

“Free” Legal Services! Attracting Legal Talent for Public Involvement Groups

A.H. Domby, Esq.
Troutman Sanders LLP
600 Peachtree Street, Atlanta, Georgia, USA

ABSTRACT

This paper reviews the public service responsibilities of lawyers, and how they can fulfill the annual goal of performing pro bono services by serving certain public involvement groups, including organization involved in Constitutional issues and environmental protection matters. Public involvement groups should consider their needs for legal services and consider soliciting lawyers to serve on their boards or to volunteer legal services which will assist those lawyers in fulfilling their professional obligations under Rules of Professional Conduct. The group should identify specific activities and tasks that require the skills and training of a lawyer, including corporate governance issues; conflict-of-interest questions; the statutory construction of laws, regulations and ordinances; or analysis of potential liability. The addition of a lawyer to advisory boards for governmental agencies and for non-profit boards of charitable, religious, civic, community, environmental and educational organizations may provide those boards with knowledge, analytical approaches and insights that complement the abilities of other board members.

Rules of Professional Conduct applicable to lawyers include admonitions for lawyers to provide “Public Service”. Representative of many rules, the American Bar Association Model Rule 6.1, entitled “Voluntary Pro Bono Publico Service” addresses every lawyer’s professional responsibility to provide legal services to those “unable to pay.” This Model Rule exhorts each lawyer to provide fifty (50) hours of legal services without fee or expectation of fee to persons of limited means or charitable, religious or civic, community, governmental and educational organizations or to individuals, groups or organizations seeking “to secure or protect civil rights, civil liberties, or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources.” This Public Service rule sets forth a goal that lawyers should aspire to meet; the rule is without disciplinary penalties for its violation.

INTRODUCTION

“Professionalism”

“...there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and stability among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good...”^a

^a Chief Justice’s Commission on Professionalism, State Supreme Court of Georgia (1987)

After being admitted to the legal “bar” a lawyer must abide by the Rules of Professional Conduct, as well as substantive and procedural laws applicable to the practice of law in a particular state. These rules of conduct, adopted by each state jurisdiction, require a lawyer to provide competent representation and to not handle matters that the lawyer knows or should know to be beyond the lawyer’s level of competence. Among other requirements, if a lawyer willfully disregards a legal matter entrusted to him or her, or if a lawyer discloses confidential information obtained in representing a client without the client’s consent, penalties up to and including disbarment may be imposed. Similarly, several rules prohibit or limit a lawyer’s representation of a client in situations where a “conflict of interest” arises. As one example, a lawyer may not represent a client when the lawyer’s own interests will materially and adversely affect that representation, such as when a lawyer and a client have a business relationship together. For violations of many of the Rules, and all of those mentioned, a lawyer may be disciplined, up to disbarment from the practice of law.

The passage, quoted above, was written almost 20 years ago when the Chief Justice of the Georgia Supreme Court established a commission on professionalism. During that time, throughout the Nation, the perception was that too much emphasis was placed on monetary compensation by lawyers rather than the manner in which lawyers engage in their profession. Some perceived a trend of “no holds barred” litigation, in which trial courts were burdened by long, uncivil, and contentious law suits which ultimately rewarded the lawyers involved more than their clients. State bars, composed of lawyers practicing within a state, began to examine their conduct.

“What,” these self-regulating groups asked, “are the fundamental attributes of a true professional?” As a professional each lawyer shares a common status with other lawyers and, consequently, a common interest to advance the profession:

“...as a community of professionals, we should strive to make the internal rewards of service, craft and character -- and not the external reward of financial gain – the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes...^b”

As a result of the legal profession’s self-interest in maintaining an effective judicial system, the various state bars have developed creeds, standards or statements on professionalism and on each lawyer’s professional obligations in the practice of law. Most are expansive and detailed, setting out a lawyer’s relationship with clients and with opposing parties and their counsel, their actions in court or other tribunals and their responsibilities to the public at large. This last relationship -- between a lawyer and the public -- expands the responsibility of all lawyers to consider how their individual actions may affect their communities and their profession. In other words, lawyers must recognize that they must look beyond their clients,

^b *Id.*

their offices, and their tribunals if they are to fulfill a standard of professional. In the absence of actions with broader reach beyond their narrow, day-to-day commitment to their client's causes, they may be "practicing law" but are not true "professionals". Consider the following articulations of a lawyer's responsibilities beyond client matters:

"...my responsibilities as a lawyer include *devotion to the public good*..."^c

"...A lawyer should uphold the image of a lawyer as *civil, professional and ethical in the eyes of the public at all times*..."^d

"...Lawyer Professionalism includes...contributing ones skill, knowledge and influence as a lawyer to further the professions commitment to serving others and *to promoting the public good*, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system..."^e

"...is always mindful of the responsibility *to foster respect for the role of the lawyer in society*..."^f

"...we belong to a profession devoted to *servicing both the interests of our clients and the public good*... Professionalism goes beyond observing the legal profession's ethical rules; professionalism sensitively and fairly serves the best interests of clients and the public..."^g

"...lawyers should exhibit courtesy, candor and cooperation in dealing with the public in participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are *hallmarks of a learned profession dedicated to public service*..."^h

"...a lawyer should further the legal profession's *devotion to public service and to the public good*..."ⁱ

"Professional Conduct" In Action

^c State Bar of Arizona, "A Lawyer's Creed of Professionalism," as amended May 20, 2005

^d State Bar of California Litigation Section, "Model Code of Civility and Professionalism", Section 1(b), 2006

^e State Bar of Florida, "Ideals and Goals of Professionalism", May 16, 1990

^f Kansas Bar Association "Hallmarks of Professionalism", 1987

^g Oregon State Bar, "Statement of Professionalism", Introduction, 1990

^h Utah Supreme Court, "Standards of Professionalism and Civility", Preamble, October 16, 2003

ⁱ South Carolina Bar "Standards of Professionalism", Statement of Principles

Given that each lawyer has a professional responsibility to advance the common good of the public, how should a lawyer take action to advance those interests? Each state jurisdiction has adopted Rules of Professional Conduct. These Rules address specific requirements that direct, encourage, admonish, prohibit, advise or pronounce the legal bar's expectations for conduct.

First and foremost, the Rules of Professional Conduct obligate a lawyer to provide "competent" representation to clients. Competence requires legal knowledge, skill, thoroughness, diligence and promptness.^j A lawyer shall not represent a client if the representation of that client will be directly adverse to another client or if the representation of one client may materially limit the lawyer's responsibilities to another client. As an example, a lawyer could not represent a land owner against the federal government in the exercise of the power of eminent domain while, at the same time, advising a federal agency on creative ways to minimize the amount of compensation due landowners when the agency condemns land.

Second, several rules address how an attorney should interact with persons other than clients. A lawyer shall not knowingly make a false statement of material fact or law to a third person.^k A lawyer must first obtain the consent of an opposing lawyer prior to talking to the other lawyer's client about the subject matter in controversy.^l A lawyer cannot give legal advice to a person who is not represented by counsel, other than to advise that person to obtain counsel.^m A lawyer may not disregard the rights of third parties to a dispute between his or her client and another person. For example, a lawyer cannot unlawfully wiretap or examine the mail sent to third parties or otherwise intrude into their activities.ⁿ

Third, Professional Rule of Conduct address the conduct of a lawyer in court or when practicing before an agency. A lawyer shall not knowingly make a false statement to a court or other tribunal or fail to correct a false statement previously made by that lawyer. A lawyer must exhibit candor in making legal arguments while providing evidence. A lawyer must disclose controlling legal precedent if known by the lawyer to be directly adverse to the position of his or her client and must not offer evidence that the lawyer knows to be false. If a lawyer is aware that a person intends to engage in falsely testifying, the lawyer is obligated to take measures, including if necessary disclosure to the tribunal, to prevent fraudulent conduct.^o

^j ABA Model Rules 1.1 and 1.3.

^k ABA Model Rule 4.1(a)

^l ABA Model Rule 4.2

^m ABA Model Rule 4.3

ⁿ ABA Model Rule 4.4

^o ABA Model Rule 3.3, Candor Towards The Tribunal.

Fourth, the Rules of Professional Conduct recognize that a lawyer's relationship to the public at large includes the obligation to ensure that those of limited financial means have access to legal services. Affirmative statements concerning a lawyer's responsibilities to the judicial system and to society at large include the following:

As a citizen, a lawyer shall seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, **a lawyer should cultivate knowledge of the law beyond its use for clients**, employ that knowledge in reform of the law and work to strengthen legal education. **A lawyer should be mindful of deficiencies in the administration of justice and of the fact the poor, and sometimes persons who are not poor, can not afford adequate legal assistance**, and should therefore devote professional time and civic influence in their behalf.^P

Voluntary "Pro Bono" Service by Lawyers

Lawyers serving on the boards of public involvement groups or supporting the missions of those groups typically serve in a "civic" capacity, and are not called upon to provide legal advice. From time to time, however, a lawyer member of such a group can provide legal analysis on specific issues, such as statutory interpretation of regulations, a legal process mandated by law, or addressing issues related to legal liability. In these capacities a legal professional may be fulfilling both the aspiration rule to provide "pro bono" services to the public and a broader civic obligation. Of course, care must be taken to avoid conflicts of interest between a lawyer's existing clients and the public involvement group, as a conflict of interest or an appearance of impropriety can sometimes arise based on unexpected circumstances.

In terms of the benefits to the public involvement group, a lawyer may provide a different perspective on issues being examined by the public involvement group. Oftentimes, a lawyer member can apply an analytical approach to an issue that is derived from legal principles. One example would be the interpretation of statutory requirements, including regulations adopted to implement the requirements. Attorneys are trained to examine specific guideposts in determining "statutory intent", as discussed below. In these and other appropriate circumstances, lawyers serving on public involvement groups – and having no expectation for monetary compensation – will provide invaluable service to the group and to society at large.

As mentioned, Rules of Professional Conduct typically contain aspirational goals for every lawyer who is admitted to practice in that jurisdiction to take action to ensure that "persons of limited means" obtain legal representation. These goals are not enforceable by discipline should a lawyer fail to meet them. In addition, State bars encourage law firms to diligently enable and motivate their lawyers to provide pro bono legal services called for by the Model Rule.

^P From State of Georgia Rules of Professional Conduct, "Preamble: A Lawyer's Responsibilities".

The American Bar Association's Model Rule for voluntary pro bono service articulates that every lawyer has a "professional responsibility to provide legal services to those unable to pay." At least fifty (50) hours of pro bono services should be provided each year to:

1. "persons of a limited means", or
2. charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of a limited means..."

"First tier pro bono" service refers to the provision of legal services directly to "persons of limited means". Examples include the drafting of testamentary wills for single parents and representing lower income tenants facing eviction from apartments.

"Second tier pro bono" service is the provision of legal services to organizations that serve persons of limited means. This would include voluntary legal services to children advocacy groups, indigent or low-income housing organizations, "legal rights projects" and homeless shelters run by churches, synagogues or civic organizations.

"Persons of a limited means" is the focus of the pro bono obligation in the Model Rule.⁹ Opportunities abound for individual lawyers to render at least fifty (50) hours of pro bono legal services to the first and second tier entities.

However, to the extent that any hours of pro bono service remain unfilled, the Rules of Professional Conduct allow flexibility. More specifically, a lawyer may provide services to individuals, groups, or organizations, "seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational pursuits, where the payment of standard legal fees would significantly deplete the organizations economic resources..."^r Some of these organizations have been less active in pursuing pro bono services in the past, and lawyers have been less aware of their pro bono opportunities with those groups, even if they have some financial means. In any event, the comments to the ABA Model Rule 6.1 makes clear that the provision allows pro bono service to "those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed...include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups."

Statutory Construction/Interpretation

⁹ For a list of the 48 States that have adopted a version of the Model Rules: http://www.abanet.org/cpr/mrpc/alpha_states.html

^r ABA Model Rule 6.1(b)(1)

Most attorneys have experience with the interpretation or “statutory construction” of laws, regulations and ordinances enacted by federal, state or local governmental authorities. This experience may frequently contribute to the work of the public involvement group by providing “rules of construction” to guide interpretation. Examples of rules of statutory construction include:

1. In interpreting a statute or ordinance, a lawyer should look diligently at the intention of the legislative body that enacted the statute or ordinance, “keeping in view at all times the old law, the evil to be addressed, and the remedy.”
2. Grammatical errors do not negate a law or ordinance and words and clauses may be transposed when a sentence or clause is without meaning as it was drafted.
3. In all interpretations of statutes and ordinances, “the ordinary signification and meaning” shall be applied to all words, except “words connected with a particular trade” which shall be given meaning attached to them by experts in such trade.
4. Words that are “defined” in a statute or ordinance shall be given the meaning specified, unless the context in which the word or term is used clearly requires that a different meaning should be applied.
5. Laws and ordinances made for the protection and preservation of the public good may not be abrogated by agreement between individuals. However, a person may waive or renounce rights granted under a law or ordinance, but only when it does not injure others or run afoul of the general public interest.

An example of statutory interpretation by a lawyer providing pro bono services involves my participation of the Savannah River Site’s Citizen Advisory Board (CAB) during the past year in addressing Waste Determinations by the Secretary of the Department of Energy (DOE). In this instance, two federal agencies had successfully implemented a “consultation” relationship and applied that relationship to two waste determinations. However, as the federal agencies addressed a third Waste Determination, the Department of Energy, as the lead federal agency, expressed frustration with the procedures employed by the second agency, the Nuclear Regulatory Commission (NRC).

Specifically, Section 3116 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 authorizes the federal Secretary of DOE, in consultation with the Nuclear Regulatory Commission, to determine that certain waste from reprocessing is not high-level waste (HLW) if it meets the statutory criteria set forth in the law. At the Savannah River Site (SRS) near Aiken, South Carolina, DOE operates tank farms that hold, as part of the Cold War Legacy Waste, approximately 33.8 million gallons of “salt waste”, which is comprised of concentrated salt solution (supernate) and crystallized saltcake. The DOE plans to remove cesium, strontium, and actinides from these materials using a variety of technologies, combining the removed cesium, strontium, and actinides with the sludge being vitrified in a defense waste processing facility, and solidifying the remaining low-activity salt stream into a grout matrix. The matrix is referred to as “saltstone grout”, suitable for disposal in vaults at the Saltstone

Disposal Facility at SRS. The disposal of this low-activity salt stream on site is subject to Section 3116.

In January, 2006, the Secretary issued his Section 3116 determination, with supportive basis for concluding that that separated, solidified, low-activity salt waste could be disposed of in the Saltstone Disposal Facility. 71 *Fed. Reg.* 3838, January 24, 2006. The Secretary concluded, consistent with Section 3116, that the salt waste is not high level waste because it (1) does not require permanent isolation in a deep geologic repository, (2) has had highly radioactive radionuclides removed “to the maximum extent practical”, and (3) meets the NRC performance objectives for the disposal of low level waste set forth in the NRC’s regulations (10 C.F.R. 61, Subpart C). Prior to reaching this conclusion, the DOE had consulted with the NRC, as required by Section 3116 (Pub. Law 108-375):

Notwithstanding the provisions of the Nuclear Waste Policy Act of 1982...and other laws that define classes of radioactive waste, with respect to material stored at a Department of Energy site at which activities are regulated by a covered State pursuant to approved closure plans or permits issued by the State, the term “high-level radioactive waste” does not include radioactive waste resulting from the processing of spent nuclear fuel that the Secretary of Energy, in consultation with the Nuclear Regulatory Commission, determines...does not exceed the concentration limits for Class C low-level waste as set out in section 61.55 of title 10, Code of Federal Regulations, and will be disposed of...in compliance with the performance objectives of Part 61 of Title 10, Code of Federal Regulations...

Before taking on its consultation role the first time, the NRC purposefully examined the processes that it would employ in performing its statutory responsibilities. See, NRC Staff Requirements Memo (SECY) 05-0073, June 30, 2005. The NRC recognized that the Section 3116 criteria were different from others that the NRC applied in the past efforts, but adopted a technical approach that generally followed its past practices in examining waste-incident-to-reprocessing (WIR). In addition, the NRC staff committed to raise any “unique policy issues” which may arise for the Commission’s input prior to transmittal to the DOE. The NRC staff also stated that it would review “whether DOE’s assumptions, modeling, and conclusions are “technically adequate”. In terms of interaction with the DOE, the NRC applied its long-established and predictable process that it applies in licensing proceedings, including Requests for Additional Information (RAIs), development of a Standard Review Plan^s, and schedule prioritization. “Consultation” is not defined in Section 3116, yet the NRC’s internal process leading to a technical work product and the work product itself fall readily within an ordinary and reasonable definition of consultation, especially given the NRC’s unique and extensive workings with the part 61 performance objectives.

^s Standard Review Plans provide guidance to the NRC Staff, in this case in its review of the DOE Waste Determinations. As guidance, a Standard Review Plan gives issues and approaches, but does not set for regulatory requirements applicable to the NRC or to the DOE’s Waste Determinations. As stated in each SRP: “Methods and approaches different from those described here could be acceptable to demonstrate that there is reasonable assurance that the appropriate criteria can be met.”

In July, 2006, the DOE General Counsel wrote the NRC and requested that the NRC's draft Standard Review Plan be "withdrawn." The DOE General Counsel observed that, "despite the limited consultative role that section 3116(a) assigns to the [Nuclear Regulatory] Commission, the overall effect of the draft SRP would be to establish a process that casts the Commission in the role of a regulator, and the Secretary [of DOE] in the role of an applicant, with the apparent objective of treating the Secretary the same as the Commission treats licensees..." The letter also questioned the NRC's need to "make all documents provided by DOE publicly available, even though many of these documents would be part of [DOE's] deliberative process..." Subsequently, the DOE asked the NRC for a non-public meeting; the NRC declined to close the meeting to the public.¹ Interestingly, in June, 2005, the NRC Commissioners had directed their Staff to ensure that the NRC's consultation was "transparent, traceable, complete, and as open to the public and interested stakeholders as possible."

In this CAB member's view, the DOE General Counsel either misinterpreted or overstated the NRC's prospective application of the Standard Review Plan. He also contrasted too sharply the distinction between "consultation" as used in Section 3116 and "regulation." Much of the NRC's Standard Review Plan is designed to provide clarity of process, transparency, and discipline to the "independent technical conclusion" that the NRC will provide to the DOE. An independent technical conclusion provided by a consultant to a client has no force and effect of law; it is not "regulation"^u. Perhaps the DOE desired more of a kibitzer or high level reviewer of DOE's plans, rather than a pre-planned, rigorous and defensible sister agency conclusion of the "technical adequacy" of the Secretary's Waste Determination. As important, the NRC's Plan provides DOE with a detailed roadmap of how the NRC will evaluate whether the Part 61 criteria will be met. Of course, those criteria were developed and promulgated as rules by the NRC, not the DOE. The DOE also failed to recognize that the Standard Review Plan addresses the *internal* review processes at the NRC, over which the NRC has authority and which was not modified by Section 3116.

In response to the DOE General Counsel's letter and press, the SRS CAB developed and adopted a Recommendation^v that avoided a sophistic debate about distinctions between "consultation" and "regulation" raised by the DOE General Counsel. The Recommendation observed that some joint meetings between the two agencies that were not public "as provided by law" might be required to address specific technical or process issues. This observation is consistent with the NRC Commissioner's direction to the NRC Staff to maintain its process "as open to the public...as possible." The actual recommendation requested that DOE and the NRC "ensure all meetings to review the important issues dealing with closing the HLW tanks are conducted in public."

¹ On November 16, 2006, the NRC and DOE held a public meeting.

^u If the NRC's conclusion was clearly different than the DOE's waste determination, that difference *might* be some evidence that the DOE's waste determination was erroneous. However, even then, the DOE record could contain substantive evidence sufficient to support the DOE's determination.

^v Recommendation 239.

With respect to Waste Determinations, the CAB Recommendation noted that the two agencies “should be working together to ensure that the performance objectives are met, and that the waste determinations are performed in a manner that supports compliance with the Federal Facility Agreement closure schedule.” By doing so, the Recommendation looks to the true objective of Section 3116. Or, as might be articulated, the Recommendation “keeps in view the old law, the evil to be addressed, and the remedy.”

CONCLUSION

Lawyers have professional obligations to fulfill in providing free legal services for the public good, referred to as “pro bono” services. Although the primary recipients of these services should be persons of limited financial means, Professional Rules of Conduct also contemplate pro bono services provided to other organizations that pursue the public good. Competent lawyers can provide interpretative skills to public involvement groups in analyzing statutes, regulations and ordinances and, on occasion, give unique guidance in addressing a technical issue that revolves around conflicting interpretations of law. Any good interpretation of a law has to square with that law’s ultimate purpose. Focus on that purpose, and avoiding irresolvable debate on the meaning of a single word or phrase, will aid a client in choosing a successful path forward.

ATTACHMENT

American Bar Association (ABA) Model Rules of Professional Conduct

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means;
and^w

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

^w Emphasis supplied.