

1991

Introduction

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Recommended Citation

Wachtler, Honorable Sol (1991) "Introduction," *Hofstra Law Review*. Vol. 19 : Iss. 4 , Article 4.
Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol19/iss4/4>

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SYMPOSIUM ON MANDATORY PRO BONO

INTRODUCTION

*Honorable Sol Wachtler**

In 1988, I appointed a committee of distinguished New York attorneys chaired by Victor Marrero to report on the extent of the unmet need for civil legal services for New York State's poor, to explore the scope and operation of legal services currently provided, and to prepare a plan of action to increase the availability of legal services to the poor. In particular, I asked the committee to consider the propriety and feasibility of imposing a mandatory pro bono obligation on all members of the bar.

After a year of study, a preliminary report and ten more months of public comment, the committee issued its recommendations, concluding that "our society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it."¹ The report advocated a variety of measures to meet the crisis, including the encouragement of clinical poverty law programs in the State's law schools,² loan forgiveness programs for law school graduates who work in legal services offices³ and increased funding

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1. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (April 1990), *reprinted in* 19 HOFSTRA L. REV. 755, 774 (1991) [hereinafter MARRERO REPORT].

2. *See id.* at 834-35 (discussing the Marrero Committee's recognition that law schools could be a significant resource for legal services to the poor).

3. *See id.* at 835-36 (noting that easing students' debt burden could enlarge the pool of those seeking legal services positions).

for legal services and assigned counsel programs.⁴ In addition, the Committee noted that many legal problems of the poor and their associated costs could be avoided by increasing public assistance benefits.⁵

The centerpiece and by far the most controversial aspect of the Committee's report, however, was a proposal that all admitted attorneys actively practicing law in the State be required to provide 40 hours of free legal service every two years to the poor.⁶ It would be difficult to overstate the intensity of the debate that this proposal has generated. I cannot remember any subject or proposition about which I have received more mail or seen more coverage in both the professional journals and the popular press.

The public discourse has been constructive, and this special issue of the *Hofstra Law Review* continues the healthy and helpful debate. As the articles that follow illustrate, the reaction to the concept of mandatory pro bono has been balanced, and good arguments have been voiced on both sides of the question.

On the one hand, lawyers enjoy a profitable monopoly on the provision of legal services and, since they are the only ones that can provide the services, it does not seem unduly burdensome to impose such an obligation as a condition encumbering their license to practice. On the other hand, doctors, plumbers, electricians, and restaurateurs are also licensed, and we do not expect, much less require, them to provide free services. In those cases, the burden of providing necessary services to the poor is borne by society at large.

Indeed, almost everyone who has joined the debate about mandatory pro bono, including the Marrero Committee, agrees that the best way to provide legal services to the poor is to increase funding for legal services and other social programs. Mandatory pro bono is at best an inefficient way to deliver the very specialized kind of legal services that poor people need. The most common and critical problems faced by people in need: housing, public assistance, Medicaid, etc., require the aid of a lawyer who works on a day-to-day basis with the complex and ever-changing maze of statutes and regulations that govern such matters. Furthermore, because court calendars are so congested, a pro bono lawyer may spend all day in court to make an

4. See *id.* at 838-41 (discussing society's potential contribution to the legal services crisis).

5. *Id.*

6. *Id.* at 784.

appearance in a single case. While the legal services attorney may also have to spend an entire day in court, as a specialist immersed in that practice, he or she may have several cases on the calendar and can spend waiting time more productively, talking with clients and negotiating with opposing counsel.

Nevertheless, although greater public funding may be a more efficient and more equitable answer, it is simply unrealistic to believe that it will be forthcoming in the near future. The trend in the last decade has been to the contrary, beginning in 1982 with a 25% reduction in federal funding for legal services.⁷ As a result, in 1987, there were 25 fewer full-time legal services offices in the State than there were at the start of the decade. We cannot abandon efforts to reverse this trend, but neither can we ignore our own professional ethical obligation to fill the gap as best we can.

Furthermore, while I agree that the needed services can be more efficiently delivered by a poverty law specialist, I am not persuaded by arguments that such specialists are the only ones who are competent, to provide the services. The Marrero Committee's definition of qualifying services is sufficiently broad and flexible to allow most attorneys to fulfill their commitment within the scope of their competence.⁸ If not, I am confident that bar associations and legal services organizations will be willing and able to provide whatever training may be necessary.

In any event, the objection that most attorneys are not competent to handle the legal problems of the poor strikes me not as an argument against *mandatory* pro bono services, but as an argument against pro bono services generally. In evaluating this argument and others (such as the claim that a mandatory pro bono plan violates the First Amendment by requiring an attorney to advocate causes that he or she may not support), one should keep in mind that the Marrero Committee proposal is mandatory only in the very narrow sense that it sets a minimum, and very modest number of hours that attorneys should dedicate to serving those who cannot afford their services. Except for requiring that the client be poor, the plan leaves the choice of client, subject matter, strategy and, for that matter, political bent, entirely up to the attorney.⁹

As for the argument that free representation will foster the litiga-

7. *Id.* at 775-76.

8. *See id.* at 789-97 (discussing qualifying services).

9. *See id.* (noting that qualifying services must be to the poor).

tion of meritless or minor claims, it should be noted that the plan does not require that the pro bono hours be spent in litigation,¹⁰ nor does it require an attorney to pursue meritless claims.¹¹ The obligation can be fulfilled by providing the same kind of counseling that an attorney provides to paying clients, which may include advice that a claim is not worth pursuing.¹² Moreover, because the Marrero plan leaves all of these choices to the individual attorney, it is less of an imposition on attorneys than is a system of uncompensated assignments in individual cases.

That there is a gap between the need for legal services and their availability has not been seriously challenged by even the most vocal of the Marrero Report critics. To be sure, there are legitimate questions about the degree of need and whether the answer to all problems is to throw another lawyer into the mix. There can be no doubt, however, that poor people in this State frequently face serious legal problems without the aid of an attorney and that, in many of these situations, their lack of legal counsel stands in the way of justice. In all of the debates, I have yet to hear of a lawyer who, despite a conscientious effort, has been unable to find someone in need of pro bono legal services. And no one in the legal services community has come forward to say "Thanks, but no thanks—we don't need the help." In fact, if there is one thing that has become clear during the debate over the mandatory pro bono proposal, it is that the need for civil legal representation for the poor in our State is urgent.

Of all the responses to the Committee's report, the most constructive has been that of the New York State Bar Association, which issued its own detailed proposal shortly after the Marrero Committee began public hearings on its preliminary report.¹³ Significantly, the State Bar's report, authored by a committee chaired by former State Bar President Justin Vigdor, did not take issue with the Marrero Committee's conclusions concerning the scope of the problem, the need for more public funding and the obligation of lawyers to increase their pro bono efforts. The Bar Association promised to redouble its efforts to procure increased funding for legal services programs and to seek other legislative action that will improve access to justice

10. *Id.*

11. *See id.*

12. *See id.*

13. *See* New York State Bar Association, Committee on Legal Aid, *New York Legal Needs Study: Draft Final Report* (October 1989).

for the State's poor. However, it also asked for a moratorium on the consideration of a mandatory pro bono requirement, so that a concerted effort could be made to achieve a similar level of service on a voluntary basis.

On Law Day 1990, I accepted the proposal of the State Bar Association by deferring implementation of a mandatory pro bono requirement for two years. I believed that the Bar Association should be given the opportunity to capitalize on the interest, energy, and controversy generated by the Marrero Committee's proposal to encourage voluntary pro bono service. It will be better for all concerned if lawyers can do their part to meet the needs of the poor on a voluntary basis.

The main reason to defer implementation of a mandatory pro bono plan is not any of the arguments raised by opponents, but the fact that opposition exists. That opposition means that a mandatory plan will inevitably result in a wasteful and divisive legal and philosophical confrontation. It also means that a mandatory plan will require the devotion of scarce resources to administration and enforcement mechanisms.

We should also consider the message conveyed to the public by voluntarism on the one hand, and reluctance on the other. We all seem to agree that the most efficient and equitable way to meet the legal services needs of the poor is to increase public funding for legal services organizations. It will certainly be more difficult to generate public support for such measures if attorneys do not consider the problem significant enough to make sacrifices of their own. Widespread participation in a voluntary program would thus have a tremendous symbolic significance, even if it cannot, by itself, satisfy the need.

Most importantly, voluntary service is preferable to compulsory service in any endeavor. Clients will be better served by lawyers who stand at their side willingly. For all of these reasons, a successful voluntary plan is the preferred choice.

We are now near the end of the two-year moratorium period sought by the State Bar Association. At the beginning of that period, a committee co-chaired by Victor Marrero and Justin Vigdor was appointed to monitor the progress of the efforts to encourage voluntary pro bono participation. I cautioned then that if those efforts were not successful, after the two year period I would seek implementation of the mandatory plan proposed by the Marrero Committee. So far, there have been encouraging signs. Conversations and correspondence

with individual lawyers and leaders of local and statewide bar groups lead me to believe that participation in voluntary pro bono programs is increasing and that the participants are finding the experience professionally and personally rewarding.

This trend must continue. As the Marrero Committee noted: "If we do not act decisively in the crisis, especially in light of the known dynamics of poverty, the legal needs of poor persons will accrue, the human hardships accompanying those needs will be multiplied and prolonged, and a fundamental failure in our justice system will be correspondingly enlarged."¹⁴

Increasingly, access to justice requires the aid of an attorney. A system of justice that closes the door to those who cannot pay is not deserving of the name.

14. MARRERO REPORT, *supra* note 1, at 758.