

Volunteer ATTORNEY

The Essence of Lawyering

By Terry Woods

Lawyers, according to the Rules of Professional Conduct, have a unique role in society that is no less than a "common calling."¹ Among the "essential characteristics of the lawyer" is "dedication to justice and the public good," giving us a "special responsibility for the quality of justice."² In particular, As a public citizen, 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; the lawyer should therefore devote professional time and civic influence in their behalf.³

Under the Code of Professional Responsibility (the ethical regulations governing lawyers prior to March 1, 2003), the manner in which lawyers were expected to fulfill their special duties as public citizens was somewhat unclear, especially with regard to a lawyer's duty to perform *pro bono* service. Rule 6.1 of the new Rules of Professional Conduct, however, is much more explicit. It begins with this simple admonition: "A lawyer should render *pro bono* public legal services."

But why? No matter how many hungry people might line up at their doors, McDonald's franchisees have no duty to give away hamburgers. Why do lawyers have to give away what Lincoln called our "stock in trade"—our time and expertise?

Time and again, the Tennessee Supreme Court has held lawyers to a standard of service that does not apply to any other profession:

The court has a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases....Where a lawyer takes his license he takes it burdened with these honorary obligations. He is a sworn minister of justice, and when commanded by the court can not withhold his services in cases prosecuted in forma pauperis.⁴

While the Constitution protects the rest of society from the uncompensated seizure of one's means of producing a livelihood,⁵ this protection does not apply to lawyers. ⁶ The lawyer's reward must be secured elsewhere:

[H]e can only rely upon the approval of his conscience here, and his reward hereafter when the final judgment is passed, for his compensation.⁷

But what happens if a lawyer has no concern about the hereafter? The Board of Professional Responsibility may not discipline a lawyer who violates Rule 6.18 Is there really any reason to worry about whether one complies with the Rule at all?⁹

Ultimately, each lawyer must determine the role that Rule 6.1 plays in his or her practice. To make that decision, it is helpful to assess what Rule 6.1 means, the who, what, when where, and how of it.

continued on page 4

FALL 2003

- 3 Pro Bono Legal Clinics
- 3 Spotlight on Firm's Pro Bono Initiative
- 6 Call for Nominations for 2003 Access to Justice Awards
- 11 Lawyers Care
- 12 Mark Your Calendar



Letter from the Chair

By John T. Blankenship

One of the many privileges afforded me in serving as Chairman of the TBA Access to Justice Committee is to work with a group of exceptional attorneys who have dedicated themselves to the goal of making our justice system available to every member of our society. I have been particularly impressed with the many wonderful attorneys who work for our various legal aid programs across the State of Tennessee. Terry Woods, of Legal Aid of East Tennessee, is a perfect example. As with other members of our committee, from Terry I have been fortunate to glean great wisdom and insight concerning this cause which all attorneys should have a passion for. In a recent meeting of our committee, one comment of Terry's in particular resonated with me. The comment was so profound that it found its way into TBA Access to Justice Committee's recently adopted Mission Statement which is reprinted at the conclusion of this letter. Terry

continued on page 2

Letter From the Chair

Continued from page 1

told us that we needed to promote a "culture of *pro bono*." Her use of that single word "culture" spoke volumes to me. Even though we now have a formal ethics rule in Rule 6.1 of the Tennessee Rules of Professional Conduct mandating participation in *pro bono* legal services, the idea of a "culture" of *pro bono* means that we understand a fundamental responsibility each of us has to assist in bringing legal services to those persons who cannot afford it, irrespective of Rule 6.1 or any other codified rule of *pro bono*.

This brings to my memory a statement a Sunday School teacher of mine made to me many years ago.

In discussing why stealing was wrong, and in particular my assertion that stealing was wrong because the Bible said it was wrong, my friend and teacher asked me a very profound question which actually taught me a lesson I will never forget. The question was, "Is stealing wrong because the Bible says it is wrong or does the Bible say stealing is wrong because it is wrong?" So my question to each of us as practicing attorneys in the State of Tennessee is, "Is providing *pro bono* representation the right thing to do because Rule 6.1 says it is or does Rule 6.1 say

that *pro bono* representation is the right thing to do because it is right?" This may seem like a no-brainer concept, but I am reminded very frequently that many members of the Bar have not embraced the concept of having a responsibility and obligation in terms of doing *pro bono*. This means that we still have a long way to go in accomplishing Terry's idea of a "culture" of *pro bono*.

Often I hear that certain lawyers don't do much *pro bono* because their area of expertise is not one suited for *pro bono* or it is an area where there is very little *pro bono*-type work. This could involve transactional law and other speciality areas. With all due respect, a lawyer thinking in these terms is missing the point. What the lawyer is really saying is that he or she doesn't feel comfortable taking a *pro bono* case because it would be in an area outside of his or



her expertise. I can't help but wonder if a client requesting services from that attorney in that same area of law plops down a \$10,000 retainer, if that would be the attorney's response. Some of our most educated and smartest lawyers are in areas which in fact do not often see the need for *pro bono* representation, but I must encourage lawyers in such areas, and all of us who find any excuse to avoid the responsibility we have, to recognize that we are smart, resourceful, and creative people who more times than not can find the way and energy to become competent in an area where there is a client in great need of legal representation, but who, for whatever reason, cannot afford to pay for those services.

Our Committee is dedicated to assisting every member of the Bar in fulfilling their responsibility to provide *pro bono*. This includes providing assistance to any attorney who wants to do *pro bono* in an area of law he or she has thus far not spent a lot of time in. Our Committee stands ready, willing and able to help you. As a matter of fact, I will provide my telephone number and email address in this letter because I intend to put my resolve where my mouth is. Please contact me if you need anything to assist you in providing *pro bono* representation and let me encourage every lawyer in Tennessee to take up the mantle Terry Woods has coined and together let's create a "culture" of *pro bono* where every citizen in the State of Tennessee, especially those in poverty and distress, has access to an attorney. It is my belief that there cannot be true access to the justice system without representation by an attorney. In such a "culture," people needing an attorney will never have to stand up and inform the court that they cannot afford an attorney. Instead each one will have a lawyer stand up and proudly announce representation of that client. ■

Sincerely,
John T. Blankenship
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TBA Access to Justice Committee's Mission Statement

- Advance the cause of equal access to justice for all Tennesseans.
- Create a culture of equal access initiatives among all members of the justice community.
- Coordinate and encourage cooperation among providers of legal services statewide.
- Educate the bar on the need and obligation to provide *pro bono* public representation.
- Support the bar in fulfilling its obligations under Rule 6.1 of the Tennessee Rules of Professional Conduct.
- Supply a voice for attorneys to the courts, the legislature, and the public on access to justice issues.

Pro Bono Legal Clinics

By Barbara Futter

Rutherford County is doubly blessed when it comes to free legal clinics for people who can't afford to hire lawyers. The Rutherford County-Cannon County Bar Association has operated a clinic for people with civil legal problems, at various places in the two counties for many years. Lawyers provide free legal advice on four Saturdays a year at locations such as the Rutherford County Courthouse, the Rutherford County Correctional Work Center and the St. Clair Senior Citizens Center in Murfreesboro, and the Community Center in Woodbury.

A separate group of lawyers came together in 1999 to found the Murfreesboro Christian Legal Clinic, which helps people with legal problems from 4-6 p.m. each Thursday, in a room at the Salvation Army center in Murfreesboro. Both clinics offer free legal assistance to people with questions about marital problems, post-divorce issues, housing, car repossession and other property disputes. The Murfreesboro Christian Legal Clinic also assists many homeless people, because of its location at the Salvation Army.

"Lawyers who volunteer for the Christian Legal Clinic talk with an average of 10 people a week," said founder John Blankenship. "For many people, we just provide referrals and information, but with a significant number of them, a lawyer volunteers to actually take on a case and pursue it," said Blankenship, a partner in a small Murfreesboro firm. "The beauty of the clinic is that there are no qualifications and no red tape."

The Bar Association clinic is staffed by a changing roster of volunteer lawyers from Rutherford and Cannon counties, who see walk-ins and answer phone calls from people who can't make it to the clinic. The two counties make up Tennessee's 16th Judicial District. Diana Burns, a solo practitioner in Murfreesboro, recalled helping an elderly man who came to the Bar Association clinic with questions about a conservatorship relating to his wife. "It was very satisfying to help someone immediately to understand the law and their legal rights," Burns said. "It was really good to be able to help someone just by answering questions and being there when they were going through a difficult time."

Blankenship said that many people come to the

Christian Legal Clinic "because they haven't been able to afford to even get in front of an attorney, and when they come to see us, they say they are so glad just to be talking to a lawyer." Lawyers who have volunteered for both clinics said that people often have legal problems which do not involve a lot of money, but which become major issues in their lives. "In one case I handled, an elderly couple living in assisted housing had a car wreck where they totaled their car on a light pole," Blankenship said. "They were being sued by the utility company for \$3,000, and they were scared to death. I contacted the lawyer for the utility and explained the situation and the company agreed to write off the debt. "A few weeks later, the husband passed away and his wife called me. She told me how much it had meant to her husband to know that that debt would not be a burden on her after he was gone."

Jerry Scott, a retired Court of Criminal Appeals judge who practices in a small Murfreesboro firm, said he volunteers for the Christian Legal Clinic because he knows that people often aren't treated fairly if they cannot get access to lawyers. "Many of the people we see are homeless, in part because of complex legal problems that they can't resolve without professional help," Scott said. Scott said he helped a homeless man who had a DUI conviction in Colorado. That DUI on his record kept the man from getting a driver's license in Tennessee, so, even though he worked in construction, he could not get beyond being a day laborer. "I made some calls to Colorado and talked to the district attorney's office there," Scott said. "They indicated that, several years earlier, all DUIs 10 years or older were set aside. That allowed this man's license to be restored in Colorado, which allowed him to get a license in Tennessee, so he could drive and get a better job here." Scott said that time spent with people who come to the legal clinic "makes you feel like you've done a great service, whether the problems are small or if they are beyond solving. You try to alleviate the pain any way you can." ■

Barbara Futter currently serves as managing attorney in the Murfreesboro office of the Legal Aid Society of Middle Tennessee and the Cumberland...She received her law degree from American University in Washington, D.C.

Spotlight on Firm's Pro Bono Initiative

In response to the *Pro Bono* Luncheon, Sherrard and Roe, PLC is in the process of drafting a formal *pro bono* policy and their aspiration is to present it at their next partnership meeting. As part of its *pro bono* program, the firm has also partnered with the Nashville Bar Association *Pro Bono* Service to launch an initiative to have legal aid clinics at Public Service Agencies. Sherrard & Roe has adopted the Nashville Exchange Club's Family Center and plan to hold free legal clinics each quarter. Their first one will be held on October 11, 2003.— *Hats Off to Sherrard & Roe!!!* ■

The Essence of Lawyering

Continued from page 1

Who: Rule 6.1 does not make exceptions; all lawyers are expected to comply. However, the somewhat peculiar structure of the first sentence of Comment [1] to Rule 6.1 (which was adopted verbatim from the pre-1993 version of ABA Model Rule 6.1) reflects that not everyone will accept the universality of the Rule's requirements. The Comment begins, "Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay..."

The second half of that sentence is oddly unrelated to the first. The Comment continues, "and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer." The sentence is divided as if the second clause concludes an unrecorded dialogue between the drafters and a lawyer who enjoys both professional prominence and a heavy work load:

Drafters: "Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay."

Lawyer: "Sure, my new associates have to do it, but I've paid my dues. Why should I do pro bono work?"

Drafters: "Because personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

What. "Pro bono" is not a synonym for "free." Sometimes free service is not regarded as "pro bono service." Sometimes service for which a lawyer is paid is considered "pro bono service."

Tennessee's version of Rule 6.1 describes two levels of *pro bono* service: (1) the type of work to which "a substantial portion" of a lawyer's *pro bono* service should be devoted and (2) opportunities for "additional services." In complying with his/her duty to "render *pro bono* public legal services," Rule 6.1(a) requires a lawyer to

- (a) provide a substantial portion of such 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 that are designed primarily to address the needs of persons of limited means.

One must study the Comments¹⁰ carefully, however, to appreciate the subtleties of Rule 6.1(a).

First, in order to comply with the Rule, one's *pro bono* service must be rendered "without fee or expectation of fee." Comment [4] emphasizes that a lawyer must have the intent "to render free legal services" in order to comply with the Rule. An unfortunate reality of practicing law is that some clients do not pay the fee

they agreed to pay. While "bad debt clients" may or may not be "persons of limited means," an essential element of *pro bono* service is the intent to provide it, as declared at the beginning of the attorney-client relationship. Therefore, work for a client from whom a fee was initially required is not considered "*pro bono*" when the client fails to pay.

On the up side, however, Comment [4] also provides that a lawyer may collect "statutory attorneys' fees in a case originally accepted as *pro bono*" and still comply with the Rule.¹¹ One basis for considering fee-generating work to be "*pro bono* service" goes something like this: You got paid; but the amount was so little, we'll just pretend you did it for free. Comment [4] says that sometimes, the fee paid to a lawyer in an appointed case is so unreasonably low that the case qualifies as *pro bono* under the Rule.¹²

Who: (Part 2) Rule 6.1(a) refers to services to:

- (1) persons of limited means; or
- (2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means

"Persons of limited means" is a euphemism for "poor people." According to Comment [3], persons of limited means "are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel."

In addition to service to individuals who have "limited means," Rule 6.1 recognizes *pro bono* work provided to certain organizations. Lawyers are often tempted to characterize a variety of personal activities as "*pro bono* service" simply because the activity is conducted by a non-profit entity and the lawyer is not paid. Rule 6.1 is not so flexible. To satisfy Rule 6.1(a)(2), the lawyer's service must meet two conditions:

- (1) The service must be to an organization that is "designed primarily to address the needs of persons of limited means" and
- (2) The service must be "legal services."

When: Rule 6.1 Comment [1] states that a lawyer should devote a "reasonable" amount of time to *pro bono* work, but it does not define how much time is "reasonable." Clearly, what one lawyer would consider "reasonable amount" of service is likely to be seen as too much by some and too little by others. In 1993, the American Bar Association revised Model Rule 6.1 to call for at least 50 hours of *pro bono* service per year, subject to each state refining that requirement to reflect "local conditions."¹³ No state has yet made any minimum number of hours of *pro bono* service mandatory,¹⁴ but 50 hours of *pro bono* service per year is widely recognized by professional organizations as an

"aspirational goal." The Knoxville Bar Association, for example, adopted the 50-hour aspirational standard as early as 1991.¹⁵

Where and How: *Pro bono* is usually defined as work that is "for the public good" or "for the welfare of the whole." It may be argued that everything a lawyer does in furtherance of justice is encompassed within this definition; but in popular parlance, *pro bono* has come to mean service performed for low-income clients without compensation. Most often, *pro bono* service is associated with the direct representation of an individual low-income client—usually in litigation. This is a narrow understanding of *pro bono* service, which often leads some lawyers to believe that they cannot perform *pro bono* work at all—because they do not have the requisite skill or expertise in the types of legal issues a low-income client would face. In reality, the definition of *pro bono* is broad enough to provide an opportunity for all lawyers to serve. Rule 6.1 makes it clear that performing *pro bono* service does require practicing "poverty law."

The "Substantial Portion" of Your *Pro Bono* Service

Rule 6.1(a) requires that the "substantial portion" of a lawyer's *pro bono* work should be providing legal services to "persons of limited means" or to an organization that is "designed primarily to address the needs of persons of limited means." Here are a few of the opportunities a lawyer has for offering *pro bono* service under Rule 6.1(a):

- **Full, Direct Client Representation:** This is the most common type of *pro bono* service. That is, the lawyer accepts a "case" from a low-income person, without the expectation of receiving a fee, and represents the client in all aspects of the case. The legal community has been giving this traditional form of service close scrutiny in recent years, however. The alternative to traditional "full representation" is called "unbundling" legal services. The "unbundling" concept can apply to representing fee-paying clients as well as *pro bono* clients; but current interest in the idea has accelerated because it can be a strategy for recruiting volunteers to assist *pro bono* clients.

- **Unbundled Representation:** "Unbundled" representation refers to providing limited, discretely

defined services without undertaking full representation. It is still "direct" representation in that the attorney-client relationship exists; but the task the lawyer performs is simply one of the many jobs that the lawyer would do if providing the client with "full" representation. Common examples of unbundled services include writing a demand letter, negotiating with an adverse party, reviewing a pro se litigant's responses to interrogatories, making a limited appearance to contest jurisdiction.¹⁶ In engaging in "unbundled" representation, however, a lawyer should give extra attention to crafting a detailed representation agreement.

- **Representation of Organizations:** There is no fiercer *pro bono*-related debate among lawyers than the one centering around the extent to which participation in community organizations "qualifies" as *pro bono* service. If we examine the definition of "*pro bono* publico," virtually any civic activity amounts to *pro bono* work. However, Rule 6.1(a) is not so flexible. First, *pro bono* service involves providing legal services. Second, when services are not provided

directly to "persons of limited means," the service must be to "charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means."

While it is important for lawyers to work with groups designed to improve the quality of life in the community (including services that do not qualify as *pro bono* under Rule 6.1), in general, *pro bono* service to a group refers to assisting non-profit organizations¹⁷ that provide services to persons with limited financial resources.¹⁸ A lawyer's participation in civic groups, social clubs, religious institutions, or similar organizations—while laudable—does not constitute *pro bono* service except to the extent that the lawyer provides legal services and the organization's activities are directly connected with providing services to low-income persons.

- **Other Activities:** Comment [2] also makes clear that *pro bono* service encompasses such a broad variety of activities that all lawyers will find some way to comply with the Rule.¹⁹ Options include "legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to

Rule 6.1(a) requires that the "substantial portion" of a lawyer's pro bono work should be providing legal services to "persons of limited means" or to an organization that is "designed primarily to address the needs of persons of limited means."

2004 Tennessee Bar Association Access to Justice Awards

The Tennessee Bar Association is pleased to announce that it is now accepting nominations for the **2004 Access to Justice Awards**. The winners will be the nominees who best meet the criteria established below by the TBA Access to Justice Committee. The awards are presented in three categories honoring public service attorneys, members of the private bar and law school students who provide outstanding representation to the state's poor. The winners will be featured in the January 2004 edition of the *Tennessee Bar Journal*.

Please submit your nomination on the form that is provided here. You may also submit additional information, letters, newspaper articles or anything else that will give us a full picture of your nominee's involvement with public service. Nominations must be submitted on or before **October 1, 2003** to:

Access to Justice Committee
Tennessee Bar Center, Suite 400
221 Fourth Ave North
Nashville, TN 37219 - 2198
(615) 297-8058 (fax)



PUBLIC SERVICE AWARD

The nominee must be:

- an attorney for an indigent client in either civil or criminal defense
- who provided dedicated and outstanding services during the past year
- while employed by an organization that is primarily engaged in providing legal representation to the poor
- and who is either still employed by the civil or defense organization or has ceased work for the organization in the past two years.

HARRIS GILBERT PRO BONO AWARD

The criteria for this award are:

- the nominee should have contributed a significant amount of *pro bono* work, either in terms of number of cases handled or significance of the work. The casework for which the nomination shall be considered should have occurred within the last three years
- the nominee should not be an employee of an organization whose primary purpose is to provide free legal assistance to the indigent
- the nominee should have demonstrated dedication to the development and delivery of legal services to the poor.

LAW STUDENT VOLUNTEER AWARD

The nominee must be:

- a student enrolled at a Tennessee law school during the 2002-2003 school year
- who provided dedicated and outstanding volunteer services during the past year
- while working with an organization that is primarily engaged in providing legal representation to the indigent.

2004 Access to Justice Awards Nomination Form

Please check one:

- PUBLIC SERVICE AWARD
- HARRIS GILBERT PRO BONO AWARD
- LAW STUDENT VOLUNTEER AWARD

■ Nominee's name:

■ Nominee's address:

■ Nominee's phone number:

■ *For Public Service or Harris Gilbert Pro Bono Award nominations only:*
Where does the nominee work? How long has the nominee worked there?

■ *For Law Student Volunteer Award nominations only:*
What law school does the nominee attend? What year is the nominee in law school?

■ Tell us what makes this individual's commitment to public service outstanding:
Feel free to use additional sheets to write your nomination, but additional pages are not necessary.

■ Name, address and phone number of person making this nomination:

**Submit your nomination online at: <http://www.tba.org/news/probonoawards2004.html>
or mail this form to: Access to Justice Committee, Tennessee Bar Center,
221 Fourth Ave. No., Ste. 400, Nashville, TN 37219
or fax this form to: (615) 297-8058**

The Essence of Lawyering

Continued from page 4

those who represent persons of limited means."

"Additional" *Pro Bono* Opportunities

Rule 6.1(b) defines how a lawyer should provide "additional" *pro bono* services.²⁰ Paragraph (b) is divided into three sections, but it actually offers four options, three of which permit charging a fee—albeit at a "substantially reduced" rate.

• **Groups Securing or Protecting Rights:** Rule 6.1(b)(1) includes as a "*pro bono* activity" legal services to groups "seeking to secure or protect civil rights, civil liberties, or public rights"; and the services may be performed "at no fee or at a substantially reduced fee."

• **Groups with Limited Resources:** Rule 6.1(b)(1) also encompasses providing legal services to "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."²¹

• **Reduced Fee Services:** Rule 6.1(b)(2) authorizes the "delivery of legal services at substantially reduced fee to persons of limited means." Comment [7] explicitly encourages "[p]articipation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate."²²

• **Improving the Law and the Profession:** Rule 6.1(b)(3) recognizes as *pro bono* service "participation in activities for improving the law, the legal system, or the legal profession." Comment [8] cites these examples: "serving on bar association committees; serving on boards of *pro bono* or legal services programs; taking part in Law Day activities; acting as a continuing legal education instructor; serving as a mediator or an arbitrator; and engaging in legislative lobbying to improve the law, the legal system, or the profession."

Giving Your Time Is Not Enough

Rule 6.1(c) makes clear that the Supreme Court expects lawyers to contribute their money as well as their time: "In addition to providing *pro bono* public legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."²³

Ultimately, Rule 6.1 simply gives us guidelines about doing what we already know we are supposed to do and what most of us have learned from experience that we want to do. Consider this the next time your local

Legal Aid office asks you to handle a case *pro bono*: "Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer." It is the essence of lawyering.

Endnotes:

1. Tenn. Sup. Ct. R. 8, RPC Preamble [1].

2. *Id.*, [1] - [2].

3. *Id.*, [6].

4. *House v. Whitis*, 64 Tenn. (5 Baxter) 690, 692 (1875) citing the precursor of Tennessee Code Annotated section 23-2-101 (Acts 1821, ch 22, sec. 3, 1857, ch 58 Code, sec. 3980):

Counsel assigned to paupers: At the return of the process, the court may appoint counsel for the plaintiff, in actions prosecuted in the manner prescribed for paupers; and also for the defendant, if the defendant make oath that, owing to the defendant's poverty, the defendant cannot employ counsel.

Today, it is rare for a court to appoint counsel in civil cases, perhaps because the bench has concluded that it would not be necessary, based on the following assumptions: (1) If an indigent party in a civil action appears in court unrepresented, the party must have already attempted to find counsel—unless the party voluntarily opted to proceed *pro se*, in which case it is not necessary to appoint counsel. (2) If the party approached members of the bar and explained the

party's indigency, a lawyer already would have volunteered to represent the party on a *pro bono* basis, given the fact that it is a mark of professional pride to follow the tradition of *pro bono* service, as well as the fact that the Rules of Professional Conduct require it. (3) If no lawyer were available to accept the case *pro bono* (because of conflicts, scheduling, etc.), it would be futile for the court to attempt to appoint counsel. See Tenn. Sup. Ct. R. 8, RPC 6.2 cmt. [2] (a lawyer may decline an appointment for good cause, including when "acceptance would . . . impose a financial sacrifice so great as to be unjust.").

5. U.S. Const. Amend. 5; Tenn. Const. Art. 1, § 21.

Rule 6.1(c) makes clear that the Supreme Court expects lawyers to contribute their money as well as their time: "In addition to providing pro bono publico legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."

6. See, e.g., *Huskey v. State*, 743 S.W.2d 609, 610-611 (Tenn. 1988); *State v. Henley*, 98 Tenn. 665, 41 S.W. 352 (1897).

7. *Patton v. Dixon*, 105 Tenn. 97, 58 S.W. 299, 301 (1900).

8. *Id.*, RPC 6.1, cmt. [11]. The BPR's authority to enforce many other provisions in the Rules is likewise limited: "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." *Id.*, Scope [1].

9. Perhaps the answer to that question lies in the Preamble to the Rules, which might be construed to contain a (probably unintentional) warning: "The legal profession is largely self-governing. . . . To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." *Id.*, Preamble (10)-(11). In other words, if we do not observe our ethical obligations to society, we may find that those obligations will become mandatory, defined not by members of the Supreme Court (100% of whom are lawyers) but by members of the General Assembly (roughly 20% of whom are lawyers).

10. "Comments do not add obligations to the Rules, but provide either additional guidance for practicing in compliance with the Rules or make suggestions about good practice, which lawyers would be well-advised to heed even though the Rules do not require them to do so." *Id.* RPC Scope [1].

11. There are two categories of statutory attorneys' fees: (1) fees paid out of the client's recovery and (2) fees paid by the adverse party. The Comment probably refers to the latter category (since the lawyer will know upon accepting the case whether a fee is collectable from the client's recovery). One reason that the Comment encourages lawyers to seek attorneys' fees from adverse parties in *pro bono* cases is that it will motivate more lawyers to accept *pro bono* cases. One reason that *pro bono* referral programs (such as Legal Aid offices) encourage lawyers to seek attorneys' fees from adverse parties in *pro bono* cases is that it motivates adverse parties to change exploitive behavior. Many *pro bono* cases—especially those referred

through Legal Aid—involve retail consumers or tenants who have been knowingly victimized by the adverse party. Unscrupulous retailers and landlords frequently bring suit with full knowledge that they have breached their statutory obligations and that they have sued to recover an invalid debt; but they count on the fact that low-income defendants cannot hire a lawyer to defend the action. When a defendant is represented and prevails, the unprincipled plaintiff may be somewhat discouraged from repeating the tactic; but if s/he has to pay defendants' attorneys' fee often enough, the dishonest practices will stop.

12. There is an apparent contradiction within the Comments to Rule 6.1, however. Comment [1] states that in order to qualify as service under Rule 6.1, the work may involve a matter that is civil, criminal, or quasi-criminal if "there is no government obligation to provide funds for legal representation." (The example used in Comment [1] for uncompensated work is "post-conviction death penalty appeals," which is compensable under Tenn. Sup. Ct. Rule 13, § 3(k)(5)-(6). This may be explained by the fact that Tennessee adopted the quoted portions of the Comments directly from the pre-1993 version of ABA Model Rule 6.1.) Yet, Comment [4] suggests that "in some cases" *pro bono* service may include compensated appointment. The phrase "[i]n some cases" may explain the discrepancy. The Rule recognizes that some lawyers are motivated to accept court appointments in part because of the compensation that the state pays (in which case the service would not qualify as "*pro bono*"), while other lawyers may accept a court appointment without regard to the amount of compensation (in which case the service would qualify as "*pro bono*"). The fact that one lawyer would consider the amount of a statutory fee to be reasonable while another would not is reflected in the Rules' acknowledgment—and requirement—that the amount of a lawyer's fee should be based on a variety of factors. *Id.* 8, RPC 1.5

13. ABA Model Rules of Professional Conduct, Rule 6.1, cmt.

14. Even mandatory reporting of *pro bono* service is controversial. See, e.g., "Arguments For and Against *Pro Bono* Reporting," in *State Pro Bono Reporting: A*

"The legal profession is largely self-governing...To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."

The Essence of Lawyering

Continued from page 9

Guide for Bar Leaders and Others Considering Strategies for Expanding *Pro Bono* Aug. 2002 (available from the ABA or at www.abanet.org/legal-services/probono/home.html).

15. KBA Resolution of Board of Governors, Nov. 20, 1991, reaffirmed by Resolution Ap. 21, 1993.

16. While unbundling services can be an effective way to serve clients, it can also be a minefield. The two primary issues involve ethics and liability. Ethics: Rule of Professional Conduct 1.2(c) indirectly addresses unbundling ("The scope of services to be provided by a lawyer may be limited by agreement with the client..."), but the closest that the Board of Professional Responsibility has come to addressing the issue is in the context of a lawyer providing assistance to pro se litigants: "Extensive undisclosed participation by a lawyer... that permits the litigant falsely to appear as being without substantial professional assistance is improper. FEO 85-F-83, Tenn. BPR (Jan. 2, 1985) quoting ABA Informal Opin. 1414.

Liability: Some authorities argue that malpractice claims actually are minimized by limited representation because claims resulting from administrative errors (such as missing a deadline or failing to communicate with the client) are reduced when the lawyer is not responsible for the many details in a case and long-term, day-to-day client contact is limited. See Molvig, Dianne, "Unbundling Legal Services," 70 Wis. Lawyer 9 (Sept. 1997).

17. The Rules do not explicitly define the groups listed in Rule 6.1(a)(2) as "non-profit" organizations. However, the listed groups typically are non-profits.

18. Comment [3] lists several examples: "homeless shelters, abused women's centers, and food pantries that serve those of limited means."

19. Comment [2] says that even "government lawyers," who endure restrictions on the outside practice of law, may undertake *pro bono* service.

20. Since Rule 6.1(a) refers to the activities that comprise the "substantial portion" of a lawyer's *pro bono* work, one may conclude that a lawyer may not elect to perform the "additional services" described in Rule 6.1(b) to the exclusion of the activities described in Rule 6.1(a). Comment [5], however, creates some ambiguity: "While it is possible for a lawyer to fulfill the annual responsibility to perform *pro bono* service exclusively through activities described in paragraph (a), the commitment can also be met in a variety of ways as set forth

in paragraph (b)."

21. This provision seems to duplicate Rule 6.1(a)(2), although there are probably a number of ways to reconcile the two provisions. For example, perhaps Rule 6.1(a) refers to legal services specifically related to an organization's service to low-income persons while Rule 6.1(b) refers to legal assistance in more general matters (bylaws, etc.). On the other hand, perhaps Rule 6.1(b) encompasses a broader range of organizations than Rule 6.1(a), which includes only groups "that are designed primarily to address the needs of persons of limited means." Another possibility is that Rule 6.1(a) permits providing legal services to the enumerated organizations regardless of whether "payment of standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate," which is the standard applicable to service to groups under Rule 6.1(b). Finally, the distinction between Rule 6.1 (a) and (b) may relate to the provision in Rule 6.1(b) authorizing the provision of legal services "at a substantially reduced fee," as opposed to charging no fee at all. In other words, perhaps the intended distinction is to encourage a "substantial portion" of a lawyer's *pro bono* work to be without charge, but additional services may be rendered at a "substantially reduced fee." One should be cautioned against concluding that this is the only distinction between Rule 6.1(a) and (b), however, because Rule 6.1(b) also describes "legal services at no fee."

22. Additional rules governing court appointments are in Rule 6.2.

23. While the Rule's suggest that financial contribution should be "[i]n addition" to *pro bono* service, Comment [9] seems to suggest that financial support may be an alternative to *pro bono* service: "[T]here may be times when it is not feasible for a lawyer to engage in *pro bono* services. At such times a lawyer may discharge the *pro bono* responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided." ■

Terry Woods engaged in the private practice of law from 1979 until she became the Pro Bono Project director for the Central Region of Legal Aid of East Tennessee in Knoxville in 2001. She received the Tennessee Bar Association's Harris A. Gilbert Volunteer Lawyer of the Year Award in 2000. She is also the author of "Spike Agonistes: Chaos Theory and the Triumph of Art over Artist."

LAWYERS CARE

TBA President John Tarpley is challenging all Tennessee attorneys to render *pro bono* legal services. President Tarpley has termed this initiative "Lawyers Care." The Access to Justice Committee of the Tennessee Bar Association is coordinating this initiative and needs your help!

The Committee wants to hear from every lawyer in the State concerning their *pro bono* involvement and/or desire to become involved in *pro bono* work. The Committee will be working with local *pro bono* programs across the State in an effort to increase *pro bono* work by attorneys. Please join in this effort by completing this form below and returning it to the Tennessee Bar Association. Thank you for joining in this important effort!

Name: _____

Firm: _____

Address: _____

City/State/Zip: _____

Phone: _____

Fax: _____

Email: _____

Check all that apply:

Please sign me up to take *pro bono* cases.

My practice areas of interest is: _____

I am unable to take *pro bono* cases but am willing to help. Please contact me about alternative opportunities such as mentoring/traning other attorneys, staffing a clinic or assisting in other ways.

I am interested in *pro bono* opportunities/programs for my firm.

I am currently participating in *pro bono* through (name of *pro bono* program):

The New Rules of Professional Conduct state, "A lawyer should render pro bono publico legal services." (Rule 6.1)

PLEASE RETURN THIS FORM TO:

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221 Fourth Avenue North, Ste 400
Nashville, TN 37219
615-297-8058 (fax)

You may also sign up online on TBA's web site at: www.tba.org



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12

Mark Your Calendar for this CLE Program

In a joint effort to recruit volunteer attorneys to represent children, the TBA Access to Justice Committee and the TBA Juvenile and Children's Law Section will present, "Legal Advocacy for Children in Domestic Violence Situations." The presenter will be Kathy Skaggs, staff attorney for the Tennessee Coalition Against Domestic and Sexual Violence. Ms. Skaggs is an experienced presenter, having recently presented at the Coalition's annual conference.

When: Monday, December 1, 2003, from 1:00 P.M. til 4:15 P.M.

Where: The Tennessee Bar Center in Nashville.
(221 Fourth Ave. N., 2nd floor)

Questions? Call the TBA office: (800) 899-6993 or in Nashville at (615) 383-7421.