ABA adopted the Model Rules of Professional Conduct (“Model Rules”) to replace the Model Code. Shuwerk and Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hous. L. Rev. 1 (1990) (hereafter, “*Guide at* ___”).

There are four specific rules in the Model Rules dealing with “Public Service.” Those rules relate to “voluntary pro bono publico service” (Rule 6.1), “accepting appointments” (Rule 6.2), “membership in legal services organization” (Rule 6.3), and “law reform activities affecting client interests” (Rule 6.4). Most relevant to this paper is Model Rule 6.1, which reads as follows:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without 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.

Model Rules of Professional Conduct Rule 6.1 (2004 ed.)

Comment 1 to Rule 6.1 states in part:

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually.

Model Rules of Professional Conduct Rule 6.1, cmt. 1 (2004 ed.)

Accordingly, the ABA Model Rule sets an aspirational goal for each lawyer of fifty hours of pro bono service per year. It also defines the type of services that constitute appropriate pro bono activity and the categories of clients to whom such services should be rendered to satisfy the aspirational goal. Although the ABA emphasizes that a lawyer should strive to satisfy her goal by providing free legal services to persons of limited means or groups whose purpose is to serve persons of limited means, it also provides that reduced fee services and services geared toward systemic concerns are legitimate pro bono work.

B. The Texas Professional Responsibility Standard

After the ABA promulgated the Model Rules, in 1984, the State Bar of Texas began considering whether it should adopt the Model Rules or otherwise modify the Texas rules governing professional responsibility then in effect in light of the Model Rules. After a great deal of work and effort by the Texas State Bar drafting committee and countless others, the members of the Texas Bar approved by referendum the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”), which became effective on January 1, 1990. *Guide* at 1-3.

The Texas State Bar drafting committee engaged in considerable discussion regarding how to incorporate or amend Model Rule 6.1. As a matter of policy, the committee wanted to avoid including in the “rules” portion of the Texas Rules any provisions that were merely hortatory, as Model Rule 6.1 is configured. Such aspirational goals were deemed to be more appropriately included in the commentary to the Texas Rules. Consequently, the committee debated whether pro bono service should be made mandatory in Texas and thus made a “rule.” It concluded that developing standards for public service issues was beyond the scope of its task of developing professional discipline standards. Accordingly, no version of Model Rule 6.1 was included as a rule under the Texas Rules. *Guide at 394-95.*

Nevertheless, the professional and ethical responsibility of providing pro bono service did not go unaddressed by the drafters. The issue appears in two places in the Texas Rules. First, pro bono service is addressed in the Preamble to the Texas Rules in paragraphs 5 and 6, as follows:

5. . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

6. A lawyer should render public interest legal services. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally. A lawyer may discharge this basic responsibility by providing public interest legal services without fee, or at a substantially reduced

fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support for organizations that provide legal services to persons of limited means.

TEX. DISCIPLINARY R. PROF'L CONDUCT, Preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

In addition, the comments to Texas Rule 6.01 (regarding "accepting appointments by a tribunal"), also deal with the pro bono service issue as follows:

Comment 3 The rights and responsibilities of individuals and organizations in Texas and throughout the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for all persons. Consequently, each lawyer engaged in the practice of law should render public interest legal service. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

Comment 5 An individual lawyer may fulfill the ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. . . .

TEX. DISCIPLINARY R. PROF'L CONDUCT 6.01 cmt. 3 and 5 (2005).

Even though the Texas Rules do not mandate pro bono service, they clearly state in very strong language that pro bono service is an ethical, professional, and moral obligation of every Texas lawyer.

The Supreme Court of Texas and the Court of Criminal Appeals echoed the view expressed in the Texas Rules regarding the nexus between pro bono service and professionalism in their Texas Lawyer's Creed. In the portion of the Creed dealing with "our legal system," these Courts proclaimed:

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

. . .

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

The Texas Lawyer's Creed -- A Mandate for Professionalism, TEXAS RULES OF COURT -- STATE 587 (West pamph. 2002).

C. The Texas State Bar Pro Bono Policy

On May 28, 1992, the State Bar of Texas Board of Directors passed a pro bono policy further enunciating the professional obligation of pro bono service. A copy of the Policy as passed and amended is attached as Appendix A. The Policy, like the ABA Rules, sets an aspirational goal "that each Texas attorney should aspire to render at least 50 hours of legal services to the poor each year." Although the Policy does not establish a mandate, it makes clear that in the view of the Texas State Bar, pro bono service is a matter of *ethics*. In that regard, it states:

Many Texas attorneys are already meeting the aspirational goal of pro bono service established in the . . . Policy. This policy should encourage those attorneys who are not yet meeting their ethical obligation to do so.

A Guide to the Basics of Law Practice 96 (Beryl P. Crowley and Mitchell L. Winick, eds. 2001)
(State Bar of Texas Pro Bono Policy as Passed and Amended May 28, 1992).

III. DEFINITIONS OF PRO BONO SERVICES

There are slight differences between what the ABA and Texas State Bar considers to constitute pro bono services. The types of services each Bar entity considers to be pro bono are set forth below, as is a brief discussion of how the ABA and Texas State Bar definitions diverge.

A. ABA Definition of Pro Bono Services

The ABA's definition of pro bono services is contained in Model Rule 6.1. In addition, the ABA has issued a "pro bono challenge" to law firms which succinctly describes the ABA's definition of pro bono services. A copy of the ABA Pro Bono Challenge and its Commentary to Statement of Principles is attached hereto as Appendix B. Under the ABA configuration, "pro bono services" are comprised of the following:

1. *Legal* Services to address needs of persons with limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means
2. *Legal* Services to groups seeking to secure civil rights, civil liberties, public rights
3. *Legal* assistance to charitable, religious, civic, community, government, or educational organizations in matters in furtherance of their organizational purposes, when payment of standard fees would deplete the organization's economic resources or would be otherwise inappropriate.

See Appendix B.

Notably, the ABA's emphasis is on legal, as opposed to non-legal services. The ABA also allows that uncharged services to some organizations who conceivably could pay attorneys fees can be considered pro bono services if the organization's resources would be depleted by paying standard fees. Consequently, the ABA recognizes as appropriate pro bono activity, free

legal services to charitable and other such organizations regardless of the precise purpose of the legal services.

B. State Bar of Texas Definition of Pro Bono Services

The Pro Bono Policy of the Texas State Bar recognizes a broader range of *services* than the ABA as constituting appropriate pro bono activity, but is more restrictive in terms of the *financial means* attributable to the client. Under the State Bar of Texas policy, the following services are recognized as pro bono:

1. Direct provision of *legal* services to poor without expectation of compensation, whether civil or criminal
2. Uncompensated *services* re: simplifying the legal process or increasing the availability of legal services to the poor
3. Uncompensated *legal* services to charitable or public interest organizations on matters designed predominantly to address the needs of the poor
4. Uncompensated *legislative, administrative, or systems advocacy* services provided on behalf of poor persons
5. Unsolicited involuntary *appointed representation* of indigents in criminal and civil matters.

See Appendix A.

Under the State Bar configuration, non-legal services geared toward simplifying the legal process for the poor and engaging in legislative or other related services can be counted toward an attorney's aspirational goal of fifty hours of pro bono services. Unlike the ABA, the Texas State Bar does not appear to recognize general legal services to charitable organizations as pro bono -- the services must be geared toward matters to address the needs of the poor.

IV. CONCLUSION

As the preamble to the Texas Disciplinary Rules of Professional Conduct states:

Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct.

Ultimately, the extent of pro bono services a lawyer provides, under the present ethical and professional responsibility standards in Texas, is governed by "each lawyer's own conscience."

This may not always be the case if the Texas State Bar determines it is necessary to adopt rules for mandatory pro bono service, as have other states. As members of the Texas Bar, we should voluntarily provide pro bono services to fulfill our moral, ethical, and professional obligations to the legal system and the citizens of our community.