

ABA/ NLADA 2008 Equal Justice Conference

**If You Order It, They Will Come: Judicial Support for  
Private Bar Pro Bono**

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**Brief Description:**

The judiciary sees the unmet need for legal services every single day. Judges know that pro bono programs, even with law firm support, struggle to enlist and train attorneys to provide representation in certain areas where the need is great. What can judges do to encourage private attorneys to take on pro bono representations? What limitations does the Code of Judicial Conduct impose on what judges properly can do, and does the Code offer any opportunities for judges to support pro bono? How does the judiciary create an administrative culture to support the good works of the private bar? Can judges give recognition, distribute “best practices,” use websites or take other steps to encourage or facilitate pro bono? Hear from members of the judiciary who are at the cutting edge of these issues.

## Topical Outline:

- I. What Limitations Does the Code of Judicial Conduct Impose on Judicial Support for Private Firm Pro Bono?
  - a. Perception of fairness: Judges have two duties that sometimes can be in tension: the duty to be completely neutral and objective, and the duty to ensure that justice and fairness prevail in the courtroom. The tension is most frequently seen when two litigants appear in a dispute, and one is represented by counsel and the other is self-represented. While a judge must remain neutral, sometimes a judge must provide some assistance to a self-represented party to ensure that the party understands the law, the process and/or the proceedings.
  - b. Efficient administration of justice. Judges must follow all appropriate rules of procedure and ensure the timely disposition of matters. Sometimes the lack of understanding and/or preparation by a self-represented party and the corresponding need to help bring a self-represented party “up to speed” may conflict with the need for efficient administration, and timely disposition, of individual matters.
  
- II. What Opportunities Does the Code of Judicial Conduct Present, or Create, to advance the work of private firm lawyers who handle pro bono matters?
  - a. The model Code of Judicial Conduct, and most state Codes, provide that judges should promote the efficient administration of justice. Judges can take procedural steps to facilitate pro bono services such as: (i) scheduling hearings and conferences in matters involving pro bono counsel at the beginning of the court day, so that pro bono counsel know that they need be in court or “on call” all day to be heard in a single pro bono matter; (ii) scheduling hearings on two or more pro bono matters handled by the same attorney together on a given day; (iii) recognizing/thanking pro bono attorneys from the bench to encourage other lawyers to do pro bono; and (iv) creating awards or hosting events recognizing those who provide pro bono as a way of streamlining the administration of justice.
  - b. Judges, working with the private bar, can create email lists and use other advance communication systems to identify pro bono lawyers available to assist self-represented litigants, and uses such lists to grant continuances to allow unrepresented parties to obtain pro bono counsel for further proceedings.
  - c. Courts can signal support for pro bono services by posting pro bono “best practices,” areas of particular need for pro bono, and court rules and procedures designed to streamline procedures for handling pro bono matters on the court’s website and in court publications.

- III. **Judicial Promotion and Endorsement of Limited Representation Models.** Judges can take an active role in recommending, implementing and evaluating various models for limited representation of low income litigants. Many states have adopted specific Rules of Professional Conduct that authorize lawyers to assist low-income individuals for limited purposes.
- a. **Mediation and judge pro tem programs.** Judges can investigate, develop, recommend and adopt programs such as mandatory mediation programs through which trained lawyers can serve as mediators in landlord-tenant, child support, small claims and other matters.
  - b. **Limited representation programs.** Judges can support the development and implementation of limited representation models, such as limited representation of a parent in a child custody proceeding solely for purposes of exploring conciliation and agreement on disputed issues in a single day.
  - c. **Courthouse amenities.** Judges can support and recommend improved courthouse facilities to expand access for lawyers engaging in limited representation and for self-represented persons, such as developing simple, understandable forms for certain proceedings such as uncontested divorces; installing courthouse information and forms stations; providing direct access to computers for litigants to identify, fill out and print required court forms; and creating conference room or other private areas for lawyers in limited representation proceedings to meet confidentially with clients.
- IV. **Creating An Administrative Culture That Supports Pro Bono.**
- a. **Judicial leadership.** In many ways, the courts are ultimately responsible for enduring access to justice to those in need. Courts and judges can create judicial Pro Bono Committees to educate the judiciary about the vast need for legal services in every jurisdiction and to promote practical and effective administrative steps that will help expand and improve the availability and effectiveness of private bar pro bono.
  - b. **Computer Access.** Judges and court administrative staff can play a key role in designing websites, forms and instructions available to lawyers engaged in limited representation and to self-represented parties that will educate clients and facilitate their ability to access the courts and achieve fair and equitable resolution of claims.
  - c. **Court Staff.** Judges can lead by conducting educational seminars and adopting personnel policies to ensure that court officers, administrators and security staff treat all litigants with respect; provide information and guidance consistent with their level of authority and otherwise contribute to ensuring access to forms and information and the smooth operation of proceedings involving lawyers engaged in limited representation and self-represented persons.

- V. Coordination of Efforts Among Judges, Public Interest Law Centers and the Private Bar.
- a. Communications. Judges can convene committees and meetings of judges and legal services and private bar lawyers to examine specific areas of law where the vast majority of litigants do not have, and cannot pay for, private counsel. Judges can use their platform to push for new and creative ways to expand legal services such as mediation and conciliation programs, courthouse limited representation programs, and public-private firm pro bono practice groups and partnerships.
  - b. Internal Court Websites. Judges and court administrative offices, in cooperation with law firms and public interest law centers, can create an inventory of available pro bono services, organized by law firm, pro bono practice area, lists of “on-call” lawyers and other databases that would enable judges to reach out directly to request pro bono legal services, and to schedule continuances and other steps to allow self-represented persons to get pro bono representation in individual matters.
  - c. Computer Technology. Judges can use computer technology to develop easy-to-understand court forms and instructions, connect individual self-represented litigants with private bar lawyers, and publicize available court-support programs such as translators, forms in other languages, services for disabled persons in the courthouse and the like.
- VI. Supreme Court Leadership. In most states, the state Supreme Court has both judicial and administrative control of the court system, and is ultimately responsible for expanding access to justice.
- a. Education. Trial level and administrative judges can take on an educational role, identifying for their highest courts those areas with the greatest levels of self-representation, such as family court and landlord-tenant disputes; developing and recommending appropriate courtroom and courthouse facility modifications to make access easier and speedier; adopting alternative models of representation such as limited representation or “unbundled legal services,” adoption of mediation and conciliation programs and authorizing courthouse clinics and other programs likely to appeal to busy private firm lawyers who want to do pro bono with a limited time commitment.
  - b. Court Technology. Trial level and administrative judges can work collaboratively with court administrative personnel to develop forms and systems approved by supreme courts to facilitate appointment of pro bono counsel and access to forms and instructions.
  - c. Rules of Professional Conduct. Supreme courts can amend the rules of professional conduct to allow a wider array of limited representation models, mediation, conciliation and other forms of pro bono assistance.
  - d. Continuing Legal Education. Supreme courts can require that pro bono training, both in substantive areas of law and in procedural law, be a part of mandatory continuing legal education. Courts can also provide that a

portion of state CLE requirements may be obtained through pro bono service, subject to appropriate training and monitoring requirements.

- VII. Funding Issues. Courts Can Use Their Unique Position and Responsibility for the Justice System on funding issues.
  - a. New sources of funding. Do we look primarily to the private bar, to state governments or to other sources to promote expansion of the models of pro bono representation and the number of lawyers doing pro bono?
  - b. Courts can promote cooperative funding efforts by bar associations, bar foundations and private law firms to raise money for legal services and programs facilitating pro bono by endorsing successful pilot projects, participating in educational programs for pro bono lawyers and new projects, and recognizing and honoring new initiatives that are successful in expanding legal representation of the needy.
  - c. Courts can adopt policies regarding IOLTA funding, cy pres awards and approved filing fee surcharges, among other systems, that provide funding for legal services training, as well as mentoring and support systems for private firm lawyers handling pro bono matters.
  
- VIII. Gender and Racial Fairness. The lack of gender and racial diversity in the courts is striking. For example, a court addressing guardianship issues should not have to be limited to a pool of Caucasian males when considering guardianship petitions from families of various racial and ethnic minorities. Judges must work to promote gender and racial diversity among judges, lawyers and courthouse staff, so that there is some parity between service providers and clients in the legal system. Judges can conduct seminars, convene gender and racial bias task forces and take other measures to help ensure access to justice by ensuring that the racial, gender and ethnic demographics of litigants in the courthouse are matched by those who administer the justice system.
  
- IX. Changing Law Firm Cultures. Through many of the measures summarized in this outline, the courts can work to change the culture of law firms to help law firm management recognize the importance of pro bono services and diversity to the integrity of the legal system and its place in the larger society.