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IN THE SUPREME COURT OF FLORIDA
CASE NUMBER 88-646

THE FLORIDA BAR, RE AMENDMENTS TO RULES REGULATING THE FLORIDA BAR - 4-6.1 PRO BONO PUBLIC SERVICE

FILED
SID J. WHITE
SEP 3 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RESPONSE IN OPPOSITION TO THE FLORIDA BAR'S PETITION

Your Respondents,[1] consisting of ninety-five recognized leaders of the legal profession who firmly believe that Rule 4-6.1 effectively promotes access to justice for all, adamantly oppose the Petition of The Florida Bar to amend the Rule by eliminating mandatory pro bono reporting, the only provision that provides any public accountability.

INTRODUCTION

For more than twenty years, beginning with this Country's first interest on trust accounts program, this Court has been the national leader in establishing programs designed to move us closer to the ideal of "equal justice under law" for all. In 1990, in another landmark decision, this Court clearly spelled out a lawyer's pro bono professional responsibility when it held "that every lawyer of this state . . . has an obligation to represent the poor when called upon by the Courts and that each lawyer has agreed to that commitment when admitted to practice in this state." In Re Amendments to Rules Regulating The Florida Bar, 573 So.2d 800, 806 (Fla.

1. The Respondents include a former member of this Court; past Presidents of The Florida Bar, the American Bar Association, and The Florida Bar Foundation; current and former members of the Board of Governors of The Florida Bar; current and former members of Board of the Florida Bar Foundation; current and former law school deans; past winners of this Court's Tobias Simon Pro Bono Award; and other recognized leaders of the profession who have joined in the fight for equal justice under the law.

1990). Two years later, in acting on the Report of The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida (hereinafter, "Joint Commission"), this Court endorsed mandatory reporting, stating that "we agree with the [Joint] Commission that, in order to evaluate the effectiveness of local government plans for pro bono services, a reporting scheme is necessary. . . . [W]e find that some basic information is necessary in order to properly evaluate the effectiveness of pro bono services and this information should be furnished to the Court with the aid of The Florida Bar. " Amendments to Rules Regulating The Florida Bar, 598 So.2d 41, 44 (Fla. 1992). The following year, in its landmark decision implementing the pro bono plan, this Court affirmed "that accurate reporting is essential for evaluating this program and for determining what services are being provided under the program. This in turn will allow us to determine the areas in which the legal needs of the poor are or are not being met. Because we find that reporting is essential, failure to report will constitute an offense subject to discipline. " Amendments to Rules Reg. The Florida Bar, 630 So.2d 501, 502-03 (Fla. 1993).[2] Nothing has changed. Reporting is still critical to the success of the pro bono plan. How else is this Court, The Bar, and the public to measure how well lawyers meet the "historic obligation of the legal profession to represent the poor?"[3] How else may we compare the quantity of pro bono services provided with the need for such services?

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2. The claim that mandatory reporting is violative of an attorney's rights was put to rest in Thomas Rowe Schwarz v. Hon. Gerald Kogan, Chief Justice and The Florida Bar Foundation, Case No. 94-40422-WS, U.S.D.C., N.D. Fla. (mandatory reporting held constitutional; summary judgment granted August 12, 1996.)

3. In Re Amendments to Rules Regulating The Florida Bar, supra, 573 So.2d at 803.

How else can we so easily remind lawyers — each and every year — of the public service obligation they accepted by becoming a member of the legal profession?

The Bar's Petition attacks the only feature of the pro bono plan which provides for accountability. It attacks the very provision of the rule which is essential to any determination of whether the rule is operating to solve the problem of access to justice. And it does so without benefit of any facts which would provide a basis for this Court to reverse its finding that information about lawyer participation is necessary in order to properly evaluate the effectiveness of pro bono services.

Unlike the carefully annotated 1989 Petition which led to the ringing affirmation of the lawyer's professional responsibility, and unlike the extensive report of the Joint Commission which provided the factual support for this Courts 1992 and 1993 decisions, the current Petition of The Plorida Bar is filed because the Board of Governors, by a 22 to 2 1 vote,4 decided to pander to those lawyers who would rather not report. Totally missing from The Bar's flawed decision is any concern for the public interest.

In a fashion similar to this Court's leadership, your Respondents have been at the forefront of the fight to make equal justice under the law more of a reality. They cannot stress enough their adamant opposition to the Petition currently before the Court. Mandatory reporting injures nobody — except perhaps for those lawyers embarrassed to report their on-going failure to live up to the aspirational goals of the profession. On the other hand, the absence of

4. Board of Governor opposition to mandatory reporting has narrowed the past few years. The vote against mandatory reporting in 1991 was 24 to 13. And some speculate that had most of Miami's Board of Governor delegation been in attendance when the vote was taken this year, the vote to file the instant Petition would have failed altogether.

reporting certainly injures the legal profession, which can be rightly accused of seeking to avoid any public accountability. And it certainly brings to a crashing halt any effort to evaluate the success of the pro bono plan.

The Bar's petition is an affront to this Court, to the many lawyers, and others, who have fought for effective pro bono policies, and to the citizens of Florida that Florida attorneys are sworn to serve. Given the lack of any factual or other support for the Petition, Respondents firmly believe that the Motion to Strike, filed by Talbot D'Alemberte and Alan C. Sundberg ought to be granted.

Even if the Petition is not dismissed for being far outside the normative rule-making process, it should be denied on the merits for its failure to provide any basis to suggest that the purpose for adopting the reporting requirement is somehow flawed or that the need is somehow diminished. Nothing in the Bar's Petition provides any reason to reverse this Court's finding that reporting is essential. That some lawyers would prefer not to report is not a reason for this Court to abandon its commitment to a voluntary, but accountable, pro bono plan.

SUCCESS OF FLORIDA'S *PRO BONO* PLAN

The original Petition which led to the adoption of Rule 4-6.1 was grounded in the well-documented shortage of legal services to the poor.[5] Still, it is difficult to evaluate the pro bono plan so early in its life. For the first year, beginning July 1, 1993 and ending June 30, 1994, 22,756 lawyers reported providing 806,874 hours of pro bono legal assistance to low income

5. Recommendations of the Special Commission on Access to the Legal System (May, 1985); The Legal Needs of the Poor and Under-represented Citizens of Florida: An Overview, Center for Governmental Responsibility, Holland Law Center, Gainesville, Florida (1980) [The Furman Study]; Legal Services Currently Available to the Indigent in Florida, The Florida Bar and University of Florida (1971) [The Levinson Report].

Floridians. For the following year, 23,706 lawyers reported providing only 581,050 hours.[6] Respondents believe, based on information provided to them by Florida Legal Services (and derived from information provided by legal aid and legal services programs), that the decline in reported hours represents more accurate reporting, not a decline in actual pro bono services, thus attesting to the wisdom of the reporting mandate.[7] For the first time, rather than anecdotal, and questionable information, we are beginning to assemble real data on our pro bono efforts. The information is extremely valuable.[8] How else can The Bar, this Court, and the public truly gauge the pro bono efforts of our profession?

Contributions to legal aid groups rose from $689,000 in calendar year 1993 to $978,000 in calendar 1994. They declined slightly, to $907,000 in calendar 1995.[9]

The Circuit Committees' reports attest to the success of the plan. In most circuits, the chief judge was a leader in the recruitment of attorneys. In total, 19 Circuit Committees

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6. Statistics were not available at the time of this writing for the third year.

7. In all likelihood, few lawyers had recording systems in place to accurately record their pro bono hours in time for the first year's reporting requirement.

8. Under the pro bono plan, attorneys can engage in pro bono activities as part of their own practice or as part of an organized legal aid effort, According to reports from The Florida Bar Foundation, as part of organized legal aid activities, private lawyers accepted 17,200 cases on a pro bono basis in calendar year 1995, an increase of 5% over the prior year. Total number of lawyers accepting cases fell by 8.7%, the total hours donated increased by 1%, reaching 150,000.

9. These figures represent actual dollars received by legal aid and legal services programs as reported by them to The Florida Bar Foundation. As with the hours reported, the dollars reported on the Annual Dues Statement, also fell. Again, the decline appears to be attributable more to accurate reporting than an actual decline in donations.

reported a total of 97 projects that were either developed or expanded under the pro bono plan. [10] ***Each circuit committee and legal services provider reported that pro bono participation and contributions increased dramatically after implementation of the pro bono plan and mandatory reporting.*** [11] Some examples of these responses include:

- 15th Judicial Circuit: "The experience of the Fifteenth Judicial Circuit has been one of increasing momentum since the mandatory reporting requirement, in terms of the reaffirmation of our legal community to the provision of equal justice to every person in our community, regardless of individual wealth. "
- Bay Area Legal Services: ", , .within months following the rule's adoption, Bay Area had recruited an additional 400 attorneys for its panel and solicited and received attorney donations in excess of $100,000."
- Volunteer Lawyers' Project of Volusia County: "In 1995 attorneys reported 1789 hours contributed towards the effort. This is an increase of 324 hours. This equates to approximately a 20% improvement. In 1993, because of the lack of participation, our program was only able to offer two methods for the delivery of pro bono services. , w e w e r e able to offer seven (7) methods of pro bono delivery. " This included the staffing of advice clinics, accepting of case referrals, assisting AIDS patients with their special needs, assisting domestic abuse clients, pro bono mediation services, pro se divorce clinics and public housing authority tenant organizing.

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10. The Standing Committee on Pro Bono Services, Report to the Supreme Court of Florida, The Florida Bar. and The Florida Bar Foundation (1995).

11. Letters received by The Standing Committee on Pro Bono Services' from circuit committees.

Some examples of successful activities that grew as a result of the pro bono plan:

- The Fourth Judicial Circuit planned a substantial expansion of volunteer lawyer involvement in local schools through peer mediation mentor and a micro-society school-based court system program. These programs assist in establishing non-violent dispute resolution systems within schools and educate students on legal rights and dispute resolution techniques.

- The Fifth Judicial Circuit's plan included the development of a family law training program with substantial judicial participation to expand pro bono service in this critical need area.

- The Twelfth Judicial Circuit's plan included a project to recruit attorneys in the more populous Sarasota and Manatee Counties to serve the legal needs of the poor in rural DeSoto County.

- The Fifteenth Judicial Circuit plan provided for the recruitment of large law firms to adopt projects such as the Juvenile Advocacy Project. In this project, lawyers represent children at risk seeking services designed to prevent their deeper entanglement in the juvenile justice system.

- The Social Security representation mentoring program in the Fourth Judicial Circuit provides training to attorneys in Social Security law and pairs them with experienced paralegals from the local legal aid program.

- The earned income tax credit assistance project in the Ninth Circuit provides the working poor with assistance in completing tax returns so they can obtain the tax credits to which they are entitled.

- The Wills on Wheels program in the Eleventh Circuit reaches out to the shut-in elderly and provides them with assistance in preparing wills.

- The advice and counsel clinic for non-English speaking clients in the Seventeenth Circuit provides Spanish speaking attorneys to staff regular advice and counsel clinics in the Spanish speaking community.

- The United States District Court for the Southern District of Florida created the Volunteer Lawyers' Project for the Southern District of Florida, a pro bono program that finds legal representation for indigent pro se civil litigants with meritorious legal claims. To date, over 700 attorneys have agreed to accept cases. One of the primary reasons for the creation of the Southern District's project was this Court's creation of the pro bono plan.

In short, the pro bono plan, including mandatory reporting, has overwhelmingly advanced Florida's low income community's access to equal justice. As the Standing Committee's 1995 Report concludes:

> The adoption of the new Public Service Rule, Rule 4-6, Rules Regulating The Florida Bar, has brought about unprecedented focus and attention on and expansion of pro bono legal assistance to the poor. As lawyers have been presented with the real and priority needs in their communities, they have responded. As opportunities for service have been created for lawyers with a wide variety of professional expertise, they have come forward to participate. Even as the required reporting continues to generate debate within the Bar, individual attorneys overwhelmingly responded to the need for accurate information on the lawyers' efforts to address the access needs of the poor and produced over $121,000,0000 worth or reported pro bono service in only its first year. The vision of what can be accomplished through the Voluntary pro bono Attorney Plan is true. Continued commitment and creativity, especially through the circuit committees, the lawyers of Florida can move even closer to a reality of equal access through the fulfillment of a lawyer's pro bono public service responsibility.

Report, p. 13-14.

Although Florida's pro bono plan has successfully expanded representation for the poor and working poor in Florida, low income Floridians face the biggest crisis in access to the courts in several decades. There are an estimated 34 million Americans at or below the poverty level. In addition, there is a growing population of "working poor" who are priced out of the legal market. [12] And, nearly half of all low-income households had at least one critical legal need that went unattended according to recent ABA studies. [13]

In Florida, the picture is similarly bleak. The population of those living in poverty has increased substantially over the last decade. Funding for legal aid programs, however, has remained relatively flat since the early 1990's. There was a 30% cut in funding this year in Legal Services Corporation funding. In addition to staff cuts, which are projected to total at least 10%, the restrictions on permissible legal services activities will make the need for pro bono services even more critical. Meanwhile, despite this Court's leadership in developing mechanisms for self-representation, most notably in the area of simplified proceedings in small claims court, probate and dissolution of marriage, the justice system remains an unnavigable nightmare for most citizens. The words of Reginald Heber Smith, written in 1919, bear repeating: "The law permits every man to try his own case, but 'the lay vision of every man his own lawyer has been shown by all experience to be an illusion, '" Smith, Justice and the Poor, at 33 (1919).

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12. Update: The National Organization of Legal Services Programs, Vol. XIV, No. 25 (1991), at 4.

13. Comprehensive Legal Needs Study, Consortium on Legal Services and the Public, ABA (1993).

The reality in Florida is that tens of thousands of low income Floridians find the courthouse doors effectively slammed shut. No time could be more critical than the present to preserve our comprehensive pro bono scheme, including the one mechanism to monitor its effectiveness, mandatory reporting.

REPORTING IS CRITICAL TO AN EFFECTIVE PRO BONO PLAN

The Petition of The Florida Bar would abolish the only feature of the pro bono plan which provides for public accountability. Reporting is the one element of the plan that annually reminds — and perhaps motivates — some attorneys into meeting their professional responsibilities, Reporting is the one element that lets The Bar convey meaningful information about its contribution to the public good. Yet, The Bar attacks the very provision which is essential to any determination of whether the pro bono rule is operating to solve the problem of access to justice.

The experience of other states that have attempted a voluntary reporting mechanism proves that such a scheme provides no statistics with of significance, a low reporting rate, and an inability to monitor results towards formulating goal-oriented plans to attack the problem of lack of access to equal justice.

For example, Texas adopted a voluntary pro bono reporting provision in 1993. The first year, only 24% of the attorneys reported their pro bono activities. The second year and third year, 39% of Texas' attorneys reported. The major criticism of the Texas model is the strong likelihood of inaccurate results because attorneys actually engaged in pro bono activity

are far more likely to respond than those not meeting the obligations of their profession.[14] Hawaii's experiment in adopting a system of voluntary pro bono reporting was even more of a dismal failure. The first survey, for the year 1995, produced a 10 % response rate. And this occurred in a state where more than 90% of all low income households reportedly have no access to legal services to help resolve critical legal problems.[15]

Clearly, from these examples, a voluntary pro bono reporting scheme gives lip service to the notion of equal access to justice, with no ability to monitor, plan for, or expand pro bono service based on actual needs. Eliminating the reporting requirement, as The Florida Bar suggests, would make a mockery out of the lawyer's professional responsibility to work in the public interest. It would further damage the public profile of Florida attorneys.

It is axiomatic that what distinguishes a profession from a commercial enterprise is "essentially that while the chief end of a trade or business is personal gain, the chief end of a profession is public service."[16] If we lose that purpose, we lose the rationale that justifies regulating the Bar far differently than any other trade or business. It bears repeating that lawyers have been granted special privileges. If the legal profession is to be more than an ordinary trade or business, it is vitally important that it repay these privileges by advancing the public interest in such fundamental areas as access to justice.[17] Lawyers have a state sanctioned

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14. Julie Oliver, Annual Pro Bono Reporting in Texas and Florida, ABA Center for Pro Bono Exchange, April, 1995, at 1.

15. Hawaii Institutes Voluntary Reporting, ABA Center for Pro Bono Exchange, April, 1996.

16. Ex Parte Dibble, 310 S.E.2d 440, 443 (SC. Ct.App. 1983).

17. A California court put it clearly:

> An attorney is unique among other professionals. An attorney is an officer of the

monopoly on the public justice system. They are ethically bound to help the poor gain access to that system because to do otherwise would be to deny equal justice. This Court, the Circuit Committees, and the public at large have both the need for and the right to know just how well the legal profession is living up to its self-proclaimed responsibilities.

Maintaining the mandatory reporting system bolsters the ability of our society to provide legal services to the poor, thereby guaranteeing with greater certainty that equal access to justice is available. Given the greater complexity of litigation in today's judicial system, access to a lawyer becomes the difference between some measure of justice or no justice at all. As a profession, we must be committed to the principle of equal access to justice if we share our culture's most important values. If we do not embrace these values, we are not legitimate custodians of the legal system, and society has every right to ask for the keys to the gate back.

CONCLUSION

Florida has a well-deserved reputation as the leader in activities, such as IOTA and pro bono programs, that address the legal needs of the poor. Other states, if past actions are any

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> court before which he or she was admitted to practice and is expected to discharge his or her professional responsibilities at all times, particularly when expressly called upon by the courts to do so. Pursuant to Business and Professional Code section 6068, subdivision (h), an attorney shall not reject the cause of the defenseless or the oppressed [this is the language of the Oath of Admission to The Florida Bar]. On a more practical level it should be immediately apparent that an attorney's professional responsibilities represent a modest consideration for the valuable license entrusted to him or her. In addition, every attorney has a real and immediate interest in maintaining the integrity of the adversary system by seeing to it that every good faith litigant, regardless of means, is adequately represented.

Yarbrough v. Superior Court, 197 Cal. Rptr. 737, 741 (Cal. App. 1st 1983), *vacated on other grounds, 702* P.2d 533 (Cal. 1985).

indication, will likely determine the direction of their pro bono plans based on the Florida experience. The Bar's attempt to change course, to retreat, while substantial progress is being made, will not only have adverse consequences in Florida, but will be a serious blow to the national acceptance of effective pro bono programs. Because of the mandatory nature of the reporting mechanism, Florida has the most accurate information in the nation about pro bono services actually being provided by attorneys. It can use that information in many ways, from providing the public with concrete statistics about the voluntary efforts of The Bar, and thus improving the image of the profession, to continuing to recruit additional attorneys willing to volunteer their services to meet the unmet needs of the poor.

Florida's requirement that attorneys report their pro bono activity is really no different than the requirement that attorneys participate in mandatory continuing legal education, mandatory IOTA, or mandatory reporting of trust account compliance. Attorneys, or all people, dislike anything characterized as "mandatory." Nevertheless, these requirements, as with mandatory reporting of pro bono activities, are all part and parcel of the ethical obligation of the attorney to strive for equal justice under the law.

Through mandatory reporting, this Court, The Florida Bar, The Florida Bar Foundation, legal aid providers, the profession at large, and the general public, will, in years to come, have accurate information to determine the level of volunteer services available, to target specific communities where services lag, to commend communities for outstanding efforts, to strategize the next steps in pursing the ideal of full access to justice, and to better evaluate the extent of unmet legal needs.

Most importantly, the current system has helped to increase access. It has served to remind lawyers of their special responsibility. The importance of the reporting requirement cannot be ignored. It is an important factor in the increase in pro bono participation and the expansion of pro bono service opportunities. Every judicial circuit that has evaluated the pro bono rule has determined that it has successfully increased their program's resources and involvement of the legal community in their work.

Wherefore, respondents respectfully request that the petition submitted by The Florida Bar be dismissed with prejudice.

On Behalf of the Following Members of The Florida Bar

Jacqueline Allee
Duane Anderson
Elizabeth S. Baker
Martha Barnett
Eunice T. Baros
Hilarie Bass
James A. Baxter
Robert J. Beckham
Robert A. Bertisch
Bruce B. Blackwell
Darryl M. Bloodworth
Tom W. Brown
J. Shepard Bryan, Jr.
Mark Buchbinder
L. Kinder Cannon, III
Russell E. Carlisle
Neil Chonin
Kendall B. Coffey
Dean C. Colson
A. Hamilton Cooke
Marcia K. Cypen
Talbot D'Alemberte
Howard L. Dale
Stephen E. Day
Alan T. Dimond
Ava K. Doppelt
Davisson F. Dunlap
Rashad El-Amin
Arthur J. England, Jr.
Robert L. Feagin, III
Renee K. Fehr
Robert L. Floyd
Rosemary Frankel Furman
William S. Graessle
Lynn H. Grasecuose
Douglas M. Halsey
Stephen F. Hanlon
William O.E. Henry
Bruce R. Jacob
John Arthur Jones
Richard T. Jones
Theodore Klein
Judith M. Korchin
Kristine E. Knab
Andrew M. O'Malley
Amelia Rea Maguire
Russell McCaughan
Marybeth McDonald
Howell W . Melton, Jr.
Enid Duany Mendoza
Donald M , Middlebrooks
William M. Midyette, III

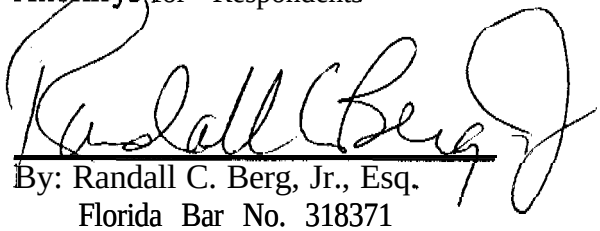
James Fox Miller
Stephen B. Moss
Chandler R. Muller
Dolores Norley
Jarret C. Oeltjen
Daniel S. Pearson
Ray H. Pearson
Thomas G. Pelham
Natasha W. Permaul
Jean S. Perwin
Roderick N. Petrey
Roosevelt Randolph
Robert M. Rhodes
James C. Rinaman, Jr.
Gerald F. Richman
Florence Snyder Rivas
Robert Rivas
Cari L. Roth
Frederick M , Rothenberg
Fletcher G. Rush
James M. Russ
Terrence Russell
Leon St. John III
George E. Schultz, Jr.
Patricia A. Seitz
L. David Shear
Chesterfield H. Smith
John Edward Smith
Samuel S. Smith
William Reece Smith, Jr.
Neal R. Sonnett
Charles R. Stepter Jr.
David U. Strawn
Sidney A. Stubbs
Janet R. Studley
Eli Subin
William L. Thompson Jr.
H. Russell Troutman
Dennis R. Turner
Richard C. Woltmann
Frank Wotitzky
Leo Wotitzky
Arthur G. Wroble
Burton Young

Respectfully submitted,

Peter M. Siegel, Esq.
Randall C. Berg Jr., Esq.
David Weintraub, Esq.

Florida Justice Institute Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33 13 1-2309
305-358-2081
305-358-0910 (FAX)

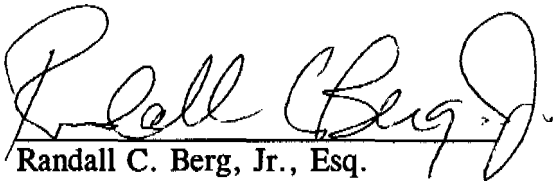
Attorneys for Respondents



By: Randall C. Berg, Jr., Esq.
Florida Bar No. 318371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was sent to John F. Harkness, Jr., Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by First Class United States Mail, on August 30, 1996:



Randall C. Berg, Jr., Esq.