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OBLIGATORY PRO BONO PUBLICO LEGAL SERVICES: MANDATORY OR VOLUNTARY? DISTINCTION WITHOUT A DIFFERENCE?

*Honorable Joseph W. Bellacosa**

The legal profession is interwoven into every nook and cranny of American life and society. De Tocqueville noted in his great commentary on our republican democracy that all issues, including the high public and governmental ones, are eventually transformed into legal questions.¹ An examination of the history of our New York State Court of Appeals' docket bears this out.² The Court's work spans from adoption to zoning on its civil docket, and from the most minor transgression to murder on the criminal docket. In the early decades of this century, the Cardozo Court grappled primarily with private law disputes—torts, contracts, sales and the like. Although the Court does not lack for these kinds of cases today, it is the public law docket that is dominating the latter decades of this century. A sparrow does not fall from the sky except that some government bureaucrat watches, counts and sues or is sued.

This pervasive envelopment of various levels of all our governments into the regulation of the lives of all citizens and into conflicts *inter sese* among various levels of governments has escalated the demand for lawyers to respond to the intensified needs of ordinary people for legal services.³ The proportionate desire and even desperate need for such services has never been more manifest and evident than now in the wake of the economic debacle, not at all nostalgically remembered as the "Greed Decade of the Eighties." The fiscal

* Judge, New York State Court of Appeals. This Article is adapted from remarks given at the Annual Dinner of the Hofstra Law Review, Uniondale Marriott Hotel, on April 21, 1991.

1. See 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Phillips Bradley ed. 1945) (noting that political questions usually become judicial questions).

2. See generally F. BERGAN, *HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932* (1985) (tracing the early history of the New York Court of Appeals).

3. See generally 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 (1991) (discussing the ordinary person's heightened need for legal services) [hereinafter MARRERO REPORT].

detritus already evident in the early 1990's is certainly a testament to that. I allude not just to the activities of the Boeskys and Milkens, but to merger-and-acquisition pyramidings; colossal bankruptcies, savings and loan scandals, unfathomable public debt at all governmental levels and the like—all involving many lawyers in one way or another. All these things, of course, also impact directly, having a ripple effect on countless ordinary people. So, can the social and professional conscience and soul of the members of the legal profession be relocated and resuscitated? Many asked the same question after the Watergate scandal of the early 1970's. Or will we be left with George Bernard Shaw's trenchant one-liner: "All professions are conspiracies against the laity."⁴ I am an optimist and confident that you incubating lawyers, and you full-fledged veterans too, can disprove that critical aphorism, and can find and walk the high road again.

The need and the call to duty are surely some of the engines driving the intensified efforts for pro bono legal services reform from within, motivated by the impulse to "do good" as a volunteer on a person-to-person basis, but also stemming from a sense of professional obligation. An opportunity is at hand—born of duty, not grace. The trick is whether the moment can be seized without a fight to the death over the hated and mistrusted "Mandate Kicker."

I would like to share with you an excerpt from a poem from a book called *Breaking Bread*, a biography of Dorothy Day—the founder of the Catholic Worker movement in the lower East Side of New York City during the troubled 1920's and 1930's; an indefatigable worker among the utterly poor and destitute, and dubbed a Communist because of her work:

Ambassadors of God

People who are in need
and are not afraid to beg give to people not in need the occasion to
do good
for goodness' sake.
Modern society
calls the beggar
bum and panhandler
and gives him the bum's rush.
The Greeks used to say
that people in need
are the ambassadors of the gods.

4. G.B. Shaw, *The Doctor's Dilemma*, Act I (1911).

* * *

To be God's Ambassador
is something
to be proud of.⁵

The needy give lawyers something to be proud of as well. They allow us to rise to greater, more humane heights as professionals. For that, they deserve *not* a patronizing attitude of *noblesse oblige*, but one of great dignity, respect and appreciation.

Consider for a moment the interesting play on words of the Latin phrase *pro bono publico*. The literal translation, for the good of the state, powerfully conveys the larger good and meaning of providing one-to-one legal services to persons in need, including the needy working poor, who constitute such a large and permanent part of society. I was extremely impressed, for example, with a *60 Minutes* segment which showed two septuagenarian widows Levitt and Quinn, Esqs., running a Los Angeles Sunset Boulevard Family Law Clinic. They explained how they were "giving back" benefits bestowed upon them over a lifetime.⁶ They were providing desperately needed family law legal representation to working needy individuals, and, ultimately, to society.

All lawyers face obligations rooted in the highest traditions of our learned profession, and as sounded in the Code of Professional Responsibility's call to action in Canon 2 and Ethical Consideration 2-25.⁷ My first job as a lawyer was on a corporate law staff in New York City which, in the early 1960's, if I may recount this with deadpan understatement, did not encourage its young lawyers to provide pro bono service. Discouraged, I sought alternative opportunities and happily found a productive career in both varied public service and law teaching. One of the highlights, so to speak, was defending a convicted murderer on a pro bono appeal assignment. The visits to, and the conferences at Sing Sing Prison (now Ossining Correctional Facility), as well as the planning and the professional exhilaration of briefing, arguing, and winning on appeal were put to the test occasionally by my young wife and children's conversational skepticism as to why I was working so hard, as they saw it, to set a murderer

5. M. PIEHL, *BREAKING BREAD* 103 (1982).

6. *60 Minutes*, (CBS television broadcast, Dec. 9, 1990).

7. See Code of Professional Responsibility, Canon 2, EC 2-25; N.Y. JUD. LAW, Appendix (McKinney 1975) (discussing the importance of providing legal services to the disadvantaged).

free. The anxieties and inner conflicts that those musings evoked, in sharp contrast to the pro bono lawyer's professional duty, still evoke deep philosophical questions. Every time I read about, or rule on a similar case (the killing of a taxi driver), I utter a small private mantra that my former client was not involved. I even fantasize that he is out there somewhere as a reformed, contributing member of society.

My early experience and my present responsibility generate this question: Where are we today as a profession and a society? A brief summary of the New York experience may be useful. Chief Judge Sol Wachtler's initiative and call to study, to reform and to action is a national beacon in this field; just as the New York State Court of Appeals has been in its adjudicative leadership for over a century.⁸ The Marrero Committee,⁹ named for Victor Marrero, the Chair and a distinguished New York City lawyer, has done a magnificent job in deliberating and formulating a plan of action, calling at its core for a controversial 20-hours-per-year mandatory legal service contribution from every lawyer in New York.¹⁰ The organized Bar sought and received a two-year moratorium on adoption and implementation of the Plan in its many particulars while the Bar fashions, funds and energizes a greatly expanded participation and volunteer program of legal services to the poor and needy.

Our Chief Judge has graphically described the plan and the moratorium as focusing the profession's mind more sharply by the sight of the gallows. There was great excitement in our magnificent courtroom in Court of Appeals Hall on Law Day, 1990 as this scenario and strategy unfolded. Across the country, too, I heard about it and witnessed lively discussions at meetings of the ABA Accreditation Committee, as law professors questioned me, and complimented our State for the leadership manifested by these developments.

To be sure, we are far from unanimity of view or approach. Amidst the applause, we hear some "Bronx Cheers." For example, Judge Titone of our own Court (who gave me advance permission to use his name so long as I called his critique a "Staten Island Cheer"), published an article not long ago urging consideration of alternatives.¹¹ He seriously questioned the mandatory approach for pro bo-

8. See generally F. BERGAN, *supra* note 2 (discussing the history of the New York Court of Appeals).

9. Committee to Improve the Availability of Legal Services.

10. See MARRERO REPORT, *supra* note 3, at 784 (stating the requirement that every attorney covered by the rule would be obligated to perform a minimum of forty hours of qualifying pro bono services every two years).

11. See Titone, *Perspective: Alternatives to Mandatory Pro Bono*, N.Y.L.J., June 21,

no services and the effectiveness of specialized Wall Street firms and lawyers in providing the most needed services in, for example, Housing Court and Social Service agencies.¹² I, myself, am troubled about the limited buy-out provision in the *Marrero Report*,¹³ because that seems to be a throwback to the notorious Civil War draft avoidance device (even some members of the Marrero Committee dissented on that one). I am also concerned about the overly narrow definition of what would count towards satisfaction of the pro bono service obligation.¹⁴ But while these concerns and those of others certainly are worthy of debate, and responsible answers and accommodations still must be given, further criticisms should not be allowed to stall necessary action. The time for reform has arrived.

In Washington, D.C., one of the nation's outstanding firms, Hunton & Williams, has launched a remarkable and unique program which answers the "over-qualified specialization objection." The firm has opened an exclusively pro bono satellite office in Richmond, Virginia, staffed by a partner and eleven associates of the main firm devoted to serving the elemental legal services needs of the poor and lower middle class. It has been so successful that the program has been expanded. Now, that is exciting, revolutionary and commendable. Many such law firm, corporate law department and other organized bar association programs are springing up in New York, too, responding out of altruism, self-interest and obligation. These programs shine in the highest traditions of fulfilling our professional responsibilities. They demonstrate action, not just words and not just a donation check!

Law schools, too, with growing clinical and authorized, supervised externship programs are likewise hearing the clarion call to dutiful sharing of our high calling, our high privilege and our talents. Law schools are spurred by pioneers like Hofstra's own Professor Dave Kadane, who just passed away, and I mention him with respectful appreciation and remembrance. I am pleased at what I see happening in this field as a lawyer, as a Judge, and as a legal educator. But there is a long road yet to travel.

Let me please relate to you a very interesting development Chief

1989, at 2, col. 2.

12. See *id.* (noting that appointed attorneys provide at best, token representation).

13. See MARRERO REPORT, *supra* note 3, at 799-806 (discussing the monetary contribution option).

14. See MARRERO REPORT, *supra* note 3, at 789-97 (discussing qualifying services).

Judge Wachtler fashioned with our Court's unanimous policy approval just a few months ago, spurred on by our Marrero Committee: Public sector lawyers (our large nonjudicial lawyers' cadre) may now render pro bono legal services, with a carefully crafted set of provisos designed to avoid and sensitize against conflicts of interest and unauthorized use of public time, money and resources. In pertinent part, the new rule provides:

- (1) Persons . . . may provide *pro bono* legal services, which do not interfere with the performance of their jobs, in contested or uncontested matters, except those brought in the courts of their own employment.
- (2) *Pro bono* services in any contested matter shall be performed under such written terms and conditions as may be specified by the approving authority
- (3) No provision of legal services or related activities . . . may take place during usual working hours unless appropriate leave is authorized and charged. No public resources may be used in any such connection. Reasonable precautions must be taken in all cases by approving authorities and authorized employees to avoid actual and perceived conflicts of interest and the actual or perceived lending of the prestige or power of the public offices or positions of the employees and conveying the impression that such employees are in special positions to exert influence.¹⁵

We have just approved our first staff lawyer's proposal to do bankruptcy work for the poor on her own time. The rule was our Court's way of saying: "Do as we do, not just as we say." Courts and the law profession must provide concrete examples and live by the decrees they would impose upon others.

It is important that you appreciate how Judicial Branch executive policy is enacted. Under the State Constitutional Reforms of 1979, standards and administrative policies are proposed and ultimately promulgated by the Chief Judge of the Court of Appeals in his capacity as Chief Judge of the State, i.e., as the Chief Executive of the Judicial Branch. In between, he must consult with the four Presiding Justices of the Appellate Division and gain approval of his colleagues on the Court of Appeals. This can be very tricky, sticky, sensitive and troublesome; and if you have any doubt about my general comment, please read *In re Morgenthau v. Cooke*.¹⁶ It describes the rule

15. N.Y. COMP. CODES R. & REGS. tit. 22, § 25.40(c) (1990).

16. 56 N.Y.2d 24, 436 N.E.2d 467, 451 N.Y.S.2d 17 (1982).

and policy-making process and how disputes are adjudicated under the rule of necessity by the very Court whose power is in question with respect to the very person, the Chief Judge, who is a party to the litigation and who is, therefore, recused from the adjudicative participation.¹⁷

In preparation for my remarks to you today, I searched by old-fashioned memory techniques, not through the newfangled, technologically fashionable electronic modern research tools, for a couple of relevant examples and illustrative cases of the needs we are discussing. They do not fit the usual recall patterns and key word punch-ins. I remembered them from a chemical brain cell category that stores jurisprudential sensitivity gems: *Sabot v. Lavine*,¹⁸ and *Zellweger ex rel. Zellweger v. New York State Department of Social Services*.¹⁹

The *Sabot* case found a single parent from Long Island arguing *pro se* at the awesome, intimidating lectern of the Court of Appeals about the Department of Social Services' reduction of her Aid to Families With Dependent Children. She was attending college part-time to get a better job. Some bureaucrats decided that the childrens' little bank accounts were alternative available resources to public assistance. Listen to the Court's decision after then-Chief Judge Charles Breitell, on oral argument, chased the Assistant Attorney General back to the office with a verbal lashing that the Attorney General should find some real and important cases to bring into court:

The sums involved are not only trivial accumulations, the record shows that they are the result of small deposits—generally \$5 or \$10—representing, indisputably, birthday and holiday gifts from relatives and casual employment by the children themselves. It is, of course, reasonable and obvious to expect a person, applicant, recipient, or beneficiary, to utilize his own resources before receiving public assistance. But the broad humanitarian purpose of the Social Services Law does not contemplate that a person must be stripped bare, emotionally and economically, of the small sums and personal paraphernalia of trivial value and of uncertain recurrence, before

17. Other illustrations abound (speedy trial-ready trial; sanctions for frivolous litigation; electronic media in trial and appellate courts; Lawyers' Fund for Client Protection), and some lie ahead (Continuing Legal Education; Mandatory Pro Bono); see also *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1970) (holding that the Appellate Division was able to adopt and enforce disciplinary rules regarding improper contingent fee arrangements).

18. 42 N.Y.2d 1068, 369 N.E.2d 1173, 399 N.Y.S.2d 640 (1977).

19. 74 N.Y.2d 404, 547 N.E.2d 79, 547 N.Y.S.2d 824 (1989).

applying for public assistance. Somewhere the line must be drawn. Thus it would be absurd and cruel, and therefore unintended by statute or regulation, to consider grand[parents]' watches, family pictures, family heirlooms of nominal value, toys, bicycles and small gifts to children as available "resources" which must be sold and consumed before any public assistance will be made available. Any statute or regulation, but particularly social legislation, however broad, must be interpreted and enforced in a reasonable and humane manner in accordance with its manifest intent and purpose.²⁰

That was 1977.

In 1989, a lawyer handling legal problems mostly for the elderly in the depressed, Canadian-border countryside of New York State argued on behalf of an 86-year-old spouse caring for her 91-year-old life partner, suffering from Alzheimer's Disease for twenty years. They were caught in a horrifying bureaucratic nightmare and a true "Catch-22." Listen once again to what a truly perceptive court can do when a proper case is presented with intelligent, cogent, caring and available advocacy by a lawyer for the poor. It is important that the advocacy exist as the initiating, focusing force because, as the great Cardozo in paraphrase warned, courts are not knights errant wandering the countryside from Long Island to Canada, then to Lake Erie, looking for personal good causes.²¹ Our Chief Judge Sol Wachtler, a successor of Chief Judge Cardozo, said in the *Zellweger* case:

Mrs. Zellweger did not meet the County's 60-day deadline for requesting a hearing on her husband's behalf. But the indignation of the Social Services Department . . . and the County over her failure to meet the 60-day deadline rings hollow in light of their own failure to comply with the law and regulations that govern the conduct of fair hearings. While holding a 91-year-old Alzheimer's patient and his 86-year-old wife to strict compliance with the statute, the respondents have in this case failed to follow the clear language of their own regulations.²²

Listen, too, to former Justice William Brennan's admonition set

20. *Sabot*, 42 N.Y.2d at 1068-69, 369 N.E.2d at 1174, 399 N.Y.S.2d at 641.

21. See B.N. CARDOZO, *The Nature of The Judicial Process*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO THE CHOICE OF TYCHO BRAHE* 164 (M. Hall ed. 1947) (noting that a judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness.").

22. *Zellweger*, 74 N.Y.2d at 407, 547 N.E.2d at 81, 547 N.Y.S.2d at 826.

out in the holding in *Mallard v. District Court*.²³

We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve. Although respondent and its *amici* urge us to affirm the Court of Appeals' judgment on the ground that the federal courts do have such authority, the District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for a writ of mandamus. We therefore leave that issue for another day. We hold only that § 1915(d) does not authorize the federal courts to make coercive appointments of counsel.²⁴

The need for legal services is at hand. The duty inures within the words, spirit and fabric of the Code of Professional Responsibility, along with copious other obligations. The quibbling, nibbling and quarreling about volunteerism versus involuntary servitude and like rhetorical rantings are silly, embarrassing and counterproductive, and should cease.²⁵ It is this kind of debate—at this stage—that unsurprisingly heaps the wrath and impatience of the public upon the legal profession. The bottom-line objection seems to be to the enforcement of the obligation that is already there. We should not play lawyers' word games here. We all know lawyers have many and varied professional obligations. But lawyers need help, encouragement and incentives to spur the fulfillment of their obligations from time to time just like everybody else, if not more so. If we were able to search our psyches for our earliest murmurings of the primary motivation for becoming lawyers, we would probably discover that it was service to others in need. So lawyers should revisit those root stirrings, and be grateful for the opportunity and corresponding obligation to bring them

23. 490 U.S. 296 (1989).

24. *Id.*, 490 U.S. at 310.

25. *See Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1960) (upholding the Appellate Division's power to adopt and enforce a rule providing for disciplinary action against attorneys for receiving higher fees than could be legally collected under retainer agreements).

to fruition.

My closing is simple. As with regular compensated work, we have another corresponding obligation in our pro bono ventures: To avoid the routinization of process and the corresponding depersonalization of the real clients, people who are always at the heart of what we dare to do. They expect, and are entitled to, respect for themselves and their causes, and our self-esteem and work satisfaction will be enhanced and reciprocated in due proportion and kind as we give it to them.

Holmes wrote a private letter to Cardozo many years ago defining the measure of success as not the place, the power, the prominence or the prestige one attains, but rather the trembling hope of striving for one's ideals day-by-day.²⁶ This is realistic idealism translatable into day-to-day accomplishments. Through a penetrating commencement address at the Jewish Institute of Religion, simply entitled *Values*, Cardozo echoes across the decades:

The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why—some of us like to believe that this is what religion means Let us not make the blunder of supposing that to live in communion with these ineffable values of the spirit, to spend oneself utterly in sacrifice and devotion, is a lot reserved for a chosen few, for an aristocracy of genius, for those that will be ranked in history among the mighty or the great To the glory of our humanity, the lowly equally with the mighty may be partakers in this bliss They had made it in humbler forms, by love, by gentleness, by sweetness, by devotion, by sacrifice of self We may not always have been conscious of its beauty. The end comes, and behold it is illuminated with the white and piercing light of the divinity within it. We have walked with angels unawares.²⁷

There can be no better call to action and mission for pro bono work to those in need. The opportunity for us lawyers to qualify as Cardozo's angels of assistance is at hand. I commend his values and message to you and wish you his measure of success as your reward.

26. See B.N. CARDOZO, *Mr. Justice Holmes*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, THE CHOICE OF TYCHO BRAHE* 86 (M. Hall ed. 1947).

27. B.N. CARDOZO, *Values: Commencement Address or The Choice of Tycho Brahe*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, THE CHOICE OF TYCHO BRAHE* 4-5 (M. Hall ed. 1947).