

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PRO BONO SERVICE RULES)
AMENDMENTS) M2008-
)
)

PETITION OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association (“TBA”) by and through its President, George T. Lewis; General Counsel, William L. Harbison; Chair, Access to Justice Committee, Debra L. House; Chair, Standing Committee on Ethics & Professional Responsibility, Lucian T. Pera; and, Executive Director, Allan F. Ramsaur, petitions this Court to encourage, facilitate, and enable greater participation in pro bono service by Tennessee lawyers through amendments to the Rules of Professional Conduct and the Court’s inherent power to regulate the practice of law.

BACKGROUND

One (1) in six (6) Tennessee residents live at or below the minimum financial eligibility standards to receive free legal assistance. Based upon

the University of Tennessee study, conducted for the Tennessee Alliance for Legal Services and funded, in part, by the TBA, nearly seven (7) in ten (10) poor Tennesseans face legal problems annually. Despite the best efforts of the federally-funded legal services programs and the dedicated pro bono service of more than 3,000 Tennessee lawyers, there still remains a considerable, un-met legal need in Tennessee.

As part of a year-long emphasis on pro bono service, the TBA hereby submits four (4) recommendations for this Honorable Court to encourage, enable, facilitate, and measure pro bono service. From the outset, it is important to say that the TBA does not favor any effort to mandate pro bono service. The essence of the attorney-client relationship is a voluntary one of mutual respect. Mandated representation would be contrary to the fundamentals of the relationship and ultimately serves neither the client, society, nor the lawyer well.

The proposals are as follows:

**1. FACILITATE SHORT-TERM, LIMITED SERVICE PRO BONO
ACTIVITIES BY ADOPTION OF NEW TENNESSEE SUPREME
COURT RULE 8, RPC 6.5.**

One method developed by legal services providers to the poor to address the overwhelming demand for legal services is limited scope programs like legal advice hotlines, limited service clinics, and pro se counseling programs.

One barrier to volunteer lawyer participation in such programs is the application of rules which require a lawyer to undertake an extensive conflicts check even though the client may receive brief advice and no ongoing representation.

ABA Model Rule 6.5, which the TBA proposes be adopted in total, permits a lawyer, with informed client consent, to undertake representation without extensive conflicts checks. Exhibit “A” is a clean version of the rule as proposed. As explained in the comment, the limited nature of the services significantly reduces the risk of conflicts with other matters being handled by the lawyer or law firm. The lawyer remains under an obligation to advise the client of any need for further assistance of counsel beyond that provided.

Another barrier may be that the lawyer may fear that undertaking pro bono service may preclude the lawyer from future representation. The Rule provides that the brief advice and the limited service do not disqualify the lawyer or the lawyer's firm from future adverse representation.

**2. ENABLE REGISTERED CORPORATE COUNSEL TO PROVIDE
PRO BONO SERVICE THROUGH ADOPTION OF TENNESSEE
SUPREME COURT RULE 8, RPC 5.5(e).**

In a petition filed contemporaneously with this petition, the TBA is recommending adoption of several measures governing the multi-jurisdictional practice of law. Under the MJP regime which the TBA proposes, Tennessee would join some thirty-five (35) other jurisdictions which permit in-house counsel practicing solely for their employer to register and provide services to their employer. ABA Model Rule 5.5(e), which *this* petition proposes to be adopted, authorizes registered corporate counsel to provide legal services through organized legal aid, state or bar association legal programs so long as the service does not require representation required by the *pro hac vice* rule.

As evidenced by the joint Tennessee Bar Association and Association of Corporate Counsel “Corporate Counsel Pro Bono Initiative,” lawyers practicing in-house are as committed to pro bono service, if not more so, than those in private practice. The TBA believes that in-house counsel should be allowed to provide pro bono service. Under this proposal, the lawyers would provide pro bono services to clients in the controlled environment of authorized and duly-organized legal aid and bar association pro bono programs. The lawyers undertaking these services would have available training and support from the legal aid program, feedback on their service, and are otherwise required to meet all of the other standards of the Rules of Professional Conduct. Exhibit “B” is a redline of the R.P.C. 5.5 as it would be amended when both the MJP and this petition are granted.

3. IN R.P.C. 6.1, ENCOURAGE PRO BONO SERVICE THROUGH SETTING AN ASPIRATIONAL STANDARD, CLARIFYING THE MEANING OF PRO BONO SERVICE, AND URGING LAW FIRMS TO ENABLE AND ENCOURAGE LAWYERS IN THE FIRM TO PROVIDE PRO BONO SERVICE.

With the adoption in 2003 of the Rules of Professional Conduct and RPC 6.1 in particular, this Court announced its policy that lawyers should render pro bono legal services. As a way to further enhance the aspirational value of Rule 6.1, the TBA proposes adoption of an aspirational standard of fifty (50) hours per year of pro bono service by lawyers in Tennessee; adoption of language which acknowledges the contribution which appointed counsel make when their service exceeds the cap on the number of hours undertaken for compensation; and, a comment urging law firms to enable and encourage lawyers in their firm to provide pro bono legal services. Exhibit “C” is a redline of R.P.C. 6.1 as it is proposed to be amended.

This proposal, which follows closely the ABA Model Rule on this subject, encourages pro bono service by giving lawyers some guidance on what the best practices are in fulfilling their ethical responsibility. The proposal is not an effort to head down the path to mandatory pro bono service. The voluntary character of the attorney –client relationship obviates mandatory pro bono service. Respect for client autonomy militates against mandatory pro bono service. Even the most zealous legal aid advocates indicate that clients might not be well-served by a lawyer whose service is compulsory.

Comment [4] now acknowledges that limits on fees paid to appointed lawyers as counsel in a criminal matter limit the number of hours for which a lawyer is paid. If a lawyer spends significant additional uncompensated time working on a case, these pro bono services should be acknowledged.

Finally, the new Comment [11] sets forth, for the first time, the responsibility for law firms to act reasonably to encourage lawyers in the firm to provide pro bono service. This encouragement might take the form of adoption of a pro bono service policy by the firm. It could take the form of permitting associates who perform pro bono service to count pro bono time against minimum hourly requirements. The important principle is that the firm, no less than the individual lawyer, must be responsible for pro bono service.

**4. LAWYERS SHOULD BE ASKED TO REPORT THEIR PRO
BONO SERVICE AS PART OF THE ANNUAL REGISTRATION
PROCESS.**

The TBA proposes that each lawyer be required to respond to a request for a report of the number of hours spent per year on pro bono legal services.

This response would take the form of an indication of a number of hours of service by an appropriate breakdown like that in Tennessee Supreme Court Rule 8, TRPC 6.1, or a response which indicates that the lawyer chooses not to respond.

According to the ABA Center for Pro Bono, one policy which has proven to be most successful in encouraging pro bono participation is a reporting requirement like that employed in three (3) other states. This requirement encourages a lawyer to think about the amount of pro bono service they are providing and allows the bench and bar to measure the enormous contribution which lawyers make in pro bono service. By measuring such service, lawyers learn about the contributions that their colleagues are making. By measuring such contributions, the respect for the legal system and the reputation of those who administer it is enhanced.

Various states have undertaken various regimes to accomplish these goals. The TBA proposes a simple requirement, from which a lawyer may opt out, that lawyers report anonymously as part of their annual registration process with the Board of Professional Responsibility. the number of hours of service. Since 2004, the TBA has administered a voluntary legal services

report as part of its dues renewal process. The number of lawyers reporting has grown steadily from 4% to 20%. The average number of hours reported is 72 hours per year per lawyer. The total contribution of lawyer time in 2006, the last year for which a full compilation is available, was \$7,848,950, based upon a conservative \$150 hourly rate.

As impressive as these numbers are, the request for information does not reach approximately 5,000 lawyers who have chosen not to be a member of the TBA. In addition, because members are not required to even indicate that they choose not to report, the rate of reporting remains relatively low. The TBA submits that the great respect for the Court and the registration process would mean that most lawyers would want to report to the court with pride the amount of service they have undertaken. Of course, no individual lawyer would be identified, but the statistical compilation of the results of the report would be available.

Since there is no model rule on reporting and since this proposal intrudes upon the administrative process of the Board of Professional Responsibility in administering the annual lawyer registration process, the TBA proposes that the Court signal that it wishes to adopt a reporting provision and that the

Board of Professional Responsibility be asked to assemble a working group, including TBA representatives, to establish a reporting provision for the next annual registration process for the Board of Professional Responsibility.

5. CONCLUSION

This Honorable Court has acknowledged that the needs of the citizens of Tennessee to have access to their justice system demand that the Supreme Court of Tennessee encourage, enable, and enhance pro bono service. The Court should expeditiously adopt all four (4) of these proposals in order to continue its leadership in this area which is vital to the justice system.

Respectfully submitted,

By: /s/ by permission _____

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit “D” by regular U.S. Mail, postage prepaid on _____.

Allan F. Ramsaur