New York County Lawyers' Association

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Statement by the New York County Lawyers' Association in Response to the New York State Unified Court System Report: The Future of Pro Bono in New York State

This Statement was adopted by the Executive Committee of the New York County Lawyers' Association at its regular meeting on March 29, 2004.

The New York County Lawyers' Association (NYCLA) welcomes the leadership of the Unified Court System (UCS) on the important issue of pro bono service by the legal profession. UCS's two-volume Report, summarizing the results of its statewide survey and presenting recommendations gleaned from its four pro bono convocations, stimulates critical thinking by all those interested in the volunteer component in the delivery of legal services and its appropriate intersection with our judicial system.

While we applaud the UCS effort and recognize that it reflects a significant commitment of UCS to pro bono services in New York State, we urge a number of modifications and a recognition of the prodigious pro bono efforts put forth by bar groups and lawyers around the state.

Summary of Recommendations

- The most significant way of providing legal services to the indigent is through a well-funded system of legal services providers and assigned counsel. The judiciary and the organized bar should advocate forcefully for sustained public monies to support such a system.

- To increase pro bono contributions in New York State, UCS should broaden the definition of "qualifying" pro bono to capture the substantial services both attorneys and bar associations provide for the public.

- Pro bono service should remain voluntary for attorneys and any suggested number of hours should be purely aspirational.

- Reporting should be voluntary for attorneys and for sponsors of pro bono programs such as bar associations.

- CLE credit should be awarded for training but not for actual pro bono service.

- The concept of unbundled legal services should be tested in carefully constructed and monitored pilot programs.

- The proposed structure─statewide and local pro bono committees—should be staffed and funded with grants available to support local programs.

NYCLA's Interest and Commitment to Pro Bono

NYCLA has a special interest in pro bono. Our original charter of 1908 stated that one of our purposes was "the facilitation of the administration of justice." Our revised certificate of incorporation in 1972 expanded on this theme, noting that all of the purposes for which NYCLA was formed were directed to "promotion of the public good," including "arranging for the provision by its members of free legal services for indigent, low income and other persons in need."

We take this mandate seriously. Our pro bono programs, sponsored by our committees and, often, in partnership with other bar associations and legal services providers, serve the public and enhance the administration of justice. With many years of experience operating pro bono programs, we offer our comments on the following key topics raised by the UCS Report: the role of government in providing legal services; the definition of pro bono; the appropriate participation of lawyers in pro bono service; reporting requirements; CLE credits for pro bono service; the "unbundling" of legal services; and the proposed structure for coordinating pro bono services.

The Role of Government

In Volume One of the UCS Report, the unmet need for civil legal services is estimated at "2.5 million legal problems for which no lawyer is available," or "86% of all civil legal needs of the poor." This staggering figure has clear implications, not only for the legal profession, but for society. The amount of funding for institutional providers of legal services for the poor, already inadequate, continues to decrease in the face of increasing need. On a national level, federal funds for the Legal Services Corporation have been cut 40%. Locally, the Legal Aid Society recently reported a very significant shortfall that may result in a staff reduction; it continues to turn away six applicants for every one civil case accepted. The private bar cannot and should not be expected to make up this shortfall in both public funding and public commitment to legal services for poor people.

NYCLA will continue to oppose the shifting of society's responsibility to the private bar and advocate for increased funding for legal service providers and the assigned counsel plan, while we encourage lawyers to volunteer services beneficial to the public. Further, we urge UCS to make such funding a top priority and to advocate vigorously, not only for the restoration of funds, but for significant increases in government support for legal services, so that the citizens of New York State, regardless of economic status, truly have access to justice.

Definition of Pro Bono

In Volume Two of the Report, UCS notes, as one of the obstacles cited by survey respondents to providing pro bono services, the "definition of pro bono" and, as a possible solution, recommendations from participants at the convocation to "broaden [the] definition to include low- and middle-income individuals" and "read [the] definition more creatively." NYCLA concurs with the idea that "qualifying" pro bono, as defined in the Pro Bono Resolution adopted by the Administrative Board of the Courts in 1997, is too narrow and must be expanded to include the array of worthwhile pro bono activities engaged in by New York State attorneys. By focusing only on services and activities to "poor persons" or those "who are financially unable to compensate counsel," the Administrative Board's definition excludes exceptionally important pro bono activities by individual attorneys and bar associations, and relegates these volunteer services to the unsatisfactory status of "non-qualifying" pro bono.

Volume One of the Report notes with chagrin that the percentage of New York State attorneys performing "qualifying" pro bono work decreased from 47% as reported in 1997 to 46% as reported in 2002, and that direct services to poor persons in civil matters showed a steeper decline, with 39% of attorneys performing such in 1997 and 34% doing so in 2002. We view this portrait of pro bono in our state with a deep sense of pride. At a time when the economy, especially in our region, was bleak, when both large firms and solo practitioners experienced sharp declines in income, we think it is laudatory that so many lawyers contributed so much "qualifying" pro bono. In addition, we believe that the data underreported pro bono contributions, both "qualifying" and "non qualifying," as many lawyers chose not to participate in the survey and others probably chose not to record pro bono work as they consider it a private matter.

NYCLA agrees that providing pro bono services to the indigent is an important goal of any pro bono plan, but many other types of volunteer contributions must be included in any realistic assessment of the scope of pro bono services and acknowledged as qualifying in any reporting system contemplated by UCS. According to the narrow definition of the 1997 Resolution, many of NYCLA's pro bono programs would not be deemed "qualifying" programs nor would its members be credited with participating in "qualifying" activities. A number of our significant programs do not subject clients to means tests but rather provide services to people of all economic levels and, often simultaneously, to the courts where these people are litigants.

None of the following NYCLA programs would qualify under the narrow definition used by the Administrative Board. Our Legal Counseling Project, a joint initiative with the Association of the Bar of the City of New York, serves 250 clients a year and provides them with legal advice in four areas: employment, housing, family and consumer bankruptcy law. The PEACE Program, which NYCLA co-sponsored with the Society for the Prevention of Cruelty to Children, a program to which the courts referred separating and divorcing parents for multi-disciplinary counseling, became a model for implementation throughout New York State. The Mandatory Joint Fee Dispute Program, which NYCLA administers in cooperation with the Association of the Bar and the Bronx County Bar Association, has trained 83 volunteer attorneys to serve on panels and help resolve the 113 cases filed with us in the two years since the program was mandated by

the Office of Court Administration. A Neutral Evaluation Program, once sponsored by the Office of Court Administration and soon to be reinstituted by NYCLA, will provide seasoned matrimonial attorneys to ease the burden of large caseloads for the justices in New York County and the high cost of contested litigation for divorcing couples.

Outside the realm of organized programs that NYCLA and other bar groups sponsor, New York State lawyers are providing a significant array of meaningful services to the public. Attorneys volunteer their time on bar association committees and the boards of non-profit organizations. They serve without compensation on local school and library boards and provide other free services for their towns and localities. They perform volunteer work as Small Claims Court or Housing Court Arbitrators, as Special Masters in state court and as arbitrators and mediators in federal court. Many retired lawyers also volunteer to assist the First and Second Departments by conducting settlement and issue-narrowing conferences before appeals to those courts are perfected.

In addition, in a wide range of areas, lawyers organize and administer charities. For instance, one lawyer we know whose brother-in-law died on September 11 organized a fund to provide a playground in his relative's name. Another lawyer whose friend died of spinal meningitis operates a foundation to raise money for research on this disease. Lawyers coach high school mock trial teams. Finally, and perhaps most commonly, in the regular course of representing clients, attorneys reduce their fees or donate their services to people of modest means.

All of this is pro bono work—it benefits the public. And it diminishes the contribution of attorney time and talent when it is labeled a "non-qualifying" activity.

In short, such a narrowly focused definition of "qualifying" pro bono produces two results: it underrepresents the number of attorneys who are performing pro bono services and it discourages the adoption and implementation of programs that would not "qualify" as pro bono activities. Furthermore, reliance upon a cramped definition of what constitutes "qualifying" pro bono may precipitate a decline in participation in many existing worthwhile, "non-qualifying" programs, in some cases causing those programs to collapse. Finally, the constricted definition of pro bono undermines the spirit of independence that should enable each lawyer to determine for herself or himself, as a matter of conscience, how and where to contribute time and talent.

Appropriate Requirements for Lawyers' Pro Bono Service

In addition to defining "qualifying" pro bono service, the 1997 Resolution adopted by the Administrative Board called for lawyers to provide at least 20 hours of pro bono legal services to the poor each year. Noting again our recommendation that the definition of "qualifying" pro bono service be considerably broadened to encompass activities that benefit groups other than the poor, we recommend that any target number of hours remain aspirational.

Lawyers should provide pro bono service because they want to, not because of a

mandate or even a recommendation from UCS that may seem like the prelude to a requirement. Lawyers may have a myriad of personal and professional reasons for choosing not to do pro bono work. They may not want to volunteer. They may already be working for the public good in government or legal services agencies. They may not have the skills for pro bono work or may lack training opportunities to acquire such skills.

Further, the Report does not take into consideration the broad spectrum of economic circumstances for members of the bar. While a significant time commitment to pro bono may be appropriate for partners in large law firms earning more than $1,000,000 per year or even for associates in large firms who start out with handsome salaries, it is unrealistic for the vast majority of attorneys who are not in such comfortable financial circumstances. Our profession includes many solo practitioners, part-time or unemployed lawyers, parents of young children, retired or disabled attorneys—lawyers who may lack the time or financial resources to donate their services.

As an alternative to giving time, the Administrative Board in its 1997 Resolution presents a second aspiration─contributing money to organizations that provide legal services to poor people. Again, this is potentially burdensome to attorneys of limited means and intrusive for all attorneys. Why should attorneys be under any obligation, however aspirational, to donate to legal organizations that help the poor, the very organizations that all levels of government seem to be systematically defunding? Why shouldn't lawyers, like all other professionals, donate their money to charities of their choice?

Reporting Requirements

UCS reports in Volume One that nearly two thirds of the attorneys who responded to the survey would be willing to voluntarily report their "qualifying" pro bono work. In Volume Two, UCS describes voluntary systems with mandatory reporting requirements introduced in Florida in 1993 and in Maryland in 2002. Based on the significant increase in pro bono activities in Florida since the reporting system went into effect, UCS then recommends that the proposed Statewide Standing Committee examine this issue within six months of its establishment.

NYCLA opposes any mandatory reporting system and recommends instead a voluntary reporting system by individuals and organizations sponsoring pro bono programs. Our major reason for opposing mandatory reporting by individuals is that such systems, as in the ones described in Florida and Maryland, couple mandatory reporting with disciplinary offenses for failure to report. We believe that linking pro bono service, which should be done out of a desire to help the public, with sanctions for attorneys who do not evince such a desire or neglect to report such service, subverts the very notion of pro bono service by the private bar. It is one thing to mandate attorneys to take continuing legal education credits and to report such with their biennial registration; it is quite another to force lawyers to report their volunteer work and face disciplinary charges if they neglect to do so or prefer to maintain their volunteer or charitable endeavors as a private matter. We note also that in states that have instituted mandatory

pro bono requirements, reporting preceded the mandate. We are thus justifiably concerned that mandatory pro bono reporting could lead to the adoption of a mandatory pro bono commitment for each admitted lawyer – a result that could be especially unfair to indebted young attorneys not practicing in premier-paying law firms.

In contrast, organizations that render pro bono legal services could report their activities, at least annually, to the UCS. Giving individual attorneys the option of reporting their pro bono service and asking bar associations and other sponsors of organized pro bono activities to report annually would provide adequate data for UCS to assess the status of pro bono service in New York State.

CLE Credit for Pro Bono Service

In Volume Two of the Report, UCS identifies a "lack of incentives" as an obstacle to pro bono service and the provision of CLE credits for such work as a possible solution. NYCLA opposes the awarding of credits for pro bono work for the same reason it opposes mandatory reporting with sanctions for failure to report—pro bono service should be freely given by an attorney. Public recognition rather than a CLE credit is an appropriate reward. Further, to award CLE credit for a lawyer who provides pro bono services in his or her area of expertise subverts the stated purpose of the CLE requirement "that attorneys maintain their professional competence by continuing their legal education throughout the period of their active practice of law." 22 NYCRR 1500.21.

NYCLA instead recommends that attorneys be eligible for CLE credit only for the training they receive from sponsored programs. For instance, attorneys volunteering for NYCLA's Legal Counseling Project or Fee Dispute Program receive six to seven hours of training by experts as well as substantial written materials. This training is the equivalent of that offered by our CLE Institute and should be creditable. However, we believe that any subsequent volunteer activities by the attorneys should be ineligible for CLE credit.

Unbundled Legal Services

NYCLA, like UCS, believes we should proceed with caution in developing programs that use discrete task representation in litigated matters. UCS's recommendations that the statewide and/or local coordinating committees proposed in the Report consider pilot projects is a useful approach to an issue that is highly controversial in the legal community.

Structure for Coordinating Pro Bono Services

Based on the brief description of the proposed structure—a Statewide Standing Committee and local Pro Bono Action Committees, with the one in New York City operating with five subcommittees (one for each borough)—NYCLA offers a qualified endorsement. On the New York City level, we recommend that each county bar be an ex officio member of its borough subcommittee. County bars are major providers of pro

bono legal services and, with their expertise in developing programs and training volunteer lawyers, would be invaluable resources for local planning subcommittees.

A major caveat in endorsing any new structure proposed by UCS is that the entity be staffed and funded appropriately and that resources, including financial support, be available to organizations providing pro bono services. A bureaucracy that provides oversight without funding has the potential for infringing on pro bono service providers and even curtailing the availability of pro bono opportunities for the private bar.

NYCLA believes that bar associations, faced with dwindling IOLA funds and other traditional sources of underwriting for pro bono programs, should be eligible for funds from UCS. One example from our own experience will illustrate the vital role NYCLA could play on a local level with additional financial support.

In Volume One of the Report, UCS cited the four most frequent reasons given by lawyers for not participating in pro bono activities: concern about time and resources demanded by pro bono work; lack of expertise in legal areas involving poor people; lack of office staff to support pro bono work; and lack of malpractice insurance to cover pro bono representation. Based on feedback from our members who volunteered in our pro bono programs, NYCLA began redesigning its programs several years ago from ones that required attorneys to represent clients to clinics where attorneys provide advice only. Our members respond enthusiastically to this model. We believe that our clinic model, coupled with our training for volunteers and our assigning mentors to further assist inexperienced volunteers, our staff support for our programs and our professional liability insurance, would help overcome the concerns lawyers expressed in the survey about pro bono service.

Conclusion

NYCLA shares the commitment of UCS to enhance pro bono services in New York State and urges that UCS consider the recommendations outlined in this response to its Report. We look forward to working collaboratively on the vital issue of pro bono and would be happy to comment further on any revised proposals.