

New York's Amended Pro Bono Guidelines

BY ROY SIMON

What is a New York lawyer's obligation to perform pro bono legal services? The answer to that question changed on April 2, 2005, when, for the first time since 1990, the New York State Bar Association House of Delegates voted to amend EC 225, the main Ethical Consideration addressing pro bono work. This article talks about the amended version of EC 225 and its background.

Background: Pro Bono In New York Up To 1990

The ABA Canons of Professional Ethics, on which New York modeled its ethics rules for many years, did not have a separate Canon urging pro bono service, and the Canons as a whole barely mentioned the subject. However, brief references to the needs of the poor were scattered throughout the Canons. For example, Canon 4 ("Counsel for an Indigent Prisoner") said: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf." Canon 12 ("Fixing the Amount of the Fee") said that a client's ability to pay cannot justify a charge in excess of the value of the services, "though his poverty may require a lesser charge or even none at all." And Canon 35 ("Intermediaries") said that the professional services of a lawyer should not be controlled or exploited by any lay agency that intervenes between the client and the lawyer, but added that "[c]haritable societies rendering aid to the indigents are not deemed such intermediaries."

In 1970, however, New York adopted new ethics rules based closely on the ABA Model Rules of Professional Conduct, including EC 225, which provided as follows:

EC 225: ... The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional workload, should find the time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay legal fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. ... Every lawyer should support all proper efforts to meet this need for legal services.

In other words, each individual lawyer had a "responsibility" or "obligation" to provide legal services to those "unable to pay" – but since the responsibility was articulated only in an Ethical Consideration, not in a Disciplinary Rule, the responsibility therefore had no consequences. Not surprisingly, individual lawyers did not provide enough free legal services to meet the needs of the poor, so the profession developed legal aid offices and other programs, and EC 2-25 likewise encouraged lawyers to support those programs.

The 1990 Version Of EC 225

In 1990, a shorter version of EC 225 took effect. The new version stated:

EC 225: A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional services at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services. In addition, lawyers or law firms are encouraged to supplement this responsibility through the financial and other support of organizations that provide legal services to persons of limited means.

The 1990 version of EC 225 thus commanded lawyers (albeit still only in an EC) to perform at least some “public interest” legal service and some “pro bono” legal service. The EC gave lawyers three choices for fulfilling this responsibility:

- Working for no fee or at a reduced fee for individuals of limited financial means
- Working for no fee or at a reduced fee for public service or charitable groups or organizations, or
- Participating in programs and organizations specifically designed to increase the availability of legal services.

EC 2-25 (as amended April 2, 2005): A lawyer has a professional obligation to render public interest and pro bono legal service.

Each lawyer should aspire to provide at least 20 hours of pro bono services annually by providing legal services at no fee and without expectation of fee to:(1) persons of limited financial means, or (2) not for profit, governmental or public service organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means, or (3) organizations specifically designed to increase the availability of legal services to persons of limited financial means.

Each lawyer also should provide financial support for such organizations to assist in providing legal services to persons of limited financial means.

In addition to meeting the aspirational goals set forth above, a lawyer also should render public interest and pro bono legal service:

(1) where the payment of standard legal fees would significantly deplete the recipient’s economic resources or would be otherwise inappropriate, by providing legal services at no fee or substantially reduced fees to individuals, organizations seeking to secure or protect civil rights, civil liberties or public rights, or to not for profit, government or public service organizations in matters in furtherance of their organization purposes; or

(2) by providing legal services at a substantially reduced fee to person of limited financial means; or

(3) by participating without compensation in activities for improving the law, the legal system or the legal profession; or

(4) by providing legal services without compensation or at substantially reduced compensation in aid or support of the judicial system (including services as an arbitrator, mediator or neutral in court-annexed alternative dispute resolution)

In addition – not instead – EC 225 encouraged lawyers (and law firms) to “supplement” the service responsibility by giving money or other support to “organizations that provide legal services to persons of limited means,” such as legal aid societies.

Thus, the 1990 version of EC 225 made no distinction between providing legal services to the poor, providing legal services to a “public service” or “charitable” organization, or helping to organize and run the county bar association’s lawyer referral service. All of this was equally good. Gone was the quasiman date of EC 2-25 that rendering “free legal services to those unable to pay legal fees” was an obligation for every lawyer. Under the 1990 version of EC 2-25 helping a welfare mother avoid an unjust eviction for herself and her three small children ranked no higher on the pro bono scale than doing legal work for the Environmental Defense Fund or a not-for-profit hospital, or helping to organize a lawyer referral service at the local bar association.

The OCA’s 1997 Survey And Resolution

When combined with the sharp decline in federal grants to the Legal Services Corporation, the result was an inadequate supply of legal services for the poor. In 1997, the Administrative Board of the Office of Court Administration (“OCA”) surveyed the legal profession in New York and found that only 47% of New York attorneys provided pro bono services to the poor (including friends and relatives) in civil and criminal matters combined. This was a lot of free legal services, but not enough. The OCA responded to the shortage by adopting a Resolution—still in effect today – that provides as follows:

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons. Every lawyer should aspire (1) to provide at least 20 hours of pro bono legal services each year to poor persons, and (2) to contribute financially to organizations that provide legal services to poor persons.

Pro bono legal services that meet this goal are:

- professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, *to persons who are financially unable to compensate counsel;*
- activities related to improving the administration of justice by simplifying the legal process, or increasing the availability and quality of legal services available to poor persons; and
- professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of *poor persons*.

Appropriate organizations for financial contributions are:

- organizations primarily engaged in the provision of legal services to the poor; and
- organizations substantially engaged in the provision of legal services to the poor, provided the donated funds are to be used for the provision of such services. [Emphasis added.]

Thus, the OCA's 1997 resolution clearly focuses on legal services to the poor as the main goal of pro bono work.

The OCA's 2002 survey and 2004 report

How has the 1997 OCA resolution worked out in practice? Not well enough. In 2002, the OCA surveyed New York's legal profession again and found that only 46% of New York's lawyers (a decline of 1% since 1997) had provided pro bono legal services for the poor during 2002, and only 27% had provided more than the 20 hours of service recommended in the OCA's 1997 resolution. That left 54% of New York's attorneys who had performed no pro bono legal services for the poor at all in 2002.

In 2002, to address the shortage of pro bono work for the poor, the New York State Unified Court System hosted four "Pro Bono Convocations" attended by judges, bar leaders, other practicing attorneys, and legal educators, from New York and elsewhere. The Convocations spurred the OCA to write a major two volume report, entitled "The Future of Pro Bono in New York," which was released on January 15, 2004 for a ninety day comment period. The report and its appendices, which were compiled by the Office of the Honorable Juanita Bing Newton, the Deputy Chief Administrative Judge for Justice Initiatives, are available online at www.courts.state.ny.us/reports/probono/index.shtml.

The OCA's 2004 report estimates that more than one million households in New York live in poverty and cannot afford to hire a lawyer to handle their legal problems. The law requires the state to furnish attorneys for indigents in criminal cases (and certain Family Court cases), but many poor people cannot find any source of free legal help with their civil legal needs. A New York State Bar Association report echoes the OCA study, reporting that poor households in New York experience a total of approximately 2.5 million legal problems annually for which no lawyer is available. Thus, the OCA emphasizes that additional legal services for the poor are drastically needed in the area of civil disputes. Yet the percentage of lawyers performing pro bono legal service in civil matters declined from 39% in 1997 to 34% in 2002.

The OCA report contained seven distinct recommendations:

(a) pro bono service should be voluntary; (b) local pro bono action committees throughout New York State, supported by a statewide Standing Committee on Pro Bono, should develop local pro bono action plans, and these plans should be in place within one year; (c) the Judiciary should play a leadership role in increasing pro bono service, and should (among other things) develop educational, recruitment and recognition programs for attorneys; (d) courts should also develop initiatives to facilitate court access for litigants with pro bono attorneys; (e) pilot projects should test whether "discrete task" or "unbundled" representation can increase pro bono service; (f) materials for law students and newly admitted attorneys should emphasize pro bono service; (g) methods should be developed to collect data about pro bono service levels on an ongoing basis. The OCA allowed a 90day period for public comments on these recommendations.

The comments on the OCA's report were varied. Some argued that the OCA's definition of "qualifying pro bono" did not take into account the wide variety of pro bono services performed by New York lawyers for clients other than persons of "limited means" (i.e., the poor). Specifically, the OCA definition was too narrow to include many 9/11 services rendered by New York lawyers, or services such as monitoring an election in a war zone in a country struggling to establish democracy. Moreover, the OCA

definition was too narrow to embrace pro bono services to nonprofit organizations that could not afford to pay for those services without diminishing their resources.

The President of the New York State Bar Association responded by appointing a special President's Committee on Access to Justice. The President's Committee reviewed all of the comments on the OCA's report and issued a report of its own. The House of Delegates amended the President's Committee report by calling for an enlarged definition of "pro bono." A blue ribbon Working Group headed by Immediate Past President Thomas Levin then developed proposed amendments to EC 225 (which the State Bar has power to amend on its own) and recommended amendments to the OCA's 1997 Pro Bono Resolution (which only the OCA can amend).

The Working Group's proposals ultimately included an expanded definition of qualifying pro bono work, and took a twotier approach that paralleled Rule 6.1 of the ABA Model Rules of Professional Conduct. The first tier would continue to encourage all attorneys to render 20 hours of service annually to people of limited means and to nonprofit organizations that help meet the legal needs of people of limited means. The second tier would count three other familiar categories of pro bono work: (a) legal services to nonprofit organizations serving the public good; (b) activities designed to improve the law or the legal system; and (c) financial contributions to nonprofit organizations serving the basic needs of people of limited means. The State Bar's Executive Committee endorsed the proposed definition in November of 2004 and circulated it to the bench and bar as part of a new and expanded EC 225. The House of Delegates debated the proposal at its January 2005 meeting, but the proposal proved highly controversial and the House deferred action until its April 2005 meeting to allow time for further comments. According to the New York Law Journal, some bar leaders worried that the supposedly "aspirational" goal of 20 hours of pro bono service per year would eventually lead to mandatory pro bono, which would especially burden solo and small firm practitioners and attorneys whose areas of expertise fall outside those most needed by the poor.

At the State Bar's quarterly meeting in April of 2005, the House of Delegates finally approved a new version of EC 225 (reprinted above – see box). The new version borrows heavily from both the 1990 version of EC 225 and the OCA's 1997 resolution, but makes some significant changes. The main changes are:

- Amended EC 225 marks the first time that the Code of Professional Responsibility has recommended a specific number of pro bono hours. The number chosen, 20, is the same number specified by the OCA in its 1997 resolution.
- Amended EC 225 puts the spotlight squarely back on free legal services to the poor. The first paragraph of the rule looks much like the 1990 version of EC 225, but the three part menu of acceptable vehicles for fulfilling the annual 20hour aspirational minimum is aimed entirely at providing free legal services directly or indirectly to "persons of limited financial means."
- Amended EC 225 semantically upgrades the status of financial contributions to organizations that provide legal services to persons of limited means. The 1990 version "encouraged" lawyers to contribute to such organizations. The new version says lawyers "should" contribute.
- Amended EC 225, like the OCA's 1997 resolution, articulates a "twotier" approach to pro bono work, making it clear that lawyers "should" render other types of public interest and pro bono legal service "[i]n addition to" 20 hours of annual free legal services to the poor.

- Amended EC 225 defines in greater detail the kinds of organizations that qualify for pro bono services not directed to the poor. These include (a) “organizations seeking to secure or protect civil rights, civil liberties or public rights,” and (b) “not for profit, government or public service organizations.”
- Amended EC 225, unlike the former versions of EC 225 and the OCA’s 1997 resolution, recognizes that pro bono work also includes uncompensated “activities for improving the law, the legal system or the legal profession,” such as service on bar committees.
- Amended EC 225 goes beyond both the 1990 version of EC 225 and the OCA’s 1997 resolution by recognizing that “services as an arbitrator, mediator or neutral in court annexed alternative dispute resolution,” as well as other legal services “in aid or support of the judicial system,” qualify as pro bono services.

Conclusion: Now It’s Up To Us

Our State Bar, which is more than 70,000 lawyers strong, has now spoken by approving an amended EC 225. Under amended EC 225, we all have three responsibilities as lawyers. First, we should spend 20 hours a year – about 24 minutes a week – providing free legal services to poor people, or to organizations that serve poor people or expand legal services to poor people. Second, we should contribute money to organizations that assist in providing legal services to poor people. Third, when we have fulfilled those two responsibilities, we should choose from the newly expanded menu of opportunities to perform additional legal services, either at no fee or at a substantial discount.

If we all make an effort to carry out the aspirational goals of EC 225, perhaps we can help to alleviate the seemingly perpetual shortage of legal services to the poor while at the same time getting the recognition we deserve for the many other ways in which we help society achieve justice and strengthen the rule of law. And as a side benefit, perhaps we can permanently stave off mandatory pro bono, mandatory reporting of pro bono hours and other more intrusive and coercive measures. It’s up to us.

Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law and is the author of SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, published annually by Thomson West. The 2005 edition will be available in May.