Moliterno & Levy, *Ethics of the Lawyer's Work*, Cap. 3, Part F: "Provision of Legal Services to Those Who Cannot Afford to Hire a Lawyer", págs. 250-256

ETHICS OF THE LAWYER'S WORK

Second Edition

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WEST

resolved." "Alright, I'll do that, but please see Herbert Allen as soon as you can."

Was there any ethical problem with Mr. Allen meeting with Mr. Rhodes in the manner be did? Should the pressures acknowledged by Cheryl Taylor cause her to decline to represent Mark Moore? Were those pressures and the conflicts that they present handled adequately?

F. PROVISION OF LEGAL SERVICES TO THOSE WHO CANNOT AFFORD TO HIRE A LAWYER
MR 6.1

With limited exceptions, ours has always been a society "that dispens[es] justice for a fee."[251] It is only a recent phenomenon that criminal defendants in our society have had a constitutional right to counsel in serious matters.[252] Appointed lawyers for indigent criminal defendants continue to be poorly compensated. These is no "civil *Gideon*" entitling indigents to representation in civil matters.

There are two ways to look at the delivery of civil legal services to the poor: first, society's organized response and second, the individual lawyer's response and duty.

1. Organized Legal Services for the Poor

> For most of our history, the situation with respect to civil legal aid for the poor could well have been summed up in Anatole France's famous gibe that: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." The courts were open

[251] AUERBACH, *supra* note 51, at 62.

[252] *See* Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963).

> to all, but only the well-to-do could afford the lawyer who was necessary for the vindication of rights.[253]

In the United States, the first legal aid was organized in 1876 in New York City by the German American community to provide general help and legal representation to newly arriving German immigrants.[254] Until 1965, those legal services in civil matters that were available to the poor were provided by individual lawyers and private organizations funded by charitable contributions. These services reached a small fraction of the poor. Usually restrictions were imposed on the types of cases the early poverty lawyers would handle: often bankruptcies and divorces were excluded. A few of the early legal aid societies were partially supported by lawyers, but most were funded by various charitable organizations with particular groups of people targeted as eligible for services.[255] In considerable measure, early support for the provision of legal services to the poor was motivated by the perceived need to stave off Bolshevism and general urban uprising. Only if poor people could be convinced that the justice system would address their needs would they be tolerant of the conditions in which they lived.[256]

Serious government involvement in providing civil legal services to the poor did not begin until, in 1965, the Office of Economic Opportunity (of the "War on Poverty") brought federal funding and a different philosophy to representing the poor. By the late 1970's, the federal money eventually expanded the coverage of legal aids to include all areas of the country, although the level of resources afforded was never sufficient to meet the need. The change in philosophy brought a view that the client of a legal aid was "the poor," not just the individual poor person. The approach made legal aid more like a large firm representing an interest group; lobbying, test cases and class actions became significant parts of the legal aid's representation repertoire.

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[253] Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 522 (1981).

[254] *See* AUERBACH, *supra* note 51, at 53.

[255] *See id.*

[256] *See id.* at 58-59.

The new substance and style of representation touched political nerves (e.g., forcing state governments to pay benefits, representing farm workers against influential agricultural interests), and there were the inevitable political reactions. The attacks came at all levels, federal, state, and local, and in response, to try to insulate this sensitive service from political pressure, Congress in 1974 created a public corporation, the Legal Services Corporation. LSC was meant to be a non-political body to distribute funds appropriated by Congress to local nonprofit organizations that hire the lawyers to represent the poor people in that area.[257]

The creation of the Legal Services Corporation did not end the political controversy, and throughout the 1980's the Reagan administration tried to do away with federal funding altogether and restrict what the legal aid lawyers could do for their clients. LSC survived, but in 1981 it received only 75% of the funding that it had received in the previous year; several service restriction regulations were adopted later in the '80's.[258] As a result, hundreds of local legal aid offices were closed and thousands of people who needed legal services and would have been served in the years immediately previous were turned away. The Corporation and local legal aids are still under fire and remain the subject of much political and fiscal pressure.

Not every restriction enacted by Congress or adopted by LSC has survived Constitutional challenge. For example, in LSC v. Valazquez[259] the Supreme Court struck down on First Amendment grounds a prohibition on LSC-supported lawyers challenging welfare reform statutes and regulations.

The resources continue to be scarce and the need great. There is one lawyer for fewer than 400 people in the general population, but there is one legal aid lawyer for more than 5,000 poor people. Legal aid organizations and

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[257] Our own local legal aid (Peninsula Legal Aid Center, Inc.), through which our law school operates a clinic, as well as the Richmond Legal Aid, were established by Professor John M. Levy, co-author of the first edition of this book.

[258] *See generally* Claudia MacLachian, *An Unclear Future*, NAT'L L.J., Oct. 14, 1991, at 1.

[259] LSC v. Valazquez, 531 U.S. 420 (2000)

individual legal aid lawyers continue to struggle with questions about how one distributes the limited legal aid available when the market does not control the distribution. How does one decide which of the innumerable problems of potential clients should be addressed and which should be turned away?

2. Individual Lawyers' Response - *Pro Bono Publico*

Many individual lawyers represent people at no charge. Some have done it on an ad hoc basis, as when a person happens to come to their office who cannot afford a fee and they take the case *pro bono*. Others, many fewer, make a conscious and planned decision to provide a certain amount of free legal services. For example, Ramsey Clark decided that after he earned a certain amount in a year, the rest of his time would be devoted to *pro bono* work. More and more law firms are establishing *pro bono* programs that are a structural commitment to providing legal services to the poor. During good economic times, a major impetus for such programs has been the firms's competition to attract law school graduates who find such programs a desirable undertaking by their law firm employers. Such efforts are often slowed during periods of economic downturn, when the legal needs of the poor often reach a peak.

Even with federally funded legal aids and the voluntary *pro bono* efforts of some public-spirited lawyers and law firms, every study shows that an overwhelming number of poor people have legal problems and lack the help of a lawyer to deal with them. A Virginia survey showed that 84% of the households surveyed which had experienced a legal problem lacked a lawyer's assistance at least once in the last three years.[260]

> [T]o provide full service to each [poor] client would require either a staggering increase in available legal services or acceptance of a state of affairs in which most will go without service in order that a few may get what they need .... A permanent condition of under-representation for disadvantaged clients casts doubt on the long term legitimacy

[260] *The Survey Results Are Here!*, VA. LAW., May 1991, at 14.

> of a professional monopoly, premised on the general availability of full, adversarial legal services.[261]

With this state of affairs, some courts have required lawyers to take a certain number of cases for indigent clients for no remuneration.[262] An early version of the Model Rules included a requirement that "a lawyer shall render unpaid public interest legal service . . . [and] make an annual report concerning such service to the appropriate regulatory authority."[263] The adopted version and its modest February 2002 revision returned to an aspirational statement rather than a mandatory one.[264] Individual state bars have flirted with, but not yet established mandatory pro bono rules.[265]

The debate surrounding "mandatory *pro bono*" is intense. The positions taken against it range from questioning the constitutionality of such a requirement for a practicing lawyer[266] to the feeling that

> "[t]here is a basic illogic and unfairness" to mandatory pro bono work . . . .

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[261] Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 362 (1978).

[262] *See, e.g.*, James S. Granelli, *Pro Bono Plan Angers Calif. Lawyers*, NAT'L. L. J., June 27, 1983, at 6.

[263] Model Rules of Professional Conduct 8.1 (Discussion Draft 1980).

[264] MR. 6.1.

[265] Texas, Maryland, New York, and Connecticut have been among the more prominent players. *See* Gary Taylor, *Texas KO's Mandatory Pro Bono*, NAT'L L.J., July 6, 1992, at 13; Joseph Calve, *CBA Launches Voluntary Pro Bono Push; Hopes to Head Off Mandatory Requirement by Legislature*, CONN. L. TRIB., Sept. 23, 1991, at 2; Paul Mariotte, *Pro Bono Recruits*, A.B.A. J., Feb. 1990, at 25; Mark Hansen, 50 *Pro Bono Hours: Should Model Rules Set a Minimum?*, A.B.A. J., Oct. 1992, at 45.

[266] Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 109 S. Ct. 1814 (1989) (specifically not deciding the constitutionality of compulsory assignments).

> "Owners of grocery stores are not required to provide free food to the poor, landlords are rot required to provide free housing, and members of other licensed professions– from plumbers to physicians– are not required to provide free services. . . ."[267]

Is there a principled reason to require lawyers to provide free legal services and not require doctors to provide free medical services? The adversary system, which is premised on an equal battle, provides such a reason. The lawyer's role, at least the parts that are covered by our monopoly, is ultimately connected to, and justified by, the adversary system. The adversary system can only be justified as a system of "justice" if it provides for a relatively equal battle from which the truth emerges. Therefore, society is more than justified in requiring a lawyer to do her part to make the system of justice just. If this were not the case, society should change the system and the monopoly and role of lawyers.

SCENARIO DEVELOPMENTS

PRO BONO POLICY AT TAYLOR & MOORE

Taylor & Moore presently has no policy regarding its lawyers' pro bono work. In the absence of a policy, lawyers do what, if any, pro bono work they choose to do, recognizing at all times that their commitments to the firm's paying clients come first. This is an unacceptable state of affairs to many of the associates, and they have organized a meeting at which they will discuss the adoption of a proposed pro bono policy to be presented to senior partners Cheryl Taylor and Mark Moore. Mary Marshall has been asked by the group to draft a working document, lead the associates' discussion, and then take the associates' proposal to the partners.

What should Mary consider in drafting the proposal? Where should the burden for providing pro bono service fall, on the firm as an

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[267] Joseph R. Tybor, *Flap Over Working For Free*, NAT'L L. J., June 15, 1981, at 1, 24 (quoting brief prepared by Skadden Arps on behalf of the LSC).

organization or an the firm's individual lawyers? What policies might the firm adopt that would place all or part of the burden on the firm? What consideration, if any, should be given to the lawyers' different skills or lack thereof? What images of a "law firm" are consistent with a firm's shouldering of the pro bono burden? How should Cheryl Taylor and Mark Moore react to the associates' proposals as you envision them?

G. FEES

MR 1.1, 1.5, 1.8, 5.4, 7.3
DR 2-103, 2-106, 2-107, 5-103, 6-101, 3-102

In contrast to the heavy regulation of lawyer handling of clients' money (based as it is on fiduciary duties), regulation of lawyer fee arrangements is light. Few restrictions on the type of fee exist, and overall, a lawyer's fee must simply be "reasonable."

1. Reasonableness

The Canons of Professional Ethics, which preceded the Model Code and Model Rules, stated, "It should never be forgotten that the legal profession is a branch of the administration of justice and not a mere money-getting trade."[268] Historically, the separation of the professions from mere money-making was linked to the religious notion that one was "called" to the work. Also, there was the belief that a profession demands intellectual work for which no price can be set. Ways around these suppositions were found, from dropping money in the hoods worn by professors in medieval universities to calling the money that was exchanged an honorarium.[269] Surprisingly, given this expression of separation from mere money-making, under the Canons a fee was not excessive unless it was "so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention

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[268] Canon 12.

[269] *See* HERBERT M. KRITZER, THE JUSTICE BROKER, LAWYERS AND ORDINARY LITIGATION 7-8 (1990).