In the Supreme Court of Florida

Case No. 88-646

THE FLORIDA BAR,
RE AMENDMENT TO RULES
REGULATING THE FLORIDA BAR
4-6. I 1'110 BONO PUBLIC SERVICE

REPLY BRIEF OF THE FLORIDA BAR IN SUPPORT OF PETHTJON TO AMEND RULE 4-6.1

On Petition to the Supreme Court

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SUMMARY OF THE REPLYARGUMENT

Contrary to the suggestion of the Respondents, the Petition presented by The Florida Bar is not intended to "bring[] to a crashing halt any effort. to evaluate the success of the *pro bono* plan." Response at. 4. The Petition simply seeks to maintain the status quo by providing for openly voluntary reporting of a member's *pro bono* activities as a part of the annual dues statement. Although the rule lauded by the Respondents yrovidcs for mandatory reporting, there has been a moratorium on enforcement. since July 1993, so that. reporting has been voluntary in practice. This moratorium will end with the impending resolution of *Schwarz v. Kogan*, the federal lawsuit. attacking the rule. The Petition of The Florida Bar provides an opportunity for this Court to decide whether the Rule should provide for openly voluntary reporting or mandatory enforced reporting. Even without enforcement, at. least 89% of the members of The Florida Bar have voluntarily reported their *pro bono* activities during each of the last three years. The Florida Bar believes they should be permitted to continue to voluntarily display their commitment to provide justice for the defenseless and oppressed.

[S]ome people have asked me over the years why I became a lawyer. I became a lawyer because I didn't want people telling me what to do. And I still remember that, and so I don't like government telling people what to do unless it's absolutely necessary.

Janet Reno, Attorney General of the United States, accepting the ABA Lifetime Achievement Award, August 3, 1996, Orlando, Florida

REPLY ARGUMENT

Over the last three years the Rules Regulating The Florida Bar have provided for mandatory reporting of voluntary compliance with the aspirational *pro* bono goals set by this Court in June of 1993. Rule 4-6.1, Pro Bono Public Service. Nevertheless, although the rule provided that failure to report was a disciplinary offense, there has been a well-publicized moratorium on disciplinary proceedings for failure to report since suit was filed in federal court. challenging the rule's constitutionality. Since July 1993, then, the Bar has operated under a hybrid reporting rule that was mandatory in form but voluntary in practice.

In August of this year, the U.S. District Court for the Northern District of Florida upheld the constitutionality of the mandatory reporting rule. *Schwarz v. Kogan*, TCA 94-40422-WS (N.D. Fla., Aug. 9, 1996) (Order Directing Entry of Judgment). Upon final resolution of this case, and barring amendment of the reporring requirement, *pro bono* reporting will become mandatory

ir. fact, and proceedings will have to bc instituted against Florida attorneys who decline, on whatever grounds, to report their *pro bono* activities.

The Petition to Amend the Rules Regulating The Florida Bar seeks to make the reporting requirement openly voluntary as it has been in fact since July 1.993.

I. THE ISSUE BEFORE THIS COURT IS PROFESSIONALISM AND PERSONAL RESPONSIBILITY.

The issue before this Court is, quite simply, the quest-ion of whether mandatory enforced reporting or openly voluntary report.ing of *pro bono* service should replace the hybrid system which has been in place over the last. three vears.

A. There is virtual unanimity that attorneys have a professional responsibility to perform *pro bono* service in their communities,

In their carcf'ully written brief, the Respondents have provided a stirring recitation of the historical commitment of The Florida Bar and this Court to *pro bono* service. SEE Response in Opposition to the Florida Bar's Petition at. 1-10. Indeed nearly one-hall' of the Response is devoted to a defense of *pro bono*. Id. Unfortunately, howcvcr, the Response implies that those who oppose mandatory reporting also oppose *pro bono* service. Such is emphatically not the **case.**

In late I. 990, this Court. stated unanimously that.

> [E]very lawyer of this state who is a memhcr of The Florid; Bar has an obligation to represent. the poor **when called upon** by the courts and that, each lawycr has agreed to that commitment when admitted to practice law in this state. Pro bono is a part. of a lawyer's public responsibility as an officer of the court..

In re Amendments to Rules Regulating The Florida Bar, 573 So.2d 800, 806 (Fla. 1990).

The Court went on to note that.

> Thomas Jefferson once said: "There is a debt of service due from every man to his country proportioned to the bounties which nature and fortune have measured to him." The lawyers of this state have recognized that they have a debt of service to the poor in the oath each took upon becoming a member of the legal profession and an officer of the courts. This important. commitment assures a justice system for *all*. We acknowledge our responsibility to provide the necessary leadership to accomplish that goal.

Id. Indeed, throughout the profession there has always been an understanding that public service is an important aspect of being a lawyer. This understanding has transcended political lines and legal specialties.

It is an issue about. which the Petitioner and the Respondents do not disagree, and upon which this Court, has spoken with a clear voice. The

Petitioner does not seek the weakening of the Bar's commitment to *pro bono* service and does not bclicvc that the proposed amendment will have the effect feared by thc Respondents. Indeed the Bar believes that voluntary reporting will encourage greater participation in *pro bono* activities.

B. There is widespread agreement that the reporting process is important in encouraging *pro bono* service and monitoring *pro bono* performance.

Nor does the Petitioner seek removal of the reporting provision of the Rule. The Respondents, quite properly, remind this Court of its prior pronouncements on the importance of reporting in encouraging *pro bono* service and monitoring *pro bow* performance. In 1993, this Court explained:

> We bclicvc that accurate reporting is essential for evaluating this program and for determining what services are being provided under the program. This . . . will allow us to determinc the areas in which the legal needs of the poor are or arc not being met..

In re Amendments to Rules Regulating The Florida Bar, 630 So.2d 501, 502-03 (Fla. 1993).

Again, thc Petitioner recognizes and agrees that reporting is an essential element in thc evaluation of thc commitment. of Florida attorneys to *pro bono*

service,[1] but points out that the proposed amendment does not remove the reporting form from the dues statement.

C. The question in dispute is whether mandatory or voluntary reporting is more appropriate in promoting, encouraging, and monitoring *pro bono* service.

The real question before this Court., then, is not whether *pro bono* is a part of a lawyer's responsibility (it. is) or whether reporting plays an important role in encouraging and assessing the success of Florida's attorneys in fulfilling that responsibility (it does), but. whether mandatory enforced reporting is the only sort of reporting appropriate in promoting, encouraging, and monitoring *pro bono* service.

The conclusion of the Petitioner is that. while replacement of the hybrid reporting system with a openly voluntary reporting system will not lead to a serious degradation of the significance of quality of data, it will reduce the

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[1] "Neither Petitioner nor Respondents believe that the dues statement reporting requirement (whether voluntary or mandatory) is by itself sufficient. to assess the degree of success of Florida's *pro bono* policy.

The Respondents, for example, argue that. information provided by legal aid and legal services programs lead them to conclude that the apparent 28% decline in *pro bono* hours between the first and second reporting years did not represent an actual decline. Response at 5. Information from such sources will continue to be necessary under any new reporting administration, whether mandatory or voluntary.

unnecessary hostility which will be engendered by the institution of mandatory enforced reporting.

II. THE PROPOSED AMENDMENT IS THE NARROWLY FOCUSED RESULT OF PAST EXPERIENCE, EXTENSIVE STUDY AND BALANCED DISCUSSION.

The Respondents suggest that. the Petitioner's decision to seek the amendment was not carefully considered or the product. of reasoned deliberation. Response at. 3. In fact, the decision was the result. of extensive study and balanced discussion growing out of the Bar's experience in administering the *pro bono* rules during the last three years.

In September of 1995, the Bar President asked the Pro Bono Legal Services Committee to study the reporting section of the pro bono plan and to consider recommending that. reporting be made voluntary. "Pro bono reporting rule under scrutiny," FLA. BAR NEWS (Sept. 15, 1995) (App. 9).[2] The committee undertook a three month investigation. seeking information from circuit pro bono committees, legal aid providers, and individual Bar members before making a recommendation. FLA. BAR NEWS (Oct. 1, 1995) (App. 10).

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[2]For the convenience of the Court, an Appendix has been prepared and attached which contains *Florida Bar News* articles and other cited materials. The materials in the Appendix are arranged in chronological order and referenced in the brief as (App. _).

On January 1.0, 1996, the All Bar Conference, representing a wide range of voluntary bar associations, Bar committees and sections, voted 56% to 44% to recommend that the reporting requirement be made openly voluntary. *See* FLA. BAR **NEWS** (Feb. 1, 1996) (App. 14). This vote occurred after a debate between former Bar presidents Patricia .A. Seitz and Benjamin H. Hill 111, and a discussion session by conference delegates. *Id.* That same day, the *Pro* Bono Legal Services Committee voted 9-6 to retain the mandatory reporting requirement. *Id.* Two other Bar committees, the Program Evaluation Committee and the Rules Committee, voted (after extensive study) to recommend that no reporting whatsoever be required. "Bar asks court for voluntary reporting," FLA. **BAR NEWS** 1, **4** (June 1, 1996) (App. 17).

Given the seriousness of the issue and the lack of unanimity, a special committee was then appointed by the Bar President to study the issue before the Board of Governors would consider the issue. "Pro bono reporting vote delayed," FLA. BAR **NEWS** (Feb. 15, 1996) (App. 15). This committee was made up of individuals on all sides of the issue, and the formation of the committee was praised by many former Bar Presidents, including eleven individuals whose names are appended to the Response. *Compare* Response at 14-15 *with* "Pro bono reporting vote delayed," FLA. **BAR** NEWS 4 (Feb. 15, 1996) (App. 15).

Three months later, on May 17, 1996, the special committee made a proposal to the Board of Governors which recommended an openly voluntary reporting system. "Bar asks court. for voluntary reporting," FLA. BAR NEWS (June I., 1996) (App. 17). The Board of Governors, after debate, agreed by a 22-2 1 margin. *Id.*

The Petition which is now pending before this Court is the product. of three years of experience under the present rule, extensive study, and balanced discussion. The Petition was not made casually or without regard to the important. mandate enunciated by this Court in its opinions on *pro bono* service.

III. THE PROPOSED AMENDMENT IS THE BEST SOLUTION TO THE DILEMMA WHICH FACES THE BAR.

While the Petition proposes amendment of the reporting provision to make reporting openly voluntary, it. is important to realize that reporting has never been truly mandatory. The proposed amendment merely seeks to make the rule comport with the reality: unless this Court intends for the Bar to prosecute an attorney's conscientious decision not to report *pro bono*, the rule should not. state that the failure to report is a disciplinary offense.

A. Over the past three years , the reporting requirement has been mandatory in form, but openly voluntary in reality.

In 1993, this Court approved the current rule, stating:

> This [reporting requirement] will allow us to determine the areas in which the legal needs of the poor are or are not being met.. Because WC find that reporting is essential, failure to report will constitute an offense subject to discipline.

Amendments to Rule Regulating The Florida Bar, 630 So.2d 501, 502-03 (Fla. 1993).

In June of 1994, however, before the rule could take effect, Thomas Schwarz filed suit. against then Chief Justice Stephen H. Grimes in order to block the *pro* bono plan. "Pro bono plan challenged in federal court," FLA. BAR NEWS (Aug. 1, 1994) (App. 2). As a part. of his suit, Schwarz sought a preliminary injunction blocking the enforcement of the reporting requirement. "Bar told not to discipline those who don't report," FLA. BAR NEWS (Aug. 15, **1994)** (App. 3). This Court instructed the Bar not to pursue disciplinary measures against. those who failed to report. *Id*. Chief Justice Grimes explained:

> In order to promote a prompt resolution of [*Schwarz v. Grimes*], the Court unanimously concluded to direct The Florida Bar to take no disciplinary act-ion against any attorneys for failing to report their pro bono activities until such time as the lawsuit has been resolved.

Letter of Chief Justice Grimes to Executive Director John F. Harkness, Jr. (July 21, 1994) (App. 1). This moratorium on disciplinary action has been extensively reported," and is still in effect.. Although the current rule is mandatory in form, it. is actually voluntary in practice.

B. A move to truly mandatory reporting would require the prosecution of hundreds of cases of non-compliance by those who conscientiously object to reporting.

Therefore, the effect of not. adopting the proposed amendment and thus making reporting truly mandatory (for the first time) would be to make many thousands of Florida attorneys subject. to discipline.[4] Clearly, committing the limited resources of the Bar to prosecuting these additional attorneys will

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[3] *See, e.g.*, "Bar told not. to discipline those **who don't** report," FLA. **BAR** NEWS (Aug. 15, 1994) (App. 3); "$94+million to legal aid," FLA. BAR **NEWS** (Oct. 1, 1994) (App. 4); "Foundation to intervene in pro bono plan challenge," FLA. BAR NEWS (Oct. 15, 1994) (App. 5); "Schwarz objects to Foundation involvement. in pro bono suit ," FLA. BAR NEWS (Dec. 15, 1994) (App. 6); "Foundation allowed to intervene in court pro bono plan challenge," FLA. BAR NEWS (June **1.5, 1995)** (App. 7): "Timetable set. for concluding pro bono rule challenge," FLA. BAR **NEWS** (Sept.. 1, 1995) (App. 8); "Pro bono reporting rule under scrutiny," FLA. BAR **NEWS** (Sept. 15, 1995) (App. 9); "Foundation wants pro bono suit quashed," FLA. BAR NEWS (Oct. 15, 1995) (App. 11);"Magistrate to recommend pro bono challenge be dismissed," FLA. BAR NEWS **(Dec.** 1, 1995) (App. 13); "Panel to make pro bono reporting recommendation in May," FLA. BAR NEWS (April 15, 1996) (App. 16); "Pro bono challenge dismissed," FLA. BAR **NEWS** (Sept. **1, 1996)** (App. 18).

[4] In the 1995-1996 reporting year nearly 6700 attorneys (more than 11%) declined to report their *pro bono* involvement on the dues form. Letter of John T. Berry, Director of the Legal Division of The Florida Bar to John A. DeVault, III (Nov. 4, 1996) (App. 19) (noting that of 58,100, members only **5** 1.400 reported).

require a significant dues increase or the diversion of scarce Bar resources from other important programs such as professionalism, unauthorized practice, the clients' security fund and continuing legal education.[5]

It should not be thought that a decision not to report is equivalent to a decision not to perform *pro bono* services. Many attorneys sincerely believe that for The Florida Bar to monitor their *pro bono* activities is an insult to the moral commitment they made when taking the oath of admission:

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So Help Me God.

Oath of Admission, para. 9 (1990). For these individuals, to report one's *pro bono* service in a public document is akin to having a list of one's charitable contributions published in the newspaper.

The Court's decision will determine whether the Bar will have to Institute thousands of disciplinary actions against the conscientious objectors to mandatory *pro bono* reporting.

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[5]In fiscal year 1995-96 the Bar expended over $5.5 million for its disciplinary programs. Letter of John T. Berry, Director of the Legal Division of The Florida Bar to John A. DeVault, III (Nov. 4, 1996) (App. 19). While it processed 8839 complaints against attorneys, it actually prosecuted 965 cases. *Id.* An additional 3000 cases annually would quadruple this case load. *Id.*

C. Only voluntary reporting satisfies the goal of honesty and professionalism in the context of personal responsibility.

In the end, only voluntary reporting gives more than lip service to the belief that the practice of law is an honorable profession, because only voluntary *pro bono* reporting recognizes the fact. that an attorney has a responsibility to serve the defenseless and oppressed whether anyone is able to check this service or not.

Respondents argue, however, that without mandatory enforced reporting no assessment. of the *pro bono* performance of Florida attorneys can be made. Response at 1 O-l 1. They point. to response rates of 10-40% among attorneys in the voluntary reporting states of Hawaii and Texas. There is ample data from the last three years under the hybrid system to suggest that Florida's response rate will be much higher. Letter of John '1'. Berry, Director of the Legal Division of The Florida Bar to John A. DeVault, III (Nov. 4, 1996) (App. 1 9) (over 89% of members in good standing reporting in each of last. three years).

The Respondents also argue that the reporting form itself may serve as a reminder to the attorney of the *pro bono* commitment. Response at 14. The Petitioner agrees, but points out that the proposed amendment does not seek to remove the reporting requirement altogether or to delete it from the dues

statement. The reminder function will be equally well served by the openly voluntary system proposed by the Bar.

In the end, the Respondents seem concerned that without. mandatory enforced reporting of compliance with aspirational *pro bono* standards, Florida attorneys will prove unresponsive to the programs designed to encourage *pro bono* service and instituted in the last three years. After extensive study and discussion, The Florida Bar disagrees. Our successes in the last three years have not been due to reporting, and our failures have not been due to a lack of coercion.

CONCLUSION

For the foregoing reasons, The Florida Bar requests that this Court grant its Petition to Amend Rule 4-6. 1 to provide for openly voluntary reporting of each member's compliance with the voluntary *pro bono* goals established in 1993.

Respectfully submitted,

John F. Harkness, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail on this 1day9 of9 6 , t o :

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Appendix

Supreme Court of Florida

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STEPHEN H. GRIMES
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BEN F. OVERTON
LEANDER J. SHAW, JR.
GERALD KOGAN
MAJOR B. HARDING
CHARLES T. WELLS
JUSTICES

SID J. WHITE
CLERK

WILSON E. BARNES
MARSHAL

July 21, 1994

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Re: Challenge to pro bono rule -
Schwarz v. Grimes, S.D. Fla. Case No. 94-6573

Dear Jack:

In order to promote a prompt resolution of the above-styled case, the Court unanimously concluded to direct The Florida Bar to take no disciplinary action against any attorneys for failing to report their pro bono activities until such time as the lawsuit had been resolved. In the event the rule were ultimately upheld, those who had failed to report their pro bono activities would be given time to make their reports. Should the reporting requirement of the rule be declared unconstitutional, the matter would be moot.

Very truly yours,

Stephen H. Grimes

SHG/pm

cc: Charlie McCoy, Esquire

Pro bono plan challenged in federal court

By Gary Blankenship
Associate Editor

A lawyer who once sued The Florida Rat over its legislative policies has gone back to federal court to block the new pro bono plan.

Attorney **Thomas Rowe Schwarz** in June filed suit against Supreme Court Chief Justice Stephen H. Grimes as chief administrative officer of the court. Schwarz challenged both the pro bono plan-which he said enforced participation in a charity chosen by the court and could hold lawyers up to ridicule—and the procedure for petitioning the court for changes to Bar rules.

The Florida Attorney General's Office, which represents Grimes, has asked to have the case moved to the Northern District of Florida. Schwarz, who lives in Lauderhill, filed in the Southern District, where, he noted, a large percentage of Bar members live.

In his suit, Schwarz said he filed an ex parte motion with the Florida Supreme Court before **May 20, alleging** that Rule 4-6 and Rule 1-12 of the Rules Regulating The Florida Bar were unconstitutional.

Rule 4-6 governs the pro bono plan, which sets an annual aspirational goal of 20 hours of assistance to the **poor or a** $350 donation to a legal **aid** program. The program also requires that lawyers report annually whether they met the voluntary **goal. Under** existing **laws** that reporting would be public record.

Rule 1-12 governs amendments to Bar rules, It requires, among other things. that at least 50 **Bar members** sign a petition seeking a rules change.

Both rules, Schwarz said, violated his rights under the **Florida and US. constitutions**.

The pro bono rule "subjects plaintiff to public and professional contumely, and further subjects him to threat of license discipline and deprivation of property unless he provide3 private charity as selected by the Florida Supreme Court, invading his privacy by requiring publication of his private papers and activities," Schwan wrote.

"Rule 1-12. Amendments provides that, while retaining exclusive jurisdiction over the subject matter of its rules, the Florida Supreme Court refused to consider complaints that such rules violate the constitutional rights of its licensees unless the individual complainant obtains the joinder of at least an additional forty-nine allies," he added.

Grimes. the suit charged, directed Supreme Court Clerk Sid J. White not to file Schwarz's ex parte motion because he did not have 49 co-signers, and to inform Schwarz the action would not be accepted by the court.

The suit asked that both rules be declared unconstitutional and that Schwarz he awarded costs and attorney fees.

In the ex parte motion. Schwarz said the pro bono rule violated several provisions of the Florida Constitution, Including:

- Article I, Section 9 by depriving Bar licensees of property and liberty without due process.
- Article I, Section3 23 and 12 by requiring publication of lawyers' private paper3 and private charitable work.
- Article I. Section 18 for imposing administrative penalties not provided for by **law.**
- Article I, Section 9 for compelling lawyer3 to give evidence against themselves in what amounts to a quasi-criminal proceeding.
- Article VII, Section 2, by creating an unequal ad valorem tax on lawyer's licenses.

Schwarz also **said** the rule violates several facets of the U.S. Constitution—the **equal** protection **clause** of the 14th Amendment, the **right to** be **secure** in person and papers **guaranteed by** the Fourth Amendment, and depriving lawyers of property without due process and their right against self-incrimination protected by the Fifth Amendment.

He also charged that the requirement of 50 signatures deprived him of the right to seek redress.

The Florida Bar, which is not named as a defendant, has received a copy of the suit and is monitoring its progress. A copy of the suit was to be presented to the Board of Governors at its July 28-29 meeting in St. Petersburg.

Wrong Venue?

The Attorney General's Office has filed a motion in the Northern District asking that the case he transferred there. It noted that adoption of rules by the court and enforcement by the Bar occur in Tallahassee.

"All likely witnesses perform their official duties in Tallahassee; all relevant documents **are located at** the offices of the Florida Supreme Court or The Florida Bar," the motion said.

The motion also said Schwarz failed to present **any** evidence for his contention that most Bar members live within thejurisdiction of the Southern District.

Assistant Attorney General Charlie McCoy prepared the **venue** motion.

Schwan sued The Florida Bar twice in the 1980s, contending that the Bar's legislative activities improperly took his due3 to promote issues he disagreed with. Both **cases** reached the 11th U.S. Circuit Court of Appeals, which ruled the Bar could take legislative positions, but had to followcareful procedures to make sure those positions related to Bar functions and interests.

As a result of those and other rulings, the Board of Governors adopted the present legislative policy, which allows members who oppose a legislative position to seek a rebate of their dues used to advocate chat position.

In reaction to the pro bono suit

Bar **told** not to discipline those who **don't report**

By Gary Blankenship
Associate Editor

The Florida Supreme Court has suspended discipline for Florida Bar members who don't, report on this year's dues statement whether they complied with voluntary pro bono standards.

The court took the action following a lawsuit challenging the legality and constitutionality of the pro bono plan and reporting requirement. The suit was filed by Thomas Schwarz of Lauderhill in the U.S. District Court for the Southern District of Florida. (See August 1 Bar *News*.)

In a letter to Bar Executive Director John F. Harkness, Jr., Chief Justice Stephen H. Grimes wrote, "In order to promote a prompt resolution of the case, the Court unanimously concluded to direct The Florida Bar to take no disciplinary action against any attorneys for failing to report their pro bono activities until such time as the lawsuit had been resolved. In the event the rule were ultimately upheld, those who had failed to report their pro bono activities would be given time to make their reports. Should the reporting requirement of the rule be declared unconstitutional, the matter would be moot."

Schwarz had sought a preliminary injunction as part of his suit. He told Assistant Attorney General Charles McCoy, who is representing Grimes, the sole defendant in the suit, he would drop that if the court agreed not to impose discipline for nonreporting. On July 29, following Grimes' letter, Schwan did withdraw his request for a preliminary injunction.

The pro bono plan sets an aspirational goal for each attorney to provide 20 hours annually of service to indigents, or a $350 donation to a legal aid office. It also directs each circuit to draw up a plan to help local lawyers meet that goal While the standard is voluntary, the court also ordered lawyers to annually report whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline, but not reporting is, under the court-approved rules.

Schwarz alleged the plan violated the state and federal constitutions, amounted to forcing lawyers to give work to a court-approved charity, and could hold lawyers who don't meet the goal up to public ridicule since their answers on dues statements would be public.

ffe also said Grimes violated his constitutional rights by refusing to allow the court to hear his petition to change the rule. Under Bar rules, such rule changes must normally be sought by at least 50 Bar member; and Schwarz filed his request alone.

In a response to Schwarz's suit, McCoy denied that the pro bono plan violated any of the plaintiff's constitutional rights.

McCoy also argued that Schwarz erred when he said in his suit that the court will only hear complaints signed by 50 attorneys. He noted that Rule 1-12.1(i) of the Rules Regulating The Florida Bar allow the court to waive the 50-lawyer requirement for good cause.

"Schwarz's petition did not even allege such," the reply noted.

The reply also noted that under the rule, Schwan was required to notify The Florida Bar 90 days before filing his petition with the Supreme Court, which he did not do.

"The refusal to consider Schwarz's petition could also have been grounded on his failure to comply with that provision," the reply said, adding, Schwan did not request a waiver of that rule.

The reply also disputed Schwarz's claim the rejection of his filing left him without legal recourse. The reply said that Schwarz did not give any facts in that part of his complaint and merely gave conclusory legal arguments.

The reply noted that Schwarz provided no supporting information for his claim the "great bulk" of Bar members live in the Southern District, and added that was irrelevant for the suit anyway. The reply concluded by arguing Schwarz filed in the wrong venue.

Southern District Judge Donald Graham agreed. On July 27, he granted a defense motion to transfer the case to the Northern District.

"The Court finds that venue is proper in the Northern District of Florida pursuant to 28 U.S.C. § 1391(b)(1) and (2) as Defendant resides in the Northern District and a substantial part of the events occurred there (the adoption and implementation of the rule at issue)," Graham wrote. He also noted that most witnesses and relevant records are there.

Lawyers report pro bono-

$94+ million to legal aid

By Mark D. Killian
Associate Editor

Ninety-three-million dollars worth of time, and more than 31.25 million in direct funding.

That's what Florida lawyers contributed last year to assisting the poor with their legal problems, according to the first annual pro bono reports, filed with the Bar on lawyers' fees statements this summer.

Responding to the aspirational **goal of** 20 pro bono hours or a $350-per-lawyer contribution to legal aid set by the Supreme Court last **year,** Florida lawyers reported spending more than 620.000 hours on legal services to the poor. At the median billing rate of $150 per hour that equates to about $93 million, substantially augmenting the $11.3 million distributed to legal aid agencies through the interest, on lawyers' trust accounts program.

"This underscores what many of us already knew--that the lawyers of Florida are doing their part; that we are a public-spirited profession with a strong tradition of contributing to our communities," Bar President Bill Blews commented. "I know of no other profession with this level of commitment to helping others without charge."

Overwhelming Response

"it looks like an overwhelming response. The hundreds of thousands **of** hours and hundreds of thousands of dollars being devoted to this cause is enormously encouraging," added Lawrence G. Mathews, Jr., chair of the Bar's Standing Committee on **Pro** Bono Legal Services.

The figures were drawn from the annual dues statements of **almost** 23,000 lawyers who reported they had individually met the Supreme Court's voluntary goal of providing 20 hours of service or contributing $350 to a legal aid program. Another 8,100 said they met the goal through the provision of other services or through collective services by their law firms.

The court adopted the standard last year, and also called on each circuit to devise localized plans to provide more services to those in need.

"Florida has consistently been in the lead in this whole movement to get adequate legal services to poor people," commented Sandy D'Alemberte, the former ABA president whose petition with other lawyers three years **ago led** to the appointment of the Florida Bar/Bar Foundation commission that proposed the new pro bono plan. "Through the **leadership** shown by the Bar and the Florida **Bar** Foundation (the Interest on trust accounts) program) **has now spread** to every state except one, and now this idea is yielding additional hard-dollar resources, plus considerable numbers of direct hours between lawyers and poor clients. It makes me very proud of the profession, but particularly proud of the leadership that Florida has given."

Beyond those reporting donated hours or dollars, the remaining reports from the 49,821 dues statements received by *News* press deadline showed about 8,000 deferred from providing services, and **8,776 were unable to provide** pro bono services last **year.**

Those providing direct aid reported spending a total of slightly more than 623.000 hours on pro bono. Another 3,593 contributed a total of $1.25 million to **legal** aid projects.

According to The Florida Bar's 1994 Economics and Law Office Management Survey, the median billable hour charged by those surveyed **was** $150 per hour. That works out to more than $93 million worth of pro bono legal services.

More Than Ever

"That's more than the total amount of legal services funding coming into Florida from government sources." said Kent R. Spuhler, director of the Bar's voluntary attorney participation program.

Spuhler said the numbers show the amount of lawyers who reported doing pro bono work **was** much greater than ever reported in the past by organized legal aid providers.

'We got probably over 50 percent participation of those who could conceivably participate." Spuhler said. "For one year out, that's pretty positive."

"There has always been a sense that Florida lawyers have been willing to give of their time in the pro bono area and there has never been a mechanism to quantify it," Mathews said. "As for the court, and the people who spoke to the court who did not know the level of participation, this has to send a terrific positive signal that the vast majority of Florida lawyers participated."

Mathews, however, warned that because of the way the pro bono reporting questions were asked on the fee statements, there were some glitches in the accuracy of the reporting.

Mathews said some members re**sponded** to more than one category and because of the **way** the numbers were entered into the Bar's computer, it is unknown how many lawyers failed to fill out the reporting form.

Spuhler said the numbers should be viewed in broad terms. 'You can't manipulate them individually too much," he said.

Addressing Glitches

The first three pro bono questions on the form **asked** lawyers whether they personally provided the service, provided service collectively through their law firm, **or** donated to a legal aid agency.

The fourth question allowed lawyers who did not fit the first three categories to detail how in some special manner they met their pro bono **goals.**

The last two questions on the form were for lawyers who did not provide services **or** who could not because they are retired or inactive, or are judges or otherwise in public-sector jobs where outside practice is prohibited.

Bar officials said some who answered "yes" to the first question also **unnecessarily** detailed how they provided service within the space provided with the fourth question. The form also failed to capture how many of those whose service was deferred or who were unable to provide services may have contributed money to **a** legal **aid** program.

"We recognize that the form was a lit-

tle bit difficu t to manage. so some of the reporting numbers don't give a true picture of what. is going on," Spuhler said. "With al. the 'yes' and 'no' boxes it was easy for some attorneys to get lost. For example, some said were unable to provide services, yet said they met the goal."

Spuhler also said in some cases where a law firm filed a collective satisfaction plan, the attorneys who did the work reported they met the goal, but other lawyers in the firm failed to understand that. they complied through the collective satisfaction plan.

Mathews said the pro bono committee will study ways to make the form clearer next year, and will submit some recommendations to tne court.

Circuit Responses

The pro bono committee has broken the reporting numbers down hy circuit to determine which circuits have low participation rates, Spuhler said, sa the panel can work with the various circuit committee to encourage greater participation.

For example. Spuhler said, if a circuit has a high number of lawyers who said they were unable to participate, that may be due to a lack of knowledge of the programs available to help lawyers meet the goal.

Spuhler also said the committee is still trying to sort out those who did not report.

"The numbers we have are the breakdown of the reports made," he said. 'We are still working at getting out of the computer the number of those who did not report at all."

Spuhler said he thinks the vast majority of those who did not report either overlooked the reporting form, didn't understand what it was, or didn't think they needed to report because they were part of a collective satisfaction plan.

"My sense is that there are probably a number who didn't report out of direct protest," Spuhler said.

Attorney Thomas Rowe Schwan in June filed suit against Chief Justice Stephen H. Grimes challenging the legaiity of the pro bono plan and reporting requirement.

The Board of Governors supported setting a voluntary pro bono goal, but argued against the reporting requirement adopted by the court.

In response to the Schwan suit, the court said it would not sanction lawyers for failing to report until the suit is resolved. The suit is pending in the U.S. District Court for the Northern District of Florida.

Foundation to intervene in pro bono plan challenge

■ The Florida Bar foundation is seeking to protect its $1.8 million investment in the aspirational pro bono plan.

By Mark D. Killian
Associate Editor

The Florida Bar Foundation has voted to intervene in a federal court challenge to the Supreme Court's voluntary attorney pro bono plan

Attorney Thomas Rowe Schwarz has filed suit against Supreme Court Chief Justice Stephen H. Grimes as chief administrative officer of the court. Schwarz said the pro bono plan forces participation in a charity chosen by the court and its mandatory reporting provision could hold lawyers up to ridicule.

Meeting in Orlando **September 23.** the Foundation Board of Directors voted to file a motion to intervene with the U.S. District Court for the Northern District of Florida.

"The Foundation believes it has invested a tremendous amount of time and money to come up with the rule now adopted by the Supreme Court which we feel very strongly about defending:' said Miami attorney Hilarie Bass, president of the Foundation

Foundation Role

The Foundation initiated and funded The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent, which came up with the recommendations that eventually became the court's pro bono plan,

The plan sets an aspirational goal for each attorney to provide 20 hours annually of service to indigents, or a $350 donation to a legal aid office. It also dire& each circuit to draw up a plan to help local lawyers meet that goal. While the standard is voluntary, the **court also** ordered lawyers to annually report whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline, but not reporting is, under the court-ap proved rules.

Lawyers' first reports, tabulated last month, recorded more than 620,000 pro bono hours and $1.25 million in legal aid contributions.

In his suit, Schwarz said the pro bono rule "subjecb plaintiff to public and professional contumely. and further subjects him to threat nf license discipline and deprivation of property unless he provides private charity as selected by the Florida Supreme Court. invading his privacy by requiring publication of his private papers and activities."

Bass said the Foundation board believes the pro bono plan meets constitutional muster and that the reporting requirement is an important component of the plan.

"There are some initial results regarding the numher of pro bono cases that lawyers have handled in the past year which would indicate that something in the rule has worked very effectively," Bass said.

After the suit was filed, Chief Justice Grimes said the court unanimously agreed the Bar should not initiate disciplinary procedures against lawyers who didn't report on this year's dues statement whether they complied with the voluntary pro bono standard, pending the outcome of the suit.

Bass said the Supreme Court did not formally requeat the Foundation to get involved in the suit and it was the Foundation board which made the decision to act. Bass said she will appoint a sub committee to look into retaining counsel to represent the Foundation.

"Clearly the sentiment of the board is that we would like to seek pro bono counsel." Bass said.

Bass said another reason for the board ta act is to protect the Foundation's investment in the pro bono plan.

Since 1990, when then Chief Justice Raymond Ehrlich asked the Bar/Bar Foundation Joint Commission to study pro bono issues, the Foundation has spent nearly $1.8 million, according to Jane Curran, the Foundation's executive director.

That figure includes $93,295 in direct costs for support of the commission; $20,900 for studies on the legal needs of low and moderate income persons in Florida; $831,300 in grants for implementation of the court's voluntary attorney pro bono plan; a grant of $231,200 to the Bat for professional staff support and out-of-pocket costs for implementing the plan; and the awarding oi another $600,000 in grants to 21 legal eervim programs as seed money to assist Florida's judicial circuits in implementing the pro bono plan.

"One of our significant concerns is to ensure that that money wan well spent," Bass said. "If it turns out the rule is significantly modified or revised or--in the worst case—overturned, that that investment will go for naught."

In his suit, Schwarz also argues the pro bono rule violates several provisions of the Florida Constitution, including:

- Article I, Section 9 by depriving Bar licensees of property and liberty without due process.
- Article I. Sections 23 and 12 by requiring publicat.on of lawyers' private papers and private charitable work.
- Article I, Section 18 for imposing administrative penaltics not provided for hv law.

'The Foundation believes it has invested a tremendous amount of time and money to come up with the rule now adopted by **the Supreme Court, which** we **feel** very strongly about **defending.'**

— Hilarie Bass, Foundation President

- Article I, Section 9 for compelling lawyers to give evidence against themselves in what amounts to a quasi-criminal proceeding.
- Article VII, Section 2, by creating an unequal ad. valorem tax on lawyer's licenses.

Schwarz also said the rule violates several facets of the U.S. Constitution--the equal protection clause of the 14th Amendment, the right to be secure in parson and papers guaranteed by the Fourth Amendment, and depriving lawyers of property without clue process and their right against self-incrimination protected by the Fifth Amendment.

Schwarz objects to Foundation involvement in pro bano suit

By Mark D. Killian
Associate Eattor

The Lauderhil awyer who has challenged the Supreme Court's voluntary pro bono plan has filed an objection to a motion by the Florida Bar Foundation to Intervene in the suit.

Attorney Thomas Rowe Schwarz has filed suit against Supreme Court Chief Justice Stephen H Grimes a3 chief administrative officer of the court. Schwarz, in the federal suit, said the pro bono plan forces participation in a charity chosen by the court and the mandatory reporting provision could hold awyers up to ridicule. *TCA 94-40422-WS*

In September. the Foundation Board of Directors voted to file a motion to intervene with the U.S District Court for the Northern District of Florida The court has yet to consider the motion.

The Foundation contends it invested a tremendous amount of time and money to come up with the rule adopted by the Supreme Court and has an interest in defending it.

The Foundation initiated and funded The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent, which came up with the recommendations that eventually became the court's pro bono plan. Since 1990, the Foundation has spent nearly $1.8 million on the commission's wnrk, according to Jane Curran, the Foundation's executive director.

In his motion objecting to the Foundation's intervention, Schwarz said his action 'was brought against the state for the deprivation of his federal constitutional rights.

"The movant for ntervention is not only widely distanced from that deprivation but, in fact has absolutely no connection with the same," Schwarz said.

Schwarz said the use of IOTA funds for the pro bono committee "is entirely irrelevant to any issue in this cause. This action does not involve IOTA."

"Tie procedures and methods by Which the Florida Supreme Court adopted the Rules in question is neither raised nor insinuated by the plaintiff and appears, for the first tine. in the movant's proposed pleading in paragraphs 2 and 3 as a red herring so RR to inject the legal philosophical principal of legislative immunity," Schwarz said.

Miami attorney Hilarie Bass. Foundation president, said Randall Berg of the Florida Justice nstitute and former Florida Supreme Court Justice Alan Sundberg have agreed to represent the Foundation pro bono in tne action.

Bass also said if the Foundation's motion to Intervene is denied, the Foundation at least Would seek to file an amicus to the proceedings.

The plan sets an aspirational goal for each attorney to provide 20 hours annually of service to indigents, or a $350 donation to a legal aid office. It also directs each circuit to draw up a plan to help local lawyers meet that goal. While the standard is voluntary, the court also ordered lawyers to annually report whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline, but not reporting is. under the court-approved rules.

In his suit, Schwarz said the pro bono rule "subjects plaintiff to public and professional contumely, and further subjects him to threat of license discipline and deprivation of property unless he provides private charity as selected by the Florida Supreme Court. invading his privacy by requiring publication of his private papers and activities."

Bass said the Foundation board believes the pro bono plan meets constitutional muster and that the reporting requirement is an important component of the plan.

"Apart from the false, inaccurate. and misleading factual premises upon which the movant seeks to intervene, its proposed answer and affirmative defenses show the intent not to join in plaintiff's pending action but, instead, to fashion its own, new cause," Schwarz said.

After the suit was filed, Florida Supreme Court Chief Justice Grimes announced the court unanimously agreed the Bar should not initiate disciplinary procedures against lawyers who don't report pm bono activities on this year's dues statement, pending the outcome of the suit.

The Supreme Court did not formally request the Foundation to get involved in the suit and it was the Foundation hoard Which made the decision to act.

In his suit, Schwarz argues the pro bono rule violates several provisions of the Florida Constitution, including:

- Article I. Section 9 by depriving Bar licensees of property and liberty without due process.
- Article I. Sections 23 and 12 by requiring publication of lawyers' private papers and private charitable work
- Article I, Section 18 for imposing administrative penalties not provided for by law.
- Article I, Section 9 for compelling lawyers to give evidence against themselves in what amounts to a quasi-criminal proceeding.
- Article VII, Section 2, by creating an unequal ad valorem tax on lawyer's licenses.

Schwarz also said the rule violates several facet3 of the U.S. Constitution—the equal protection clause of the 14th Amendment, the right to be secure in person and papers guaranteed by the Fourth Amendment, and depriving lawyers of property Without due process and their right against self-incrimination protected by the Fifth Amendment.

Foundation allowed to intervene in court pro bono plan challenge

The Florida Bar Foundation has been allowed to intervene in a case challenging the pro bono plan and its reporting requirement in Florida Bar rules.

Ft. Lauderdale attorney Thomas Rowe Schwan last year filed the case, naming Florida Supreme Court Chief Justice Stephen H. Grimes as the defendant. Schwarz challenged the constitutionality of the plan that sets a voluntary goal for Florida lawyers to provide 20 hours of service annually for the poor, or donate $350 to a legal aid program.

While that standard is voluntary, lawyers are required to report on the Bar annual fee form whether they met the goal. Shortly after Schwan filed his case, the Supreme Court suspended enforcement of the reporting requirement, and the suspension remains in effect this year.

Assistant Attorney General Charlie McCoy, who is representing Grimes, said the Foundation will essentially be a co-defendant with the chief justice. The Foundation sought to intervene because it funded a joint commission appointed by it and The Florida Bar that drafted the pro bono plan.

On another part of the case, McCoy said the 11th U.S. Circuit Court of Appeals turned down Schwarz's petition for a writ of prohibition seeking to have all federal judges and magistrates in the Northern District of Florida disqualified because they are members of The Florida Bar.

Northern District Judge William Stafford, who is presiding over the case, earlier turned town Schwarz's request that the judge remove himself fmm the case because he belongs to the Bar.

Schwarz argued that judges who are Bar members have a conflict of interest, especially since judges are exempted from the plan while lawyers are not.

McCoy said the two sides stipulated to the facts of the case last December, and the next step is to file a joint report this month. That will lay out the schedule for proceeding with the case.

Timetable set for concluding pro bono rule challenge

By Mark D. Killian
Associate Editor

A federal magistrate has approved a timetable to govern the proceedings in a challenge to the Florida Supreme Court's voluntary attorney pro bono plan.

Attorney Thomas Rowe Schwarz filed suit last year against Chief Justice Stephen H. Grimes challenging the constitutionality of the plan and reporting requirement. Schwarz said the pro bono plan forces participation in a charity chosen by the court, and its mandatory reporting provision could result in lawyers being held up for ridicule.

Acting August 10, U.S. Northern District Magistrate Judge William C. Sherrill, Jr., adopted a joint report that gives the chief justice and the Florida Bar Foundation, which intervened in the case, until September 5 to file a motion for summary judgment. The order then allows Schwarz until October 16 to file a response containing arguments as to whether discovery is needed. *Schwarz v. Grimes*, TCA 94-40422.

In his suit, Schwarz said the pro bono rule "subjects plaintiff to public and professional contumely and further subjects him to threat of license discipline and deprivation of property unless he provides private charity as selected by the Florida Supreme Court, invading his private papers and set vities."

After the suit was filed, the court unanimously agreed the Bar should not initiate disciplinary procedures against lawyers who do not report on their Bar fees statements whether they complied with the voluntary pro bono standard.

During the scheduling conference, the Foundation and the Florida Attorney General's Office, which represents Grimes, contended the case required no discovery because the few facts needed to decide the case are not in dispute.

Schwarz, however, argued that discovery may be needed—particularly on his equal protection claim—but he will be unable to determine if discovery is necessary until he sees the defendant's response.

"A defensive motion for summary judgment would inform plaintiff as to his discovery needs, and will afford him an opportunity to make that argument to the court," Sherrill said. "It will also clarify the dispute for the court."

Sherrill said if after reviewing the motion and responses it appears Schwarz cannot fairly respond to the motion without discovery, then discovery will be permitted by both sides.

The plan sets an aspirational goal for each attorney to provide 20 hours of pro bono services to indigents, or a $350 donation to a legal aid office. It also directs each circuit to draw up a plan to help local lawyers meet that goal. While the standard is voluntary, the court also ordered lawyers to annually report whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline, but not reporting is, under the court-approved rule.

In his suit, Schwarz argues that the pro bono rule violates several provisions of the Florida Constitution, including:

- Article I, Section 9 by depriving Bar licensees of property and liberty without due process;
- Article 1, Sections 23 and 12 by requiring publication of lawyers' private papers and private charitable work;
- Article I, Section 18 for imposing administrative penalties not provided for by law;
- Article I, Section 9 for compelling lawyers to give evidence against themselves in what amounts to a quasi-criminal proceedings; and
- Article VII, Section 2 by creating an unequal ad valorem tax on lawyer's licences.

Schwarz also said the rule violates several parts of the U.S. Constitution—the equal protection clause of the 14th Amendment, the right to be secure in person and papers guaranteed by the Fourth Amendment, and depriving lawyers of property without due process and their right against self-incrimination protected by the Fifth Amendment.

After Schwarz files his response to the motion for summary judgment, the court gave Crimea and the Foundation until October 31 to file a reply and then will allow Schwarz until November 11 to file a response to the reply.

Sherrill said the motion for summary judgment will be taken under advisement on November 12 and a report and recommendation on the motion will be made to Chief Judge William Stafford on or after that date.

The Foundation intervened in the case to protect its investment in the pro bono plan. The Foundation initiated and funded The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent. Since 1980, when then-Chief Justice Raymond Ehrlich asked the Bar/Bar Foundation Joint Commission to study pro bono issues, the Foundation said it has has spent nearly $1.8 million on the plan.

That figure includes $93,295 in direct coats for support of the commission; $20,000 for studies on the legal needs of low- and moderate-income people in Florida; $831,200 in grants for implementation of the pro bono plan, a grant of $231,200 to the Bar for professional staff support and out-of-pocket costs for implementing the plan, and the awarding of another $600,000 in grants to 21 legal service programs as need money to assist Florida's judicial circuits in implementing the plan.

> 'A defensive motion for summary judgment would inform plaintiff as to his discovery needs, and will afford him an opportunity to make that argument to the court:
>
> — *William C. Sherrill, Jr., Magistrate Judge*

In 1993-1994, the first full Bar year of the pro bono plan, Florida lawyers reported performing more than 620,000 pro bono hours and donating $12.5 million in legal aid contributions. Statistics for the 1994-95 Bar year are still being tabulated.

September 15, 1995 • Vol. 22. No. 19

Pro bono reporting rule under scrutiny

■ Saying Bar members resent the regulation, the Bar president is initiating a review of the pro bono reporting rule.

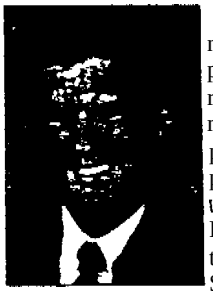
By Gary Blankenship
Associate Editor

Florida **Bar President** John DeVault has asked the Pro Bono Legal Service Committee to consider asking the Board of' Governors to recommend to the Supreme Court. that it repeal the mandatory reporting section of the pro bono plan.

A rule change eliminating the reporting requirement of the Bar's pro bono rule could be considered by the board as soon as its September 22-23 meeting in Ponte Vedra Beach.

The pro bono committee was scheduled to meet during the Bar's September 6-8 General Meeting of Committees and Sections, after this *News* went to press.

"I've asked the chair of the committee, Larry Mathews, if I could make a brief presentation to the committee and ask them to consider if they would ask the board to ask the Supreme Court to repeal the mandatory reporting provision of the reportmg plan," DeVault said.


DEVAULT

The Board of Governors originally opposed the mandatory reporting requirement, which was proposed as part of the pro bono plan drawn up by a joint Bar-Florida Bar Foundation commission. The Supreme Court, in a split decision, approved the mandatory reporting rule. Another major part of the plan — the aspirational goal that lawyers provide 20 hours annually of free legal services to the indigen: or donate $350 to a legal aid organization — is voluntary

Bar members must, though, report whether they met the goal on the Bar's annual fee statement.

After two years' experience with the plan, DeVault said it's time to revisit the reporting rule.

"The Supreme Court opinion, which adopted the pro bono plan, envisioned in the plan a method to initially evaluate the effectiveness of this plan," DeVault said. "We agree with the commission that in order to evaluate the effectiveness of local [circuit] plans [called for in the rule] a reporting scheme is necessary.

"I believe we now have that information; it's well documented, and I think there's no need to continue, at least on an annual basis, to require members of The Florida Bar to do that reporting."

He added, "I think the members would be extremely supportive, not only of dropping it, but I think they would be glad to voluntarily comply when the information is next sought by the board or by the court."

The Bar president said he found widespread dissatisfaction with the reporting mandate among members during his election campaign. That unhappiness was reflected again in this year's Bar membership attitude survey, he noted.

"This requirement seemed to be offensive to more of our members than any other regulation that has been put in place," DeVault said. "I don't think it's because members recent doing pro bono work; most of them are happy to do that. They just didn't like being mandated to do the reporting."

He emphasized that revisiting the reporting requirement does not mean the Bar is backing away from supporting the pro bono plan or encouraging members to do pm bono work. He added that the heart of the plan-and a model for other pm bono efforts around the country—is the drawing up of local circuit plans geared to meet the special needs of each locality.

Pro Bono Vital

"Particularly in these difficult financed times where the federal government is cutting back on funding, we want to do everything we can to encourage our members to give their time and money," DeVault said. 'We need to do that in a manner that is encouraging rather than mandatory in nature."

Board of Governors action could come as soon as the group's September 22-23 meeting in Ponte Vedra Beach, the president said. "I would hope that we could get a report from the pm bono committee and then if possible take it to the appropriate board committees and see if we can get it presented to the board as early as the September meeting," he said.

The mandatory reporting rule has been controversial since it was proposed by the Bar-Bar Foundation commission, which had rejected another proposal for mandatory pro bono.

Opponents of the reporting requirement argued it in effect made the plan mandatory pm bono since lawyers could he held up to ridicule if they reported they didn't meet the voluntary goals. They air, claimed the rule was an imposition on Bar members. and an insult to the majority of lawyers who already do pro bono work.

Supporters of the rule have argued that it's necessary to measure the effectiveness of the program and help the circuit committees that oversee the local plans make the maximum use of available resources

In 1994, the Supreme Court suspended enforcement of the rule (members are required to report, but there will be no enforcement) following a lawsuit challenging the reporting mandate. The suit was filed by Ft. Lauderdale attorney Thomas Schwarz.

On August 10, U.S. Northern District Magistrate Judge William C. Sherill, Jr., set September 15 as the deadline for the Bar Foundation and Chief Justice Stephen H. Grimes to file a motion for summary judgment in the suit. (See story in the September 1 Bar *News*.) Schwarz then has until October 16 to file a response and outline what discovery he thinks is needed. The Foundation intervened in the case to protect its investment in the pro bono plan.

The defendants will have until October 31 to respond to Schwarz' brief, and Schwarz will have until November 11 to reply to that filing. Sherill said the summary judgment motion will be taken under advisement on November 10 and a report and recommendation made to Judge William Stafford on or after that date.

Schwarz has argued the plan violates several provisions of the state and federal constitutions, including depriving lawyers of property without due process and the right against self-incrimination. The plan, he said, requires publication of lawyers' private papers, imposes administrative penalties not provided for by law and deprives lawyers of liberty and property without due process.

In 1993-94, the first full Bar year with the plan, Florida lawyers reported performing more than 620,000 pro bono hours and donating $1.25 million to legal aid offices. Statistics for the 1994-95 Bar year are still being tabulated.

DeVault seeks repeal or pro bono reporting rule

■ Lively debate marks a commit tee's considerat ion of the proposal tc repeal mandatory reporting o' pro bono work.

By Gary B'ankenship
Associate Editor

A committee nas tabled Florida Bar President John DeVault's request to recommend a repeal of the mandatory pro bono reporting rule. But the panel promised to make a recommendation by the end of the year.

The Supreme Court's Pro Bono Legal Services Committee heard from DeVault September 7 when it met during the Bar's General Meeting of Committees and Sections. Former Bar and ABA President Wm. Reece Smith. along with representatives from several legal aid programs,, also attended to oppose the rule change.

The committee voted 6-4 to table the issue saying they needed more information and that they wanted to hear from circuit pro bono committees, legal aid providers, Bar members and others before making a recommendation.

Members then unanimouslv voted to refer the issue to a subcommittee with instructions to seek input from the various groups and report hack by the end of the year

Board Vote Delayed

DeVault, after the vote, said he was disappointed at the delay because it would mean the Board of Governors would not take up the issue at its September 22-23 meeting. But he also said he welcomed the chance for Bar members who oppose the mandatory reporting regulation to make their views known to the pro bono panel.

Besides the reporting issue, which dominated the meeting, members also received preliminary numbers on pro bono work reported by Bar members for the 1994-95 fiscal year. Kent Spuhler, who directs the pro bono program, said the number9 are lower but that may mean only that **lawyers** more accurately filled out the reporting form.

The Supreme Court-approved plan has just finished its second full year. The plan sets an aspirational goal for Bar members to perform 20 hours annuallv of pro bono work for the indigent, or contribute $350 to a legal aid office

While the goal is voluntary, the court required lawyers to report annually on the Bar fee statement whether they met it. The mandatory reporting requirement was recommended by a joint Bar-Bar Foundation commission which drew up the plan, but opposed by the Bar Board of Governors which wanted voluntary reporting.

The commission was appointed after a group of Florida lawyers petitioned the court to enact a pro bono plan. Those lawyers noted an English common law precedent hinding in Florida could be read to require attorney9 to accept cases from the indigent.

Lawyers Unhappy

"The great majority of our members, those who support the giving of pro bono services and those who do not. resent the requirement to report their service," DeVault told the pro bono committee. 'We've had two pro bono reporting cycles and I think we've demonstrated Florida lawyers do an outstanding job of providing pro bono services."

He added: "I'm of the opinion if we eliminate the mandatory nature of the reportina we will increase the amount of pro bo: service."

The president gave a couple reasons for his desire to change the rule. DeVault said lawyers he encountered during his presidential campaign overwhelmingly complained about being ordered to report their pro bono work. The resentment is continuing, he added, noting he gave a speech to the Hillsborough County Bar Association just before the pro bono committee meeting and eot a spontaneous ovation when he called for changing the reporting rule.

A second reason, he said, is the Bar faces tremendous challenges from such things as efforts in Congress to slash funding to legal services and attempts in Florida to have the legislature take oversight of the Bar from the Supreme Court.

A unified Bar is needed to address those serious issues, DeVault said. hut "the main thing that fractionalizes our Bar more than anything else is having to do mandatory reporting."

Bar President John DeVault, center, talks over the reporting rule with First **DCA Judge William VanNortwick, left, and former Bar and ABA President Wm. Reece Smith.**

He also argued that if voluntary reporting didn't work, the court could always return to mandatory reporting

Input Needed

Cathy Tucker. pro bono coordinator with the Legal Aid Society of Orange County, said the pro bono rule and reporting requirement has produced a positive impact on the amount of pro bono work in Orange County. She said other coordinators should have a chance to report their experiences.

Other local pro bono coordinators expressed similar sentiments later in the meeting.

Committee member Sharon Langer proposed tabling the issue. She noted several committee members were absent and many committee members were at their first meeting and needed more information before making a major change to the pro bono program.

Her motion to table passed six to four, hut committee members continued to discuss the issue

First District Court of Appeal Judge and committee member William VanNortwick, who chaired the joint commission that drer up the plan, suggested referring DeVault's proposal to a subcommittee chaired by Fifth DCA Judge Emerson Thompson. He said that panel has reviewed all other proposed changes to the plan.

"It seems that's a responsible way to move it forward," VanNortwick said. "I'm just trying to move it along."

But 18th Circuit Judge and committee member Thomas Freeman said the delay and study weren't needed.

"If we wan: lawyer support [for the pro bono plan we have to accommodate the majority of the lawyers," Freeman said. 'We can': be so focused on our mission that we leave the lawyers behind.

"When he [DeVault] ran for president, the single thing the lawyers told him was 'Look, we don't like this mandatory reportrng or, how many pro bono hours we did,'" he added.

He warned continuing mandatory reporting could erode lawyer support for the pro bono program.

Committee member William Douglas Marsh said the mandatory reporting requirement has generated massive opposrtion in northwest Florida. "I will tell you. as a former chair of a circuit committee they do not like mandatory reporting, that it is an impediment to getting some to help."

But other committee members said more study is needed.

"The only thing I hear here is people want an informed discussion of the issues," committee member Steve Hanlon said.

"I supported the motion to table because I think it is clearly inappropriate to vote on this today," committee member Hamilton Cooke noted I'd like to know the effect of mandatory reporting, I want to hear from the [legal aid] coordinators. I'm trying to keep an open mind of where I would come down."

Smith Objects

Smith said he decided to attend the committee meeting after hearing DeVault at the Hillsborough bar meeting. He warned that the Bar dropping the mandatory reporting requirement would he seen as a retreat from supporting pro bono work.

And, he cautioned, combined with congressional efforts to cut support for the Legal Services Corporation, it would be seen as a broad retreat from providing legal assistance to the poor.

"I think it is an obligation for all of us in the legal profession to provide legal services to the poor," Smith said. "I have difficulty understanding why lawyers resist reporting that which they should do . . . . We need to make them understand why this is part of our obligation."

Committee member Jim Baxter, who also served on the joint commission which drafted the pro bono plan, said many lawyer-a don't understand the rationale for the reporting requirement.

Many commission members, he noted, wanted a mandatory pro bono program, but instead other members came up with an alternative that included mandatory reporting.

"We wanted to get accountability, we wanted to avoid setting up a new bureaucracy in Tallahassee and we wanted to make sure it was not mandatory [pro bono]," he said. "That is the reason you have this structure today.

"If you're going to pull a major piece of this program out, I would hope the proponents of that will come forward with an alternative that will serve that function."

If no alternative is provided, Barter predicted the pro bono program would eventually fail.

Court Jurisdiction

He also noted that the Supreme Court has retained jurisdiction over and kept open the pro bono case, and expects reports on how the plan is functioning.

"We have to be very careful before we start dismantling this program or we're going to find ourselves before the court in a very uncomfortable position," Baxter warned.

"The development of mandatory reporting was in effect a mmpmmiae between a fairly substantial group who were in favor of mandatory pm bono and those of us who were not," VanNortwick said. "It wan not a stalking horse [for mandatory pm bono], but it was a good faith attempt to get information we thought was important"

And despite the initial criticism and resistance to mandatory reporting, VanNortwick said he believes opposition is waning, noting, "I think this is gradually being accepted as part of our culture."

Board of Governors and committee member John Thornton asked what the effect would be of switching to voluntary reporting. Spuhler replied that Texas adopted a voluntary reporting pro bono program and that effort has been less effective.

Numbers Down

Spuhler also passed out preliminary figures for pro bono work and donations for the 1994-95 Bar year. Although a few reports have yet to be tabulated, he noted the reported pro bono houre worked and money donated have drastically declined from the previous year.

But, he added, that doesn't mean fewer hours were donated or leas money given. Spuhler noted there was great confusion about what constituted pro bono work for the poor in the initial year, as well as uncertainty about how to correctly fill out the reporting form.

This year, he said, the form is better and clearer and lawyers are more familiar with the program and how it works.

Spuhler said that in 1993-94, lawyers reported giving $1.5 million to legal aid programs under the plan, but various legal services offices reported receiving only $750,000.

"Not all valid contributions goes to legal aid programs," Spuhler added. "The financial reporting this year looks like it is much closer to what the providers received . . ."

'This year is probably the more accurata year. Last year was a shakeout year and people were probably not accurately reporting. Probably this year is the baseline year."

With' some reports still to be added, Spuhler said lawyers reported giving about $766.000 to legal aid programs, as oppoaed to $1.5 million last year. In time, lawyers reported giving 507,600 hours, compared to about 800,000 last year.

Committee Chair Larry Mathews said the panel will try to make a recommendation on DeVault's proposal as soon as the subcommittee makes its recommendation. If necessary, he said the committee would meet before its next scheduled gathering January 12 during the Bar's Midyear Meeting.

Bar members who wish to make their feelings known about the mandatory rule should write to Bar President John DeVault, c/o The Florida Bar, 650 Apalachee Parkway, Tallahassee 32399-2300.

Foundation wants pro bono suit quashed

By Mark D. Killian
Associate Editor

Chief Justice Stephen H. Grimes and the Florida Bar Foundation recently entered a motion for summary judgment in the challenge to the Florida Supreme Court's voluntary attorney pro bono plan.

Attorney Thomas Rowe Schwarz filed suit last year in the Northern District of Florida against Grimes challenging the legality and constitutionality of the pro bono plan and reporting requirements. *Schwarz v. Grimes*, TCA 94-40422.

Schwarz said the pro bono plan forces participation in a charity chosen by the court, and that its mandatory reporting provision could hold lawyers up for ridicule.

The Foundation and the Florida Attorney Generals Office, which represents Grimes, said the complaint should be dismissed for lack of subject matter jurisdiction and, assuming the court does have jurisdiction, "there is no merit to the plaintiff's claims."

The Foundation intervened in the case to protect its investment in the pro bono plan. The Foundation initiated and funded The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent which drafted rules for the pro bono plan.

In his suit, Schwarz said the pro bono rule "subjects plaintiff to public and professional contumely, and further subjects him to threat of license discipline and deprivation of property unless he provides private charity as selected by the Florida Supreme Court, invading his private papers and activities."

The plan set: an aspirational goal for each attorney to provide 20 hours annually of legal service to indigents, or a $350 donation to a legal aid office. It also directs each circuit to draw up a plan to help local lawyers meet that goal. While the standard is voluntary, the court also ordered lawyers to annually report whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline, but not reporting is, under the rule.

After the suit was filed, the court directed the Bar not to initiate disciplinary procedures against lawyers for failure to report on the 1995 fees statement.

In accordance with a Joint report adopted by Magistrate Judge William C. Sherrill, Jr., in August, Schwarz has until October 16 to file a response and arguments on whether discovery is needed.

Parker D. Thomson, special assistant attorney general, and Assistant Attorney General Charlie McCoy are representing Grimes and Randall C. Berg, Jr., Peter M. Siegel and Alan Sundberg are counsel for the Foundation.

The defendants said the voluntary and aspirational goals of the pro bono rule do not invade Schwarz' First Amendment right of nonassociation. Schwarz attacked the goals of the pro bono rule on their face, they said, and to do that he must show that under no circumstances can the rule be constitutional.

"Given the voluntary nature of the rule, that is a showing the plaintiff cannot make," the defendants said.

"While plaintiff alleges an impairment of his First Amendment rights, it is difficult to understand exactly how the pro bono rule impairs his rights to freedom of speech and freedom of association or forces him to convey a message that he does not wish to convey," the defendants said. "He is simply not required to do anything."

Since Florida Bar members have the "absolute legal right" to decline to provide any pro bono service or make any monetary donation, the rule does not facially compel an attorney to support or associate with groups serving the legal needs of the poor or any other group, the defendants said.

"Plaintiffs First Amendment claim is meritless," the defendants said.

The defendants also said the mandatory reporting of pro bono activities does not violate Schwarz' privacy rights.

Under Rule 4-6.1(d), an attorney must disclose how many hours (if any) of pro bono legal service were provided and how this was done; how much money was donated and to what agency; whether that attorney was unable to provide pro bono service; or whether that service was deferred. Those exempt from pro bono service must declare which exemption they claim.

Schwarz claims the disclosures violate his First Amendment right to privacy. The defendants, however, said the "recordkeeping requirements would seem to be an apt regulation of the legal profession."

"The pro bono rule addresses the 'free' functioning of Florida's court system; that is, the courts' anility to function fairly regardless of a civil litigant's wealth," the defendants said. "Not only are the courts, collectively, one of the most important governmental institutions; they are the most vulnerable to the perception—true or not—that justice is only for the rich."

The defendants said the reporting of pro bono service donations provides "important and useful" information to the Judiciary and Florida citizens. The reported information reveals the geographic distribution of pro bono service, and helps identify places where additional assistance is needed, the defendants said. The information also provides one means by which the general public can better evaluate lawyers and the accessibility of the court system, the defendants said.

The AG's office and the Foundation also said the reporting requirements could not be narrower and still have utility.

The defendants said the rule also respects attorney-client privilege by not requiring disclosure of individual clients who are represented pro bono. While recipients of monetary donations must be identified, the eligibility of such recipients is also left to "an attorney's good faith determination," they said.

"Moreover, plaintiff has never claimed the reporting requirements were broader than necessary to achieve their purpose," the defendants said. "He has always contested the mere existence of any reporting requirements."

The defendants said there is no evidence before the court that would sustain Schwarz' "conjecture of professional embarrassment through compliance with the rule."

The defendants also said "not even a penny" of Schwarz' property is taken by the pro bono rule.

"The taking claim must be rejected an very simple grounds," the defendants said. "Nothing belonging to plaintiff is taken."

The defendants also said because under no circumstances can the plaintiff face possible criminal charges for reporting that he performed, or did not perform, pro bono activities, Schwarz' Fifth Amendment claim is "totally devoid of merit."

"The pro bono rule does not require an attorney to open any private records to the government or the public," the defendants said. "It requires that a limited amount of information be distilled from private records and tersely reported in the annual dues statement."

While the reporting process may raise a question about the government's ability to require disclosure of such information, the defendants said, the pro bono rule simply does not implicate the Fourth Amendment right to be secure in one's person and papers, against unreasonable searches and seizures.

lawyers report half a million pro bono hours

By Mark D. Killian
Associate Editor

Florida lawyers reported contributing more than a half million hours and more than $1376.)00 in direct funding to assist the poor with their legal problems, according to the second annual pro bono reports filed with the Bar on lawyers' fees statements this summer.

Responding to the aspirational goal of 20 pm bono hours or $350-per-lawyer contribution to egal aid set by the Supreme Court two years ago, Florida lawyers re-p&d spending 561,351 hours on legal services to the poor. At the median billable rate of $150 per hour, that equates to more than $84 million worth of time donated to the poor.

Those numbers, however, are down significantly from last year, when Bar members reported more than 620,000 hours and more than $1.5 million in direct funding.

Better Numbers

But that doesn't necessarily mean that fewer hours were donated or less money was given, according to Bar President John DeVault. He said there was a great deal of confusion about what qualified as pro bono under the court's plan in its initial year, as well a3 uncertainty about how to correctly fill out the reporting form.

"I don't think it indicates a real decline in participation," DeVault said. "I think it is probably a more accurate reflection of what our members are doing in terms of the way pro bono is defined in plan."

Kent Spunler, director of the Bar's efforts with the plan, said last year was a "shakeout" vear because the reporting requirement was initiated in the middle of a Bar year and lawyers were asked to estimate back what pro bono service they had provided. He said before the pro bono rule waa enacted there was no reason for lawyers to keep track of their pro bono hours.

Spuhler agreed this year's numbers give a more accurate picture of the amount of pro bono work being performed that qualifies under the rule.

"Standing alone, I think these numbers are very impressive," Spuhler said.

The figures were drawn from the annual fees statements of 22,283 lawyers who reported they had individually met the Supreme Court's voluntary goals. Another 3,608 said they me: the goal thmugh the provision of other services or through collective services by their law firms. Spuhler said approximately 20,000 hours were reported through the collective satisfaction provision.

Beyond those reporting donated hours or dollars, the remaining reports received by News press deadline showed that 11,832 said they were unable to provide pro bono services last year and another 7,845 said they were deferred from providing services.

'Tremendous Participation'

DeVault said the numbers show that more than half of Florida lawyers are either providing direct assistance or contributing to a legal aid organization.

"I think it shows tremendous participation by our lawyers," DeVault said.

Spuhler said the clearest example that this year's number are more accurate then last year's is a comparison of the direct funding contributions reported on the fee statements and the amount of contributions IOTA-funded legal aid providers report receiving.

In 1994-95. lawyers reported giving $876,837 to legal aid programs under me plan, while IOTA grantees reported receiving $879.513 The first year of the plan, lawyers reported giving $1.5 million in direct funding, but the legal aid programs reported receiving only $750,000.

"That is why we think these numbers are more accurate," Spuhler said. "We knew last year there were contributions reported that we were not able to find within the system."

Spuhler said while not all valid contributions would be channeled to an IOTA funded program, "the vast majority of contributions would go to those providers."

Organized Services Up

While the bulk of pro bono hours are still being performed by lawyers on their own, Paul Doyle, the Florida Bar Foundation's director of legal assistance for the poor granta, said the Foundation's 40 legal aid to the poor grantees report the number of lawyers providing pro bono services through their programs increased between 1993-94 and 1994-95 by 37 percent.

According to the Foundation, 14,170 lawyers performed pm bono through a legal aid service last year. compared with i0.349 the year before. Pm bono lawyers working through the legal aid offices provided 140,990 hours in 1994-1995, up from 112.229 the year before, Doyle said.

"I think this overall demonstrates that the plan hat was adopted by the court is showing some real pro- and success and while there may be some substantial growth yet to be experienced, the early returns show there has already been substantial growth." Doyle said.

Doyle ala" said the increased number of lawyers providing services through the legal aid offices demonstrates that the $600,000 in Foundation grants two years ago to 21 legal service program as seed *money to assist judicial circuits in implementing* the pm bono plan has paid off.

Reporting Review

After two years of experience with the plan, DeVault has asked the Pm Bono Legal Services Committee to recommend to the Supreme Court that the mandatory reporting feature of the rule be repealed.

DeVault told the committee in September that the "great majority of our members" resent the requirement to report their service.

"We have had two pro bono reporting cycles and I think we have demonstrated Florida lawyers do an outstanding job of providing pro bono services," DeVault said.

He said since the plan has been in effect, *Bar members have reported more* than 1.2 million hours of pro bono service to the poor and made direct casn contributions to legal services programs totaling about $2.4 million.

"These reporting statistics confirm what we have long known, that our profession gives more of its time, energy and resources to helping others than any other in the world," DeVault said. Nevertheless, the mandatory nature of reporting remains a source of controversy and irritation among our members."

Since he first called for the end of mandatory pro bono reporting in September. DeVault said he has received "overwhelming support" for rhe move while visiting local bar associations

The people there tell me that they—and moat of the lawyer5 they know—do *pm bono work and feel it* is a professional obligation," DeVault said. "They just don't want somebody telling them they have to fill out the report."

DeVault said the pro bono information the Ear needs can be gathered through surveys or other voluntary methods of collecting information.

"I think we can get greater unity in the Bar and greater participation in the pro bono program by encouragement rather than mandates." he said.

The committee expects to *make* a recommendation by the end of the year.

Circuit Plans

As part of the plan, the court also called on each circuit to devise localized plans to provide more services to those in need.

Spuhler said the circuit committee has been successful in developing programs that are responsive to lawyers' needs and are encouraging attorneys to direct their pro bono sefvice toward priority needs.

He also said there has been a lot of interaction between circuit committees. A workshop for circuit committee leaden was held in June to allow the panels to shared what programs have work and which have not.

Spuhler said the committees are now in the process of submitting their second-vear reports, which should go further in identifying which programs are working well.

Court Challenge

Meanwhile, the pro bono plan is being challenged by attorney Thomas Rowe Schwartz, who tiled suit last year in the Northern District of Florida against Chief Justice Stephen Grimes challenging the legality and constitutionality of the pro bono plan and reporting requirement.

Schwarz said the pro bono plan forces participation in a charitv chosen by the court. and that its mandatory reporting provision could hold lawyers up for ridicule.

These reporting statistics confirm what we have long known, that our profession *gives more* of *its* time, energy and resources to helping others than any other in the world.'

— John A. DeVault III

Magistrate to recommend pro bono challenge be dismissed

By Mark D. Killian
Associate Editor

A federal magistrate in Tallahassee will recommend a challenge to the Florida Supreme Court's voluntary attorney pro bono plan be dismissed.

Saying he failed to see how the Northern District Court had jurisdiction, Magistrate Judge William C. Sherrill said at the close of a November 15 hearing he will recommend the defense's motion for summary judgment be granted.

Sherrill also said in his view the pro bono rule did not violate the plaintiff's due process and equal protection rights.

Sherrill's recommendation will go to Northern District Judge William Stafford, who will make the final decision. *Schwarz v. Grimes*, TCA 94-40422.

The suit was filed last year by Lauderhill lawyer Thomas R. Schwarz against Chief Justice Stephen H. Grimes. The Florida Attorney General's Office, which represents Grimes, and the Florida Bar Foundation, which intervened in the case, moved in September to have the case dismissed for lack of subject matter jurisdiction.

Schwarz responded in October with a motion for summary judgment. Those motions were argued November 15.

Pro Bono Rule

At issue is Rule 4-6.1 of the Rules Regulating The Florida Bar, which sets a goal for each attorney to provide 20 hours annually of legal service to indigents, or make a $350 donation to a legal aid office. While the standard is voluntary, the Supreme Court required lawyers to report on their annual Bar fees statement whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline. Not reporting is, although the court has not enforced that provision during pendancy of the suit.

Schwarz said he sought federal relief after his petition to the Florida Supreme Court asking that the rule be declared unconstitutional was not accepted.

"I was hoping that they would kill their own snakes," Schwarz said at the hearing. "They did not."

Schwarz said Rule 1-12, which governs amendments to Bar rules, denied him access to Florida's courts, in violation of his equal protection and due process rights.

Asked by Judge Sherrill why he didn't take the case directly to the U.S. Supreme Court, Schwarz said there was no record to present to the Court.

Access v. Compliance

"Your argument is you came in one door and were kicked out the other and that denied you access to the Florida courts," Sherrill said.

"Yes, that denied me equal protection and due process," Schwarz said. "I would have preferred the Supreme Court handle the petition."

Parker D. Thomson, special assistant attorney general representing the chief justice, said Bar Rule 1-12 requires at least 50 Bar members to sign a petition seeking a rule change and that Grimes directed the clerk not to accept Schwarz' petition without 49 more signatures.

Thomson said Schwarz had an opportunity to try to amend the rule, but he did not comply with the provisions of Rule 1-12.

"He abandoned the process," Thomson said, adding that the attack on Rule 1-12 was not properly before the court and should not be considered.

Schwarz said Rule 4-6.1 provides that it is a lawyer's "professional responsibility" to provide free legal services to the poor. He said the rule violates his equal protection rights by "arbitrarily exempting" designated groups of lawyers from fulfilling that responsibility and from publicly reporting if they had complied with the rule.

The rule says the obligation does not apply to "members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule or regulatory prohibitions." The rule also does not apply to members of the Bar who are retired, inactive or suspended

Schwarz argued that regardless of their employment, judges, state attorneys and others exempt under the rule could fulfill their pro bono obligation by the contribution of money to a legal aid organization.

They can't provide direct services, but on the other hand, I have not been able to find anything that prohibits judges and state attorneys from contributing $350 to legal aid," Schwarz said. "My complaint is that the exemptions are arbitrary."

Schwarz said because there is no "logical connection" between the exemptions and the ability to pay $350, the rule is capricious and should be thrown out.

Coercive Provisions

Schwarz also argued that since the reporting requirement is public record, those who choose not to provide pro bono services will be labeled "professionally irresponsible."

Schwarz said there is no "legal or rational policy, or ethical basis, for the discriminatory and coercive aspects" contained in Rule 4-6.1.

Thomson said Schwarz' argument that the rule is arbitrary because it exempts judges and other government lawyers who are prohibited from providing free services to the poor is without merit.

Thomson said judges and others were exempt "because they can't do what the court is requesting the private bar to do:' which is perform direct legal services to the poor.

He said the deferred classifications are "clearly rational and necessary."

Thomson also said those reporting that they did not meet the aspirational goals of the plan are not exposed to "ridicule or contempt."

"There is nothing in the opinion to suggest that," Thomson said.

He said the only reason the court added the reporting requirement to the voluntary rule was to gauge how well the program is working.

Thomson noted the commentary to the rule states: "The reporting requirement is designed to provide a sound basis for evaluating the results achieved by this rule, reveal the strengths and weakness of the pro bono plan, and to remind lawyers of their professional responsibility under this rule."

The defendants said the reporting of pro bono service donations provides "important and useful" information to the judiciary and Florida citizens. Thomson said the reported information reveals the geographic distribution of pro bono service, and helps identify places where additional assistance is needed. The information also provides one means by which the general public can better evaluate lawyers and the accessibility of the court system, Thomson said.

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ABC: End reporting

■ A committee endorsed the mandatory pro bono reporting rule, but the 4 I Bar Conference opposed it.

By Gary Blankenship
Associate Editor

A key committee is recommending that the Florida Supreme Court not change the requirement that Bar members annually be required to report how much, pro bono work they do for the poor.

The Pro Bono Legal Services Committee, which advises the court about the plan it ordered in 1993, voted 9-6 January 10 not to recommend changing the reporting requirement. The vote came after more than two hours of debate and taking testimony, and also after the All Bar Conference voted 73-58 earlier in the day that the mandatory requirement should be lifted.

The conference vote followed a debate on the issue by former Bar presidents Ben Hill and Pat Seitz, and discussion from conference delegates that included a comment from Supreme Court Justice Gerald Kogan.

The Bar Board of Governors is scheduled to review tne rule at its January 26-27 meeting in Tallahassee

DeVault Wants Repeal

The pro bono committee discussion was run by Fifth District Court of Appeal Judge Emerson Thompson. Bar President John DeVault and President-elect John Frost called for lifting the reporting mandate, while Seitz urged the panel to recommend keeping the rule.

"There's no other single issue that Rar members around the state react so dramatically to, and the feeling when you get out into the hinterlands is overwhelming," DeVault said. "The rank-and-file member who won't come to the All Bar Conference, who won't come to the Annual Meeting, who is struggling to make a buck, resents having to make this report.

"They tell me, 'I do pro bono work. I do it regularly and I do it because I feel like I ought to.' But they just don't like having to keep records. The intensity of their feeling is incredible."

Both he and Frost said Bar members would be more likely to join circuit pro bono plans if the mandatory reporting requirement were lifted. Both pledged they would lead the recruitment efforts to improve lawyers' involvement in pro bono work.

Frost also said lawyers he's talked to are afraid their reporting records will be used against them. And he questioned whether the requirement has generating valid numbers, noting they showed a large dmp in service and donations to legal aid offices from 1934 to 1995.

'I think it puts a chilling effect on a lot of lawyers who are going to do [pro bono], but not report it," he said.

Seitz said lawyers are naturally independent and therefore resent being told what to do. even if for a good cause. She noted lawyers had in the past opposed mandatory continuing legal education and being required co UK recycled paper for court filings, although those are now accepted.

"The reality is the system that has existed in providing legal services [through the federally funded Legal Services Corporation] is going bye-bye, and we don't have a long lead time to address meeting the obligations," Seitz said. "Legal Services funding is gone. That's $17 million. We don't have a printing press in our basement to make that up. We need to get ahead of the curve to come up with solutions.

"No one has come up with a better plan than the pro bono package. The reporting requirement is part of that package. It is a way that we do not put the entire onus of providing pm bono work on the leadership. It is a way that each member of the Bar says. 'I am doing my share, that I make a voluntary commitment to get it done.' "

More Lawyers Involved

Stephen E. Day, president-elect of th. Florida Bar Foundation and a member of the Fourth Circuit pro bono committee, presented figures indicating that voluntary service Increased since the plan began.

He showed the committee figures gather by the Foundation that showed in 1992, before the pro bono program, 10.349 Bar members volunteered to provide pro bono work through legal aid agencies. In 1994. the first year of the program, that number rose to 14.174, or nearly a 40 percent increase, he said.

Those attorneys provided 108.000 hours in 1992. and that increased to nearly 141.000 in 1994, the first reporting year of the pm bono plan. Day said. And in 1992, lawyers donated 1395.150 to legal aid offices. In 1394, that increased to $936.000.

The pro bono plan sets an aspirational goal of providing 20 hours of service to the poor or donating $350 to a legal aid office. While the service is voluntary, lawyers must report how much work they did or what they donated.)

Debate and testimony generally followed those lines. Proponents of mandatory reporting, which included representatives from legal aid programs, said it had encouraged more lawyers to participate and resulted in more legal assistance for the poor, who otherwise would not have access to the courts

They also said the requirement only asked lawyers to report what they had sworn to do when they joined the Bar, and the reporting rule was not onerous but served as a reminder or a "tickler" that lawyers have an obligation to help the poor.

Opponents said circuit plans—not just the reporting requirement—encouraged the increased participation, and that some lawyers protested mandatory reporting by either not reporting pro bono work they did or not participating in circuit plans.

Figures Available

They also said satisfactory figures on lawyer participation in pro bono are available from reports of legal aid offices and from Bat surveys. But supporters of reporting said the Bar figures don't give enough detail tb help circuit plans and legal aid figures don't include lawyers who provide the work on their own.

Committee member and former Supreme Court Justice Raymond Ehriich expressed skepticism that pro bono work would increase if the mandatory rule were revoked. but ne said in deference to DeVault he would support the repeal.

But he warned if the reporting becomes voluntary and pm bono work falls off. the court "might be inclined to make it [pro bono work] mandatory.*

Ehrlich also noted that lawyers objected to many changes are now considered a routine part of legal practice, including mandatory CLE. mandatory IOTA participation, using recycled paper for court filings and changing from 14-inch to 11-inch paper For all court filings. The latter change, Ehrlich said, generated more controversy than any other item in his years on the court.

Committee Chair Larry Mathews said he didn't think any lawyer would ever be disciplined for failing to report his or her pro bono service, and consequently the rule was unenforceable and should be changed "I rue the day the court would disbar or put into Southern Second someone who did not check a box." he said.

Thompson said he was less concerned with what lawyers want than the necessity of providing legal services to the poor. He also said relying on lawyers' good will was insufficient, noting it was the "good will" of Floridians that kept segregated schools and the courts that overrode that will and integrated schools and other institutions.

'Law brings order to a chaotic society, yet thousands of people have no access to the courts because they have no lawyen to assist them," Thompson said. "We have a large number of people who are

[illegible] disenfranchised and therefore [illegible] becoming angry because they cannot get their problems resolved in a forum that has legitimacy."

The committee took two votes. In the first, members unanimously voted that reporting should still be done on the Bar's annual fee statement. In the second, they voted 9-6 against dropping the mandatory requirement for the reporting.

Mr. Hinds noted the committee is preparing recommendations for the court for its two-year review of the pro bono plan, and will consider other issues besides mandatory reporting. Those could include, he said, ways for government lawyers and the judiciary to provide pro bono services.

By vault, after the committee meeting, [illegible] surprised by the vote. He added that he felt the All Bar Conference vote was more representative of the Bar membership as a whole. He said the issue would still go to the Program Evaluation Committee and then to the *Board of Governors* at its Tallahassee meeting.

The board met after this *News* went to press. Its action, if any, will be reported in the February 15 edition.)

All Bar Debate

Hill and Seitz' debate at the All Bar Conference proved to be an amplified version of the committee's debate later that day. Representatives at the All Bar also made several comments, as did Justice Kogan.

Hill said there is no disagreement over whether lawyers should provide pro bono work only over whether mandatory reporting of assistance to the poor is an effective method of reaching that goal.

"We have a duty as professionals to see to it that legal services are indeed available to everyone," he said.

Mandatory reporting was done, he said, because it was felt it would encourage lawyers to do more pro bono for the needy and it would provide a public relations bonanza for the legal profession.

"I would submit to you the records as we have them now demonstrate neither of those two objectives are effectively being met," Hill argued. He noted lawyers reported doing much less pro bono work in 1995 than they had in 1994—down from 806,000 hours to 561,000 hours—and donations to legal service agencies were also lower.

"The image of the legal profession certainly has not improved because of pro bono reporting," Hill added. "If we want to improve the image of the legal profession, we need to address the examples of commercialism that each of us can see every day [in lawyer advertising]."

He also said the reporting requirement undermines the idealism and commitment lawyers bring to pro bono work, noting most Bar members feel they have a professional obligation to provide such service.

"I've always been concerned about the person who goes around telling everyone how good they are," Hill said. 'I don't think we need to go out and tell the world how good we are. I think if we do our job, if we address the issues that are there, then we will get the recognition that maybe we should receive."

He said lawyers—committed to pro bono work—have expressed resentment to the reporting requirement in letters.

"What strikes me when I review these letters is the sincerity with which you say I do pro bono work, because it makes me feel good. I do pro bono work because I am [to] I do pro bono work because it's part of what we should do as a member of our profession,'" Hill said. "These same lawyers go on and say, 'I don't need to be required to tell you I'm going to do that work.'"

He said information gained by the Bar provide the information now garnered from the required reporting.

'I don't think we need to go out and tell the **world** how good we are. I think **if** we address the issues that **are** there, then we will **get** the **recognition.**'
— Ben Hill

'Don't cripple the **comprehensive pro** bono plan that we have just **instituted** unless you **can come up** with **one today to replace it.'**
--Pat Seitz

Reporting Defended

Seitz contended that a majority of Bar members support the reporting requirement and demonstrate that support by compliance with the rule without complaining or writing letters.

Members support it, she said, because they see the coming cutbacks in spending for legal aid programs that U.S. Rep. *Bill McCollum, R-Fla.*, warned about in another discussion during the All Bar Conference. (See story in this *News*.) And while McCollum urged lawyers to look to corporations for private funding for legal services, Seitz said that was unlikely to happen.

The reporting provides an essential management tool for the court ordered plan. Seitz said, noting the court order4 the plan the dry before she was sworn in as Bar president in Juno 1993.

I-hat plan calls for local circuit committees to design programs to meat their local needs and recruit local Bar members to meet those needs. Thanks to that effort. local plans found creative ways to involve more Bar members in pro bon" efforts. Seitz said.

"Lawyers are very creative, bur if we don't know what people are doing and we don't have concrete data, we are operating in an unrealistic world.' Seitz said.

"And last but not least, I believe that it does make a difference in our image to the public," she said. 'I have seen a sense of enthusiasm among lawyers as they say, 'I am proud of the oath that I took, I want to work together with all of my fellow members in a plan that recognizes my finite resources.'"

She concluded, "Don't cripple the comprehensive pro bono plan that we have just instituted, unless you can come up with one today to replace it."

Questions

Caryn Carvo, representing the Florida Association of Women Lawyers, asked why the plan didn't allow reporting of all pro bono work. instead of being limited to help for the poor.

Hill noted he had pushed for a wider definition of what could be counted under the plan. 'Our obligations as a lawyer by virtue of our training, and our requirement for public service is far greater than simply serving poor people under a defined plan," he said.

"The issue is part of the oath we took is not to neglect the defenseless or the oppressed," Seitz said. "My helping the Miami City Ballet does not quite fall into that category."

The same question later prompted Kogan to comment. "We do know that lawyers do contribute a great deal of time and money to charitable causes," he said. "The issue that thrs addresses is legal services to the poor, and that is what this con.centrates on and that is what the court is focusing on."

Evan Marks, president of the North Dade Bar Association and who coordinates the Family Law Section's mentor program for volunteer attorneys. criticized the rule.

The reporting requirement casts a chilling effect on individual lawyers' privacy, he said, adding programs should report pro bono data instead of lawyers.

Day presented his Foundation figures showing increased service and donations after the plan, but Hill suggested that might have come about because of publicity about the effort and from the circuit plans.

"I believe that when you put into place the plans thar have been put into place in the circuits, that accounts for a lot of success we've had in pm bono work." he said. "I don't want to say it's ail [from] reporting."

Seitz agreed. but said reporting also helps by reminding lawyers they have an obligation to help those without access to the courts.

The debate ended with the members voting 73-58 that mandatory reporting should be abolished.

The conference participants were also asked if they favored mandatory pro bono. Twenty-nine said yes while 90 opposed that. Eleven said providing legal aid to the poor war only attorneys' responsibility, while 107 said it was a wider

Pro bono reporting vote delayed

By Gary Blankenship
Associate Editor

Bar President John DeVault has appointed a special committee to study the mandatory pro bono reporting rule and find a possible alternate reporting system.

DeVault announced at the Board of Governors' January 26-27 meeting in Tallahassee that he was appointing the committee instead of seeking a board vote on a change in the rule.

"I am persuaded that it would be premature during this meeting to bring up for discussion and a vote the issue of mandatory pro bono reporting," the president said.

He noted that on January 25, board members had attended the Tobias Simon pro bono awards at the Supreme Court, and heard reiterated warnings that legal aid programs face a crisis because of a reduction and threatened cutoff of federal funds. DeVault said it could send the wrong message for the board to follow that warning by seeking a change in the pro bono rule which might be seen as a further reduction in legal help for the poor.

He named Miami board member John Thornton to chair the committee. Also named were board members James Fenaom, Dr Wilhelmena Mack, Martin Garcia, John Cardillo, Manny Morales, Larry Mathews and Hank Coxe. Kent. Spuhler, who helped the Bar set up the statewide pro bono program. was named staff for the panel.

After the meeting, DeVault said that "several of the members prior to the meeting expressed to me their view that the timing of this vote was of some concern to them. They did not want, nor do I want. anyone to feel that the vote on this Issue signals any attempt to lessen our recognition of the responsibility of members of Tht Florida Rar to provide pro bono service to the poor."

He reiterated his belief that lifting the reporting requirement would encourage more lawyers to provide pro bono services. But he added that "I felt it was important that we have in place a plan that would give the Supreme Court. and the public true data necessary to show the nature and type of work that was being done by Florida lawyers before we voted on this issue

He said as soon as the special committee reports "we will go forward and take a vote on this issue.

"I continue to be committed to the idea that mandatory pro bono reporting is not the best way to obtain the services of Florida lawyers and will go forward to bring that issue to the board and the Supreme Court of Florida," DeVault said.

PAST PRESIDENT Pat Seitz discusses the pro bono reporting requirement with former board member Don Gifford. Seitz addressed the board on behalf of 14 past Bar presidents who support keeping the reporting requirement.

Former Presidents

The creation of the committee won the praise of former Bar President Pat Seitz, who has supported the mandatory reporting rule. She presented the board with a letter signed by a dozen former Bar presidents urging the board to support the mandatory reporting requirement.

Seitz agreed that the reporting rule is controversial, noting, "We were concerned this was going to tear the Bar apart, and we were going to abandon the challenge we have from our public oath to preserve equal access to Justice."

The letter presented by Seitz noted the reporting allows accurate compiling of lawyers' pro bono work and that the federal government wants to shift legal aid work from the federal government to states and local bars.

"Constructive leadership requires that the board propose effective alternatives in this effort before it recommends the abolishment. ofreporting," the letter said.

The letter was signed by former presidents Chesterfield Smith, Marshall Criser, Burton Young, Wm. Reece Smith, Robert Floyd, L. David Shear, Sam Smith, James Rinaman, William O.E. Henry, James Fox Miller, Alan Dimond and Seitz. She also said former presidents Joe Reiter and Steve Zack asked that their names be added to the letter.

The action at the board came two weeks after the All Bar Conference voted 73-58 to support, repeal of the mandatory reporting rule. But later that day, the Pro Bono Legal Services Committee voted to recommend to the Supreme Court, which is expected to conduct a two-year review of the pro bono program, that the reporting rule be retained.

DeVault has said that he's found the mandatory reporting requirement in the court-ordered pro bono plan to be the greatest source of resentment among members toward the Bar, and that he would like to see the mandatory requirement dropped.

Panel to make pro bono reporting recommendation in May

A special committee studying the Bar rule requiring annual reporting of pro bono service is moving toward making a recommendation by the Board of Governors' May 17-18 meeting in Key West.

Committee chair John Thornton reported at the board's March meeting the group is considering three options but hasn't made any final recommendation.

One proposal from Bar President John DeVault would retain the reporting requirement, but include a tear-off section to the Bar's annual fee statement. Bar members could voluntarily use that section to submit their names to their local circuit pro bono committee if they are willing to participate in local pro bono efforts.

Thornton said that provision would protect lawyers' privacy while providing the circuit pro bono committees with a list of lawyers available to help in pro bono programs.

Another option, he said, is leaving the reporting on the fees form, but make filling it out optional. "The language [on the form] would say the amount and type of pro bono service is a personal choice and a lawyer is entitled to privacy in that,' Thornton said

'The last option is to leave the reporting requirement untouched.

Thornton said committee members have reviewed the two Florida Supreme Court opinions that set up the pro bono plan, pending federal litigation challenging the plan and related issues. He said committee members discussed the options during a March 5 conference call meeting.

The Supreme Court is due to review the operation of the pro bono plan, which sets an aspirational goal for each lawyer of 20 hours annually helping the poor with legal problems or donating $350 to a legal aid office. While the goal is voluntary, lawyers must report each year whether they met it.

DeVault has said he's found the reporting requirement the most divisive issue among Bar members, and eliminating it would unify members at a time when the Bar faces challenges to its existence in the legislature.

The president has argued doing away with the requirement would end lawyer resistance to the pro bono work and result in more legal assistance for the poor.

But the Pro Bono Legal Services Committee, which advises the court on the plan, voted earlier this year to recommend keeping the reporting requirement. They noted that legal aid programs have reported more donations and assistance from lawyers since the *pro* bono plan started.

A legal challenge to the reporting requirement is pending in the Northern District federal court. although a magistrate has recommended that the case be dismissed. The Supreme Court has suspended enforcement of the reporting rule -although not the *requirement* to report itself-while that challenge is pending.

Thornton indicated it could be a close vote on the special committee. 'Some people felt the rule should remain the same," he said. "About an equal numhcr felt it [reporting] should become voluntary."

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By one-vote *margin*

Bar **asks court** for voluntary **reporting**

By Gary Blankenship
Associate Editor

The Bar Board of Governors **has voted** to ask the Supreme Court to no longer require lawyers to annually report whether they comply wrth the court's voluntary pro bono plan.

The plan, set out at rules 4-6.1 and 4-6.5 of the Rules Regulating The Florida Bar, asks lawyers to donate 20 hours or $350 to the provision of legal aid to the poor. Rule 4-6 I d) requires the tiling of the certificate now appearing on the Bar's annual fees 9ta:ement.

At its May 17 meeting in Key West, the board approved a special committee proposal to recommend switching to voluntary reporting. Two board committees had earlier suggested dropping any annual reporting, voluntary or mandatory.

Bar President John DeVault, who has pushed for abolition of mandatory reporting since assuming office, cast the deciding vote after the board deadlocked 21-21 on the issue. The president usually votes only when the board is tied.

The board also voted to ask the court to review its request as an emergency rules change. President-elect John Frost, who made the motion, said including it in the annual rules package next January would leave too little time to change the June 1997 annual fee form if the court approved the voluntary reporting. Members report their pro bono work on that form.

Responsive Board

"The board's action shows the lawyers of Florida that we are responding to them," DeVault said after the vote. "I'm pleased that this was approved by the board. I think the committee'9 decision was a reasonable compromise that will still permit us to obtain the information about what lawyers do without the overlay that is so troublesome to so many lawyers."

DeVault noted that the special committee was formed to try to find a compromise on the reporting issue. Earlier this year, the Pro Bono Legal Services Committee voted to recommend to the court, which is expected to review the operation of the pro bono plan, that it make no change to the mandatory reporting requirement.

The board's Program Evaluation and Rules committees, though, both voted to recommend that any reporting requirement be dropped.

The mandatory reporting rule was proposed by a joint Bar/Bar Foundatron commission, and the Board of Governors voted to ask the court to impose voluntary reporting Instead. In its ruling, two justices said they were ready to go to mandatory pro bono, three said they supported mandatory reporting only and two said mandatory reporting went too far.

The court also kept open the case, promising to review the plan after a couple of years of operation.

Argument9 by board members followed debate9 in other committees, with supporters of mandatory reporting saying it has boosted pro bono work and opponents saying it's too intrusive into Bar members' activities.

Pro Bono Boosted

Board member Rick Fernandez noted that in Hillsborough County, Bay Area Legal Services was getting about $10,000 a year in donations from lawyers and had 500 lawyers volunteering to handle pro bono cases before the pro bono rule. After the rule, donations rose to $100.000 and 1,200 attorneys working with the agency's programs.

'We are a: the point where WE have to lead," he said. Fernandez added that while many Bar members have complained about mandatory reporting, 'during the same time those complaints were being voiced, we increased our pro bono in quantum leaps."

"This is not so onerous that you can't take the time to do the pro bono and, hopefully, report it," board member Skip Campbell said. 'From a purely publicity and promotion standpoint, I think it helps the profession. I don't see it as a major problem.*

But while Campbell said he hasn't had Broward County lawyers complain to him about reporting, fellow 17th Circuit board members John Hume and David Welch said they have encountered much resentment. "This is an issue that's popular with lawyers right now," Welch said. 'I think what has been worked out by the special comittee is reasonable."

Board member James Fensom said hrs Panhandle constituents 'do five hours of pro bono a month, if not a week. They cannot stand having people looking over their shoulder."

He said voluntary reporting has never been tried and could work as well as mandatory reporting for encouraging lawyers and providing necessary information.

'My members do five hours of pro bono work a month, if not a week. They cannot stand having people looking **over** their shoulder!
—*James Fensom*

Pro bono challenge dismissed

By Mark D. Killian
Associate Editor

A federal judge adopted a magistrate's recommendation dismissing a challenge to the Florida Supreme Court's voluntary attorney pro bono plan August 8.

Magistrate Judge William Sherrill recommended granting a defense motion for summary judgment, finding the plan, including its reporting requirement, constitutional. Judge William Stafford adopted the report. *Schwarz v. Grimes*, TCA 94-40422.

At issue was Rule 4-6.1 of the Rules Regulating The Florida Bar, which asks each attorney to provide 20 hours annually of legal service to the poor or make a $350 donation to a legal aid office. While the standard is voluntary, the Supreme Court requires lawyers to report on their annual Bar fees statement whether they met the goal.

Failure to do the work or donate the funds is not grounds for discipline. Not reporting is, although the court has not enforced that provision while the *Schwarz* suit was pending.

"The goal is nothing new," the federal court said. "It came with his privilege to serve as an advocate for others within the judicial branch of government."

Reports Needed

The court also said that the collection of data is necessary for determining to what extent the aspirational goal has been achieved and to what extent unmet legal needs of the poor still exist.

The suit was filed in 1994 by Lauderhill lawyer Thomas R. Schwarz against then-Chief Justice Stephen Grimes. The Florida Attorney General's Office, which represented Grimes, and the Florida Bar Foundation, which intervened in the case, moved last year to have the suit dismissed for lack of subject matter jurisdiction.

Schwarz sought federal relief after his petition to the Florida Supreme Court asking that the rule be declared unconstitutional was not accepted.

While the suit was pending, the Florida Bar Board of Governors voted to ask the Florida Supreme Court to make the annual reports voluntary. The court still is considering that request.

Privacy Claim

Schwarz claimed having to report whether he met the goal could damage his reputation, would require him to incriminate himself under threat of quasi-judicial discipline in violation of the Fifth Amendment, and invade his rights to be secure in his person and property under the Fourth Amendment. He also argued that exemption of certain Bar members from the rule was arbitrary and discriminatory in violation of his equal protection rights.

Schwarz also said the rule is a legislative enactment outside the scope of authority vested in the Florida Supreme Court.

The Ruling

The federal court found the legitimate state interest in collecting pro bono information outweighed the threat to privacy interests, calling the requirement "minimally intrusive."

"A Bar member who has not provided legal service, but who is not deferred, only has to indicate 'yes' next to the statement 'I have been unable to provide pro bono legal services to the poor this year,'" the court said. "No explanation is required as to why service was not provided."

The court said there are a number of conceivable reasons why a member would be unable to provide pro bono service in a given year and lawyers do not have to say why they were unable to meet the goal.

The court also said Schwarz' interest in privacy is considerably diminished, "if not extinguished, by the fact that the disclosure is a consequence of the close regulation of his profession consistent with historic understandings of the professional responsibilities of a lawyer."

The court said regulation of Florida lawyers is exclusively vested in the Florida Supreme Court under Art. V, §15 of the Florida Constitution.

"Indeed, the Florida Supreme Court determined 46 years ago that it had inherent authority to regulate the practice of law and the discipline of persons so admitted to practice," the court said, citing *Petition of the State Bar Association*, 40 So. 2d 902 (Fla. 1949). "The court reasoned that 'the law practice is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of government.'"

Thus, the court said, the authority conferred by the Florida Constitution and inherent in the Florida Supreme Court to discipline lawyers includes authority to say what are and what are not the standards of practice, including defining professional responsibility.

Professional Responsibility

The court said providing pro bono has long been a fundamental aspect of a lawyer's professional responsibility and an applicant for admission to practice "may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order."

The court also said the pro bono rule addresses the court system's ability to function fairly regardless of a civil litigant's wealth.

"The rule does nothing more than restate that which has historically been thought to be fundamental to the professional responsibility of a lawyer," the court said. "The minimal public disclosure, that plaintiff was 'unable' to fulfill the aspirational goal, invades no area to which he had any significant expectation of privacy."

The court said there are so many conceivable reasons justifying inability to serve that it negates Schwarz' claim that requiring a lawyer to disclose he was unable to contribute or serve necessarily has an adverse effect on his professional reputation.

"Moreover, even if the implication were negative, 'absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech,'" the court noted.

The court said even if there is a minimal privacy interest, the balancing test tips markedly in favor of the Supreme Court.

"The Bar has an interest in tracking the pro bono service provided by its members in order to determine the effectiveness of the aspirational goal and to see whether there is an unmet need," the court said. "There is no other effective way to gather the data."

The court also said disclosure to the public is a consequence of a "significant, long-standing public policy" in Florida that governmental records not be hidden from the people.

"The only way that disclosure would not have occurred would have been to have no reporting requirement at all, which would have entirely defeated the interest in obtaining comprehensive data," the court said. "Thus, plaintiff's privacy claim fails."

Defamation

The court also said Schwarz was not entitled to relief based on his claim that the rule could damage his reputation.

"Disclosure in this instance does not occur incident to termination of employment, and damage to reputation alone, even if shown, is not a constitutional claim," the court said.

Restating the argument as an unconstitutional taking of a lawyer's reputation without due process likewise merits no relief, the court said, because it does not result in the taking of liberty or property protected from deprivation without due process.

Nonassociation

Schwarz' claim that the pro bono rule violates his right to nonassociation by compelling him to disclose his views on a public issue also is without merit, the court said.

"Bar members are not required to associate themselves with any particular association or cause, or to support a particular one," the court said. "This is not a case where members are required to support ideological or political activities unrelated to the legal profession."

The court said Schwarz has not shown that the reporting requirement compels him to associate with, affirm, or support the aspirational goal itself or any of its intended recipients, "and he therefore fails to demonstrate a First Amendment violation."

The court also said the maintenance of records by Bar does not violate the Fourth Amendment rights of its members, because in making the records for its own purposes the Bar "neither searches nor seizes records."

Self-Incrimination

Schwarz also argued that requiring him to report on the fees statement that he has not complied with the aspirational goal—and is not "deferred" from the requirement—requires him to incriminate himself because it requires him to state that he is "professionally irresponsible."

The court said while a report is compelled in the pro bono rule and failure to report is a basis for disciplinary sanctions, the disclosure must also be incriminating for the privilege to apply.

"The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination," the court said. "A lawyer's failure to provide pro bono service or make a donation to legal aid is not a criminal offense, and does not result in discipline or any other sanction by the Bar."

Equal Protection

Schwarz asserted that the rule violates equal protection and substantive due process because there is no rational basis for deferring or exempting from the "buy-out" provision those members who are unable to provide pro bono service.

He argued that there is no reason why judges and other members who are deferred from the pro bono requirement should not at least be required to donate $350.

Since Schwarz challenged a rule created by the Florida Supreme Court, the court said it reviewed the rule using the rational basis test.

"The issue is whether there is a conceivable legitimate purpose and a conceivable rational basis for the legislative enactment," the court said.

The court said Supreme Court had an "entirely reasonable basis for codifying this principle as an aspirational goal and for mandating that data relating to implementation of the goal be reported in the manner chosen."

The narrower issue, the court said, is whether there is a conceivable rational basis for deferring certain Bar members from the legal services goal and from the buy-out alternative."

The rule itself, and the opinions of the Florida Supreme Court in promulgating it, set forth the needed rational basis, the court said.

"As to the deferral of some from the aspirational goal, in adopting the rule the Florida Supreme Court recognized the 'unique dilemma' faced by judicial officers and government employees in providing legal services to the poor," the court said. "While it is possible for some of these lawyers to provide some sort of service relating to the goal, the court chose not to expand the definition of pro bono service so that it would include a wider range of charitable works, believing 'a narrow definition of pro bono services is necessary to ensure that the purposes behind the implementation of these rules are in accordance with our authority.'"

The Supreme Court encourages participation in allowed activities and development of programs to foster limited participation by exempted members, but held, at least for now, that they should be deferred from participating in the program, the federal court said.

"The decision, therefore, to exempt judicial officers and their staff lawyers, and government lawyers prohibited from providing such services from the aspirational obligation to provide pro bono services to the poor was not irrational," the court said.

The buy-out provision for non-deferred member's was more controversial, the court said, "and it is at the heart of plaintiff's suit in this court as reflected in his motion for summary judgment."

In the Report of The Florida Bar/ Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida, specifically recommendation 24 titled "Voluntary Pro Bono Legal Services" (prior to adoption of 4-6.1), the Joint Commission recognized that while some objected to the buy-out provision as demeaning to the profession, there would be practical difficulties for some lawyers and pro bono programs in utilizing services. It was also noted that while higher dollar amounts had been considered, the amount should not be so high that voluntary contributions would be discouraged.

"It is reasonable to conclude that without the option, some lawyers would be unable or unwilling to provide any pro bono service and therefore would not participate at all," the court said. "This sort of neglect to participate could generate greater antipathy to the voluntary goal. Since a voluntary goal, unlike a mandated program, depends entirely upon the good will of all of the Bar, the compromise had a conceivable reasonable basis."

Finally, the court said, there is the issue of whether it was irrational not to mandate that those deferred from the goal should at least pay $350 annually.

"This decision likewise has a conceivable rational basis," the court said. "If those members who are legally or ethically constrained from providing services were required to pay the $350 to meet their professional responsibility, at least for them the buy-out would not be an alternative at all."

Access

Schwarz also claimed he was denied access to a Florida court in his attempted challenge to Rule 4-6.1, saying a petition he filed with the Florida Supreme Court was denied.

The federal court, however, said the claim is not ripe for review.

"All that plaintiff has alleged is that Chief Justice Grimes construed this petition as an attempt to invoke the court's legislative jurisdiction," the court said. "It is entirely speculative at this point whether the Florida Supreme Court would rule that plaintiff has no judicial remedy under Florida law. Since there is no case or controversy pending, this court lacks jurisdiction on this claim."

THE FLORIDA BAR
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JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600

November 4, 1996

Mr. John A. DeVault, III
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202

Re: Lawyer Regulation Statistics

Dear Mr. DeVault:

In response to your request regarding pro bono reporting, budget and disciplinary case statistics I advise you:

total lawyer regulation budget FY 95-96	$5,620,015
number of Florida bar members who were sent a dues statement FY 95-96	58,126
number of Florida bar members who reported pro bono involvement for 95-96	51,409
total lawyer disciplinary files opened FY 95-96	8,839
number of lawyer disciplinary files closed by staff 95-96	5,778
number of lawyer disciplinary files closed by grievance committees 95-96	1,720
actual cases prosecuted FY 95-96	965

I am advised that our records indicate that the rate of pro bono reporting has always been 89% or better.

During the 1995-1996 fiscal year the bar spent over $5.6 million for its disciplinary programs. During that same time it

processed 8,839 disciplinary files, though only 965 resulted in actual prosecutions.

Sincerely,

John T. Berry

John T. Berry
Staff Counsel

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