

JOURNAL

A person wearing a denim jacket and dark pants is sitting on a wooden bench. Their hands are clasped in their lap. In the foreground, there are two brown paper shopping bags. The bag on the left has some text printed on it, and the bag on the right has a wavy pattern. The person is wearing light-colored sneakers. The background is dark and out of focus.

THE LAWYER'S MAGAZINE/DECEMBER 1, 1987

**GOING WITHOUT
MALPRACTICE INSURANCE**

**ONE LAWYER'S
TRIUMPH OVER ALCOHOL**

FOR THE PUBLIC GOOD

PRO BONO PUBLICO

► In Texas, a 1983 study found that 468,000 citizens have a civil legal problem and cannot afford an attorney. Less than 10 percent of these people obtained any legal assistance.

► In Colorado, a 1984 survey found that 61 percent of households below the poverty line—nearly 100,000—had a legal problem that year. But only 37 percent reported seeing an attorney in the previous five years.

► In Massachusetts, where lawyers have increased their pro bono efforts, the state bar reports that less than 15 percent of the civil legal needs of the poor are met.

There is more poverty in America today than 20 years ago. Today a family of four at the federal poverty level is surviving on only \$11,000 in annual income. Changes in Aid for Dependent Children and Social Security disability programs, and rising housing costs have created more legal problems. And at the same time funding of legal services has been slashed.

Meanwhile only 15 percent of lawyers nationwide participate in organized pro bono programs for the poor, according to the ABA Private Bar Involvement Project.

To start a discussion of this national problem, the *Journal* publishes its first editorial in five years on the following page. It is directed at doctors and lawyers and is co-published in the Dec. 4 issue of the *Journal of the American Medical Association*. It is not a policy statement of either association and is the opinion of the authors. But if you're a true professional, the editorial will mean something to you.

The accompanying articles spotlight important activity in pro bono work of lawyers:

► Thirty-five lawyers from Los Angeles donated more than 5,000 hours in a lawsuit on behalf of the homeless.

► Mandatory pro bono has been adopted by several federal courts, proposed in two state legislatures, and imposed by seven local bar associations.

► Years of damaging budget cuts and systematic harassment have left the Legal Services Corporation woefully understaffed and financially troubled.

► In his monthly "Message from the President," Robert MacCrate outlines the ABA's pro bono efforts involving the new immigration law, death row inmates, the homeless and AIDS patients.

The ABA Private Bar Involvement program helps bar associations operate pro bono programs with technical help, publications, an information clearinghouse and grants. Today there are 585 such programs nationwide. The ABA Division for Legal Services has 27 staff members who support several ABA committees devoted to legal service for the poor.

Find out where you fit in.

50 Hours for the Poor

Doctors, lawyers and the clergy belong to the classic learned professions, which are historically distinguished from trades and businesses. Although this distinction has blurred in modern times, one of the characteristics of a true profession remains its special relationship with the poor.

Edmund Pellegrino, the director of the Kennedy Institute of Ethics, states that a fundamental difference between a business and a profession is that "at some point in the professional relationship, when a difficult decision is to be made, you can depend on the one who is in a true profession to efface his own self-interest."

The privilege to practice law or medicine has carried with it the obligation to serve the poor without pay. Doctors and lawyers today have tended to become overly concerned with their professional incomes and practice efficiencies, but they must not forget higher duties. Many members of our professions have always cared for the poor who need legal or medical help.

But their efforts are not what they should be and there is abundant evidence of unmet needs. For example, 35 to 50 million Americans are now believed to be medically uninsured or seriously underinsured; access to health care is widely considered to be in crisis. And, in 68 percent of legal problems encountered by poor people, the services of a lawyer are not used, according to the American Bar Foundation.

The philosophical and ethical roots of the medical and legal professions are entwined with the public interest, service to the community, and caring for the poor. These professions maintain those values.

In law, the official policy of the American Bar Association, adopted in 1975, states: "It is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services without fee or at a substantially reduced fee in the following areas: poverty law, civil rights law, charitable organizations representation and administration of justice. It should always be provided in a manner consistent with the Model Rules of Professional Conduct. The organized bar should assist each lawyer in fulfilling his responsibilities in providing such services as long as there is need, and should assist, foster, and encourage governmental, charitable, and other sources to provide public interest legal services."

In medicine, the American Medical Association's original code of ethics written in 1846 emphasizes relief of pain and diseases without regard to danger or personal advantage and states that "to individuals in indigent circumstances, professional services should be cheerfully and freely accorded."

In 1987 the AMA House of Delegates approved as policy: "That the AMA urge all physicians to share in the care of indigent patients." Principle 3-6b of the Health Policy Agenda

for the American People states, "All health care facilities and health professionals should fulfill their social responsibility for delivering high quality health care to those without the resources to pay."

How many of our members of the legal and medical profession now deliberately care for the poor in a voluntary and uncompensated way? Many, but not enough. What percent of their time is spent doing so? Much, but not enough. Accompanying articles in this issue of both the *ABA Journal* and *JAMA* explore these questions in some detail.

Doctors and lawyers in our society have benefited greatly from the abundant opportunities made available to them from the fruits of our plenty.

We believe that all doctors and all lawyers, as a matter of ethics and good faith, should contribute a significant percentage of their total professional efforts without expectation of financial remuneration.

This percentage will vary depending upon time, setting, opportunity and need. But, all should give something. This is the proper behavior of a learned professional. We believe that 50 hours a year—or roughly one week of time—is an appropriate minimum amount.

There is a great tradition behind the giving of this gift. In the church, it is called stewardship. In law, it is called pro bono publico. In medicine, it is called charity. In everyday society, it is called fairness.

George D. Lundberg, M.D.
Editor
*Journal of the American
Medical Association*

Laurence Bodine, Esq.
Editor & Publisher
ABA Journal

Despite the growing problems of the poor, more progress in the effort to improve legal services to the poor has been made in this decade than at any other time in our history. The ABA has been a leader in this effort. Here is a brief list of some of the ABA's projects.

The **Private Bar Involvement Project** helps bar associations establish and operate pro bono programs to match lawyers and indigent persons who need legal services. The project does this through on-site and telephone consultations, specialized publications and an information clearinghouse.

Since 1982, the number of bar-supported private bar involvement projects has grown from fewer than 50 to more than 500 pro bono programs, with more than 90,000 lawyers volunteering their services. Each of these programs is designed to provide legal services to the poor.

Here is an example of how the project works. In 1984, ABA staff members began work with the Fayette County (Kentucky) bar association, a local bar with 600 members.

The Fayette County Bar formed a pro bono committee to work with the project staff, hired a pro bono coordinator, and began a recruitment drive. The president of the ABA spoke at a reception that yielded 122 volunteers for the new pro bono program, a 20 percent sign-up rate. During the next two years, 220 lawyers—30 percent of the Fayette County Bar—participated in the pro bono program.

Most of these programs, especially those that rely on volunteer attorneys, are sponsored by local bar associations.

Lawyers interested in doing pro bono work should contact the ABA project for information about a program in their community.

The project information clearinghouse contains articles, news clippings, reports and studies on such topics as the elderly and pro bono, pro

bono by law firms, judicare, IOLTA and pro bono in rural areas. The clearinghouse also contains a file on most of the private bar involvement programs around the country, with descriptions of their structure and operation, samples of forms and publicity materials, and information about how the programs were started.

The **ABA Commission on Legal Problems of the Elderly** works to link state and local bars with state and regional agencies on aging. The commission deals with the substantive issues that have grown around the problems facing older Americans: nursing home problems, health care decision-making and social security issues, among many others. The commission provides technical assistance to state bar and local bar committees on the elderly.

The **Standing Committee on Legal Aid and Indigent Defendants** has advocated legal services for indigent persons for more than 60 years. The committee encouraged Congress to create the Legal Services Corporation. Since that time, the committee has represented the ABA in its efforts to support the Legal Services Corporation.

The committee works with the ABA Sections of Criminal Justice,

General Practice and Litigation, and the Young Lawyers Division to operate the **Bar Information Program**, which distributes information and provides assistance to bar associations, judges and legislatures about the improvements in indigent defense services.

Every year the **Standing Committee on Lawyers' Public Service Responsibility** and the **Private Bar Involvement Project** sponsor the Pro Bono Conference, the only national gathering devoted solely to pro bono issues. The conference brings together pro bono experts, bar officials and legal services staff. The 1987 conference was attended by more than 400 persons. The issues discussed ranged from the nuts and bolts of program operations to program self-assessment, involvement of minority bars and lawyers and training younger lawyers. The 1988 conference will be held in New Orleans, April 21-23.

The **Commission on Interest on Lawyers' Trust Accounts**, which reflects the rapid expansion of IOLTA programs, coordinates the work of the IOLTA clearinghouse, a source of comprehensive information, materials and assistance on IOLTA programs in each state. ■

The ABA and the Poor

Advocates for the Homeless

BY IRWIN SPEIZER

Jon Davidson made his first trip to Los Angeles' Skid Row in the summer of 1985. It was a shock: run-down transient hotels, overflowing toilets, torn mattresses, broken furniture. The odor of decay.

"It reminded me of the Tijuana slums," says Davidson, a lawyer with Irell & Manella in Los Angeles. "I really didn't have an idea that that was the way anyone lived in the United States."

Davidson is one of 35 lawyers from the firm who together donated more than 5,000 hours in preparing a memorandum filed in Superior Court on behalf of the homeless of Los Angeles. The memorandum's descriptions of life in the last-resort hotels in Skid Row led to an overhaul of Los Angeles County's arrangements for the shelter of homeless people. *Paris v. Board of Supervisors*, Aug. 12, 1986, Superior Court No. C-523361.

It is significant that one of the more important lawsuits filed on behalf of the homeless in the Western United States depended so heavily on the volunteer services of private attorneys. Like most people, lawyers for years averted their eyes from the problems of the homeless.

Irwin Speizer is a free-lance writer in Fresno, Calif.

"These are the most vulnerable, underrepresented people in society," says Stanley Herr, a law professor at the University of Maryland and a founder of the Homeless Persons Representation Project in Baltimore. "They have been that way a long time, but it has taken the bar a long time to catch up."

As the estimated number of homeless people in the United States soared past 1 million, public advocates began to take notice.

Legal outreach programs were founded in cities like New York and Washington, D.C., for people without permanent addresses. Private lawyers joined these groups, and some bar associations launched their own efforts to aid the homeless, who often were unable to obtain the most basic legal assistance.

From New York to Kansas City to Los Angeles, lawyers with offended social consciences but little practical experience in social welfare signed up to help the homeless resolve legal problems. The resulting pro bono cases have run the gamut from simple mixups in public benefit entitlements to major litigation like *Paris*. And public-advocacy groups, swamped by the sheer size of the homeless problem, have welcomed the help private lawyers offer.

"Absent the good relations we have with the bar, things would be desperate," says Gary Blasi, a lawyer

who directs the Homeless Litigation Unit of the Legal Aid Foundation of Los Angeles. "I never take on one of these cases without thinking how we can get the private bar involved."

Many volunteer lawyers find their first encounter with the homeless to be an unpleasant awakening to the grim reality of life at the bottom. Their introduction usually comes on a tour of one of the shelters or run-down hotels where people with no place to sleep are sent by local governments. Wall Street lawyers who volunteer to help out with the Homeless Family Rights Project in New York often find themselves working in Times Square, where most of Manhattan's hotels for the homeless are located.

NIGHTMARISH CONDITIONS

"It's an education for them," says Arthur J. Fried, supervising attorney with the HFRP. "Although they have volunteered, they have very little experience with this side of life. Their reaction is just disbelief. They see families with three and four children cooped up in 10-by-12 rooms. Buildings 17 or 18 stories high with broken elevators. Filthy walls and corridors, heat and hot water often turned off, drafty in winter. Nothing to reduce the sound. Fire and safety code violations. Vermin."

Davidson was a typical upwardly mobile associate with Irell &



ABAJ/Wide World



Jon Davidson: "Once people didn't have a place to live, all sorts of things started to happen."

Manella when he joined other members of the firm to work with the Legal Aid Foundation of Los Angeles on behalf of the homeless. His first trip to Skid Row—a casual stroll with a public advocate and several other lawyers—was greeted with skepticism by police officers patrolling their beat.

"We were somewhat dressed down," he says, "but we still looked out of place. A police car came by and one of the officers said, 'Excuse us, folks, are you lost?' They thought we were tourists."

But Davidson was not a tourist; he was just taking the first step in becoming a tough advocate for the homeless. His experience in *Paris* is a good example of how private attorneys become involved in litigation for the homeless.

Paris challenged Los Angeles county's system of dealing with the homeless. Like other large cities around the country, the county provided lodging vouchers to those who had no place else to sleep. The vouchers could be used to pay for rooms in one of 200 authorized hotels, most of which were along Skid Row. In effect, those hotels represented the housing safety net for the homeless.

Public-advocacy groups had gathered strong evidence that living conditions in at least four of the hotels were not much better than living

on the street. But their case stalled when the county removed those hotels from the list of hotels eligible to redeem housing vouchers.

Realizing that an effective challenge to the voucher system would entail a broad attack on the entire, 200-hotel network, and require far more resources than they commanded, the public advocates turned to the private bar.

Lawyers from Irell & Manella, a firm of 150 lawyers, had already done pro bono work on an individual basis and had expressed an interest in helping with complex litigation. The firm invited the public advocates to make a presentation of their work. The voucher case fascinated Davidson and others.

"The case was just kind of sitting there," Davidson says. "It seemed good to us—something concrete we could do. It involved a complicated issue of devising an enforcement mechanism for a county system. We came in as co-counsel. From then on, we acted as lead counsel."

Davidson and other lawyers in the firm visited the hotels to gather evidence and declarations. Their on-the-scene investigations resulted in a stack of documentary evidence 2 feet high.

THERE BUT FOR FORTUNE ...

"The overwhelming number seemed very much like normal, average people who were just down on their luck and had something bad happen," Davidson says. Among those he encountered on his visits with the homeless were two former law students. "There were an amazing number of sad stories—a spouse died, a lost job, evictions. There were people who had come to L.A. thinking it would be easy to find work and were wrong."

"Once people didn't have a place to live, all sorts of things started to happen. Their possessions were stolen. They were assaulted or raped. After a couple of days living in the same clothes, not taking a shower, it became impossible to get a job of any sort. The hotels exacerbated the problems. Many people told us they'd been attacked in the hotels, both by other tenants and by management."

The harrowing details of life in L.A.'s voucher hotels eventually became a memorandum of points and

authorities. The memorandum combined the declarations of hotel residents with photographs of the living conditions. The object was to give the judge some sense of what it was like to live in these places.

In a section on bathroom conditions, Harry Hall, a tenant in the Bixby Hotel, reported that "the toilets were filthy and constantly out of order. Some are covered with urine and excrement and don't have seats."

Hennington Marvin, a tenant in the Boyd Hotel, declared that "none of the bathtubs worked, so everyone took showers. That was a problem because there were 70 people staying there and only four showers. They continually backed up, which was sickening, especially if you took a shower right after someone else. ... You don't know what you're standing in."

The memorandum includes a photograph of a "trash and feces-filled toilet in communal bathroom across from room 43 in Leo Hotel." There is another photo of the "floor of a shower with mold growing on it."

A judge never got to see these shots, however, because the county agreed to a pre-trial preliminary injunction under which new regulations were instituted. Now, when a homeless person seeks help from Los Angeles County, he gets not only a voucher for a hotel room but also a

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Skid Row in Los Angeles.



Arthur J. Fried with Gregory Dean, who, with Fried's assistance, found shelter for himself and his family at New York's Holland Hotel.

written explanation informing him that he is entitled to a place with working toilets, running water, clean sheets and no rats. If his hotel fails these tests, he is entitled to stay in a different hotel.

County inspectors are required to respond to complaints about substandard conditions within 24 hours. In addition, a new ranking system has been instituted under which the county sends clients to its best-rated hotels first. The ratings are done by the health department.

While the injunction could not resolve the broader issues that put the homeless on the streets in the first place, it did provide some relief for those who turned to the county when they had nowhere else to go.

For Irell & Manella, the injunction was a moral lift after hundreds of thousands of dollars in lawyer hours and out-of-pocket expenses. Concerns that the firm's involvement in a highly publicized social-issue case would alienate paying clients have so far proved unfounded.

"The firm really didn't get any flack," says Davidson. "As a matter of fact, we got several letters from clients that were very touching. Some big corporate clients said they were very proud to have our law firm involved. Some clients even offered to contribute to the cause."

Other firms have also seen positive side effects after letting some of their lawyers do pro bono work.

"I think it definitely has an ef-

fect on morale," says Fried. "Doing interesting litigation is a positive factor for people in a lot of law firms. And the satisfaction is very high."

Indeed, projects encouraging volunteer legal work with the homeless continue to multiply across the country. Among the efforts currently under way:

New York City. The Homeless Family Rights Project works with large law firms in cases involving shelter, public benefits, living conditions and other issues. HFRP is run by the Legal Aid Society of New York, a privately funded organization.

Washington, D.C. The Homeless Project has recruited and trained about 100 volunteer lawyers to provide legal services to the homeless. Volunteers visit shelters, receive referrals from legal clinics and participate in impact litigation. Begun as a product of the D.C. Bar, it is now separately incorporated.

Philadelphia. The Philadelphia Bar Committee on Problems of the Homeless recruits and trains lawyers to provide legal assistance. Lawyers see clients in shelters and monitor city ordinances and regulations for possible impact litigation.

Kansas City, Mo. A homeless outreach project recruits and trains volunteers to work with clients at shelters or legal clinics. The project is jointly sponsored by the Kansas City Bar Association Volunteer Lawyers Project and Legal Aid of Western Missouri, which is a Legal Services Cor-

poration entity. About 20 lawyers were initially recruited to work with the project.

Des Moines. Volunteer lawyers and law students offer legal services at shelters for the homeless in a project coordinated by the Legal Aid Society of Polk County and involving several other organizations. About 60 volunteers have been trained so far.

New Haven, Conn. Third-year students at Yale Law School offer legal aid at shelters and motels used as temporary housing for the homeless. Students receive course credit for their work. The project is run by the Yale Law School Clinic.

Baltimore. The Homeless Persons Representation Project recruits and trains volunteer lawyers to represent the homeless and to lobby for law changes at the local and state levels. The project is co-sponsored by the Maryland State Bar Association, the Greater Baltimore Shelter Network and the Maryland Volunteer Lawyers Service.

Los Angeles. The Legal Aid Foundation of Los Angeles has a Homeless Litigation Unit that recruits volunteer lawyers to work on both individual cases and impact litigation. The foundation is funded by the Legal Services Corporation.

Chicago. Currently in development is the Volunteer Lawyers for the Homeless Project, being put together by the Chicago Bar Association and the Legal Assistance Foundation of Chicago. Plans call for the recruitment and training of volunteer attorneys to work with the homeless.

While lawyers in these and other cities have been initiating projects to serve the homeless, the American Bar Association is planning a "Representation of the Homeless Project" to spread the volunteer efforts to 25 additional cities and states. Sponsored by the Section of Individual Rights and Responsibilities, the ABA plan also calls for creation of a national clearinghouse offering practical advice for volunteer lawyers.

While the efforts of private attorneys have not resolved the issue of homelessness, their volunteer work has at least made legal services available to those who would otherwise have none. Few current social issues have raised as enthusiastic a response from the ranks of the nation's private attorneys. ■

BY DEBORAH GRAHAM

Cyrus Vance used to be opposed to mandatory pro bono. But the former secretary of state, now a senior partner at Simpson, Thatcher & Bartlett in New York, has changed his mind.

"For years I have hoped that we lawyers would be able to meet our obligations by voluntary actions," he told New York's Legal Aid Society in March. "As the years have passed, however, I am forced to conclude that this is unlikely. Therefore, I believe that, failing substantial change for the better, pro bono service for all lawyers should be mandated."

Vance's view appears to be gaining currency in the bar. Largely dismissed as a dead issue after the Association of the Bar of the City of New York and the ABA resoundingly rejected mandatory pro bono proposals in 1979 and 1980, its resurrection is still far from certain.

The most concrete signs of a burgeoning interest in mandatory pro bono are judicial and legislative initiatives.

During the past five years, local rules or general orders providing for the mandatory appointment of free counsel in indigents' civil cases have been adopted by district courts in eight federal jurisdictions (the Eastern and Western Districts of Arkansas, the Northern and Central Districts of Illinois, the Northern and Southern Districts of Iowa, the District of Connecticut and the San Antonio division of Texas' Western District). A similar proposal currently is pending in New York's prestigious, pace-setting Southern District.

There also have been legislative moves. During the past year, an Oregon state legislator proposed a bill calling for lawyers and other professionals to donate a specific number of hours, or dollars, to services for the poor (the bill didn't make it out of committee). In Washington, State Sen. Philip Talmadge, chairman of the Washington Senate Judiciary Committee, held hearings last summer on mandatory pro bono. Though Talmadge does not plan to submit a bill, he says the legislature remains

Deborah Graham is a free-lance writer in Chicago.

Mandatory Pro Bono

The Shape of Things to Come?

"interested in the issue" and may revisit it if the private bar doesn't increase voluntary pro bono activities among the state's lawyers.

The Washington hearings reflect a growing interest in mandatory pro bono among some members of the bar: Talmadge practices law with the chairman of a special task force that has urged the Washington State Bar Association to consider a mandatory pro bono system.

So far, seven local bar associations—in three Florida counties (Orange, Leon and Palm Beach), two Texas counties (Bryan and Athens), and in DuPage County, Ill., and Eau Claire County, Wis.—have imposed mandatory pro bono requirements on their members. But the initiative in Washington is one of three pro-mandatory efforts launched in less than a year by state bar committees. Early this year, the Dade County Bar Association in Florida considered and, in a close contest, ultimately rejected mandatory pro bono, and a special Civil Legal Services Committee in

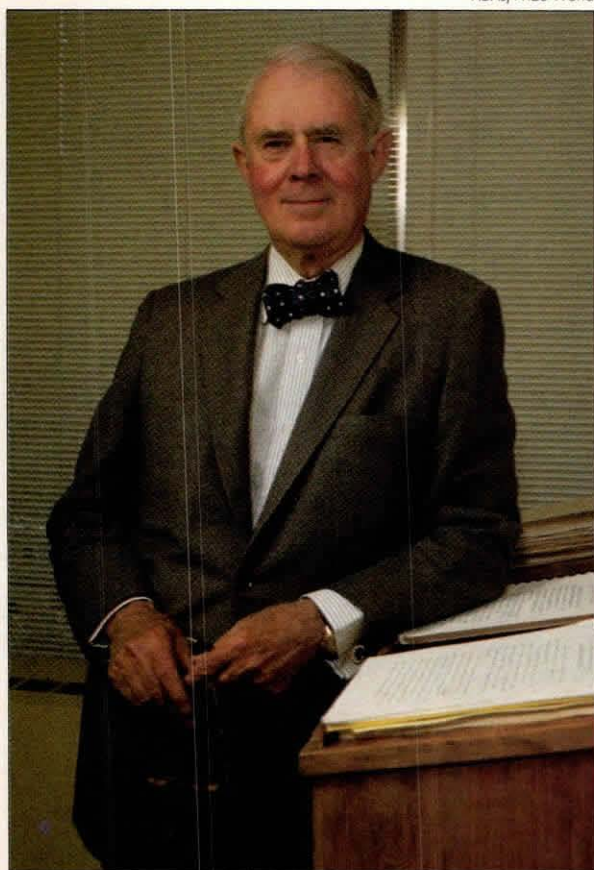
North Dakota soon will submit a mandatory plan to the state bar association's board of governors.

The reason for the resurgent interest in mandatory pro bono is, quite simply, the massive, unmet legal needs of the poor.

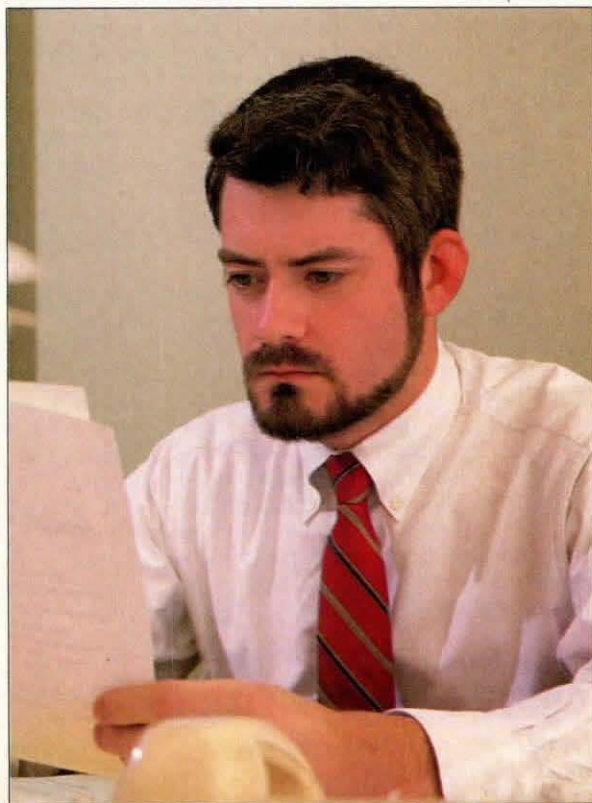
Mandatory pro bono increasingly is viewed as "perhaps the only way to make any significant inroads into what we perceive to be the severe gap between the need and the availability" of legal services for the poor, says Joseph S. Genova, a lawyer with Milbank, Tweed, Hadley & McCloy in New York and chairman of the New York State Bar Association's Committee on Legal Aid.

How big is that gap? A draft report by North Dakota's Civil Legal Services Committee suggests that 97 percent of the civil legal needs of the state's poor and "near poor" are not being met.

According to Catherine Tinker, a staff attorney in the pro se office of New York's Southern District, "we're absolutely overwhelmed" with civil



Cyrus Vance



Joseph Genova

cases requiring the appointment of counsel for indigents.

15 PERCENT PARTICIPATION

The bar's voluntary programs generally have not been enough to meet the demand for legal services among the poor. The ABA's 1987 Directory of Private Bar Involvement Programs reports that just 15.1 percent of the country's licensed attorneys participate in formal pro bono programs.

And, according to Leah Iraheta, associate director of the Seattle-King County Bar Association, voluntary pro bono programs have been hard pressed to improve on those percentages. Though Washington programs have been "rapidly growing," Iraheta notes that, like most pro bono programs across the country, they typically obtain "15 to 20 percent participation, at most."

But opposition to mandatory pro bono remains intense. Opponents offer a litany of philosophical, legal and practical reasons that pro bono services shouldn't be compelled.

And the critics of mandatory pro bono are as diverse as their arguments. Legal services activists and professionals are among the most ardent foes.

Neil H. Chonin, of Coral Gables, Fla., a member of South Miami's Legal Services Board and an avid supporter of mandatory pro bono, says legal services professionals' opposition stems from their reliance on the organized bar for financial support and other resources. During 1984 hearings of The Florida Bar's Special Commission on Access to the Legal System, legal services professionals bluntly told him, "We don't want to antagonize the people who mean our survival."

But legal services veterans express doubts about mandatory pro bono that go far beyond political pragmatics. Many view mandatory pro bono as a fundamentally flawed concept at odds with the true meaning of pro bono. It violates principles of equity and fairness, they say, and threatens the effective delivery of legal services to the poor.

"The idea of a mandatory requirement totally undercuts the idea of this being an ethical obligation that an attorney is required to discharge," says Lonnie A. Powers, executive di-

ABA/Jose Fernandez



Neil Chonin

rector of the Massachusetts Legal Assistance Corporation and a member of the ABA Special Committee on Delivery of Legal Services.

Philosophical objectors also emphasize that mandatory pro bono undercuts the argument that ensuring legal representation for all is a general social and governmental obligation. A non-mandatory pro bono system "more truthfully reflects what I see as the responsibility of society as a whole to make legal representation available," says Thomas H. Moreland, president of New York's Volunteers of Legal Services Inc.

"That's an obligation of society and should be recognized as such by the government and all of us as taxpayers should fund that."

"It's outrageous that lawyers as a group are called on to pick up the tab" for a governmental problem, says Kenneth W. DeVaney, a sole practitioner in Fresno, Calif. DeVaney is one of those who has translated righteous indignation into the threat or reality of lawsuits challenging mandatory pro bono.

When Fresno County's Superior Court moved in 1983 to compel pro

bono representation of indigents in paternity and child support cases, DeVaney was fully prepared to mount a constitutional challenge based on the 14th Amendment's prohibition against involuntary servitude.

At the 11th hour, the Fresno court backed down and dropped its plans for court-ordered appointments. But involuntary servitude claims are one of the legal weapons that might be used against mandatory pro bono.

So far, statutory, procedural and constitutional arguments based on the equal protection clauses of the Fifth and 14th Amendments have predominated in the relatively few challenges to court-ordered pro bono appointments. There's been a division of opinion on whether 28 U.S.C. 1915 (d), the federal statute authorizing appointment of counsel for indigents, permits judges to compel or merely request lawyers to volunteer their services. There's also been a split on the equal protection ramifications of court-ordered counsel appointments.

Most recently, equal protection and procedural arguments were raised when Joseph M. Erwin of Little Rock, Ark., challenged his court-ordered appointment earlier this year. But the Arkansas court remedied the procedural defects of its mandatory program and rescinded the order affecting Erwin.

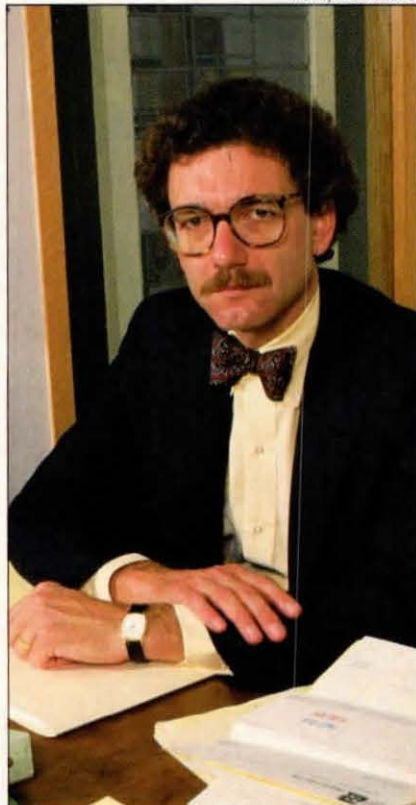
Though Erwin hasn't pursued the litigation since then, he says he knows of other local attorneys threatening to pick up where he left off.

The legality of mandatory pro bono also may regain front-burner status in California. After sidestepping the issue two years ago, the California Supreme Court now is faced with the same question in the same case it originally remanded—*Yarbrough v. Superior Court*, 39 Cal. 3d 197 (1985). The State Bar of California, one of 20 amicus curiae when the case was last considered by the Supreme Court, has urged the court to review the matter.

THIRD-RATE JUSTICE?

Among legal services activists, there's widespread concern that mandatory pro bono might result in inferior legal services for the poor. Suggesting that "the tendency would

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Lonnie Powers

be to discharge that obligation grudgingly and without the highest quality of service," Powers says, "I don't think we should be giving the poor people in this country second- or third-rate justice. I mean, they get enough of that already."

"It's a disservice to poor people" to have them represented by lawyers who specialize in arcane fields and know nothing about litigation or poverty law, adds Theodore Klein of Miami.

Jane P. Gill, the former director of legal services for the Colorado State Bar and current chairperson of the bar's Availability of Legal Services Committee, also suggests that legal service work demands special skills and practitioners. "I'm very concerned that we have attorneys who cannot represent poor people, who should not represent poor people and who won't represent poor people," she says.

"I have the same concern," acknowledges Michael D. Hampden, a staff attorney with Bronx Legal Services and one of those responsible for the new mandatory program in Bronx County. "I've seen enough cases in

which private attorneys are handling poor people's cases to know it's a very important concern."

Hampden suggests, however, that the answer isn't to avoid mandatory pro bono altogether but rather to "do what's necessary to monitor it and provide back-up when needed."

One problem with that approach, however, is its inefficiency. Mandatory pro bono, notes Moreland, "really doesn't get around the inefficiency problems" that have plagued voluntary programs like the 1986 pilot project that matched five major New York firms and five legal services offices in an attempt to offset the enormous need for representation of indigents in New York's housing court.

Moreland, who coordinated that project, says the experiment was less than a total success, in part because the private attorneys ended up having to spend much more time than anticipated, both to learn the ropes of housing cases and to handle those cases.

Training and supporting the volunteers also proved to be a drain on the resources of the legal services providers. "The bottom line is that it's not efficient for anybody," says Moreland.

Administrative and enforcement issues also are cited by opponents like Klein, who successfully argued in the Florida Supreme Court against a 1983 petition to require mandatory pro bono service by state bar members.

Klein says his opposition to that petition was partly based on "the administrative difficulty of trying to police a system that required every lawyer to donate hours to the poor." According to Klein, "it's difficult enough to enforce just the disciplinary program we have." Adding enforcement of a mandatory pro bono requirement "would be just a nightmare."

Others fear that mandatory pro bono might have a chilling effect on voluntary participation in bar associations or in other pro bono programs. One California appeals court has said that compulsory representation of indigents would discourage attorneys from taking part in voluntary pro bono activities.

And according to Donald Middlebrooks of Miami, chairman of the



Patrick Leston

Dade County Bar's Legal Aid and Public Services Committee, one reason that the committee's mandatory proposal failed earlier this year was concern that mandatory pro bono would lead to a drop-off in bar membership. Iraheta notes that the proliferation of specialty and local bar groups in urban centers makes bar associations wary of issuing mandates that might encourage their members to go elsewhere.

There's been little evidence that mandatory pro bono chills voluntarism, however. Glen Ellyn, Ill., sole practitioner Patrick J. Leston, president of the DuPage County Bar Association, can recall only one instance in about 15 years when a struggling attorney did not join the bar because of its pro bono requirement.

The president of the Bronx County Bar Association, Roy H. Josephson, says he hasn't "heard a word of protest" about the court-ordered mandatory program established last summer with the bar's support. He notes, however, that the Bronx program affects only family law practitioners and assigns them cases in their field. "It might generate greater pro-

test if you start assigning people to areas outside their expertise," he says.

Allen L. Gropper, chair of New York City Bar's Committee on Legal Assistance, suggests that narrowly drawn programs like Bronx County's may be the most effective vehicle for mandatory pro bono. A less selective program might be something that can't work on a very large scale, he says.

To achieve a mandatory program, Chonin argues, it may be more effective to look to courts rather than politicized bar associations. (Chonin notes, however, that in Florida, "the court seems reluctant to take the bull by the horns because of the very close relationship between the organized bar and the court.")

But Julie Oliver, executive director of Texas Lawyers Care, a statewide pro bono activation project, thinks it would be more effective to implement mandatory pro bono through bar associations. "It's probably less of an imposition on individual attorneys when their peers have voted it in, as opposed to some power from above like a judge or a legislature."

According to Henry G. Rose, director of the Loyola University Community Legal Center in Chicago, the "virtually insurmountable" politics of mandatory pro bono make it impractical to promote mandatory programs through the bar association route. "We're so far away from getting mandatory pro bono that it's just not worth the effort to try to achieve it," he says.

Hazarding a guess that bar associations might "get more people to actually do pro bono by pushing voluntary rather than by pushing mandatory," Rose adds that the lengthy debate which likely would surround a campaign for mandatory could "turn a lot of people off of pro bono."

Raymond C. Caballero of El Paso, the former local bar president who spearheaded the mandatory program there, acknowledges that the very word "mandatory" carries a negative connotation.

"If you start calling things mandatory, people are going to start getting their backs up, even if it's good," he says. "I like to call it the equal distribution of an ethical obligation."

No matter what you call it, the issue is hot—and getting hotter. ■