IN THE SUPREME COURT OF FLORIDA

IN RE: PRO BONO ACTIVITIES BY JUDGES AND JUDICIAL STAFF ATTORNEYS
_____/

Case _____

REPORT OF TASK FORCE ON PRO BONO ACTIVITIES BY JUDGES AND JUDICIAL STAFF AND STANDING COMMITTEE ON PRO BONO LEGAL SERVICES

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By Amended Administrative Order No. AOSC00-7, on October 5, 2000, the Supreme Court of Florida created the Task Force on Pro Bono Activities by Judges and Judicial Staff (Task Force) and charged the Task Force with the responsibility of working with the Florida Bar Standing Committee on Pro Bono Legal Services (Committee) to study and report on whether and how judges and members of the bar employed by the judiciary can be involved in activities relating to pro bono services. Specifically, the Court instructed the Task Force and the Committee to study the involvement of judges and judicial staff in activities relating to pro bono legal services and to make recommendations to the Court about the need for additional rules or rule changes relating to pro bono service by judges and judicial staff.

This report reflects the institutional pro bono knowledge of the Committee developed since its inception in 1993 and almost sixteen months of study and consideration by the Task Force and Committee. In this report the Task Force and Committee recommend the

adoption of amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar and Canons 4(B) and 4(D) of the Code of Judicial Conduct. A copy of our proposed rule and canon changes are attached as Appendix 1.

The Task Force and Committee

The Task Force and Committee created a single body to carry out the responsibilities delegated by the Court. The combined group is made up of seventeen lawyers, nine judges and one public member. The members are as follows:

Judge G. Cynthia Angelos, Fort Pierce
Fernando S. Aran, Coral Gables
Judge Roberto A. Arias, Jacksonville
Judge James M. Barton, Tampa
James A. Baxter, Clearwater
Judge Lucy C. Brown, West Palm Beach
Robert Michael Brush, Lakeland
Susan Christmas, Rockledge
Ian M. Comisky, Philadelphia, PA
A. Hamilton Cooke, Jacksonville
Marcia K. Cypen, Miami
Charles Chobee Ebbets, Daytona Beach
Raymond Ehrlich, Jacksonville
Judge Eugene J. Fierro, Miami
Judge Thomas Freeman, Sanford
Don L. Horn, Miami
Dorothy Inman-Crews, Tallahassee
Don Isaac, Ft. Myers
Donna Krusbe, West Palm Beach
Sharon Lynne Langer, Miami
Marybeth McDonald, Orlando
Natasha Williams Permaul, Orlando
Robin Lynn Rosenberg, Tampa
David Bill Rothman, Miami
Judge Emerson R. Thompson, Jr., Daytona Beach
Judge William A. Van Nortwick, Jr., Tallahassee
Judge Reginald K. Whitehead, Kissimmee

The Court's Charge to the Task Force and Committee

When it adopted the comprehensive pro bono legal service plan, see Rule 4-6.1, Rules Regulating The Florida Bar, the Supreme Court of Florida recognized that judges and their staff attorneys are prohibited from performing legal services. Thus, the Court deferred members of the judiciary and their staff attorneys from the pro bono requirements of the rule. *See, Amendments to Rules Regulating The Florida Bar - 1-3.1(a) and Rules of Judicial Administration - 2.065 (Legal Aid)*, 630 So. 2d 501, 503 (Fla. 1993). The court explained its deferral decision, as follows:

> The responsibility of judicial officers and government employees in providing legal services to the poor presents a unique dilemma. Judicial officers and their staffs are expressly prohibited from practicing law, specifically: (a) article V, section 13, of the Florida Constitution (judge shall devote full time to judicial duties and shall not engage in the practice of law); (b) Code of Judicial Conduct, Canon 5B(1) (judge should not serve in civic or charitable organization if it is likely the organization will be engaged in proceedings that may come before the judge or will be regularly engaged in adversary proceedings in any court); (c) Canon 5D (judge should not serve in fiduciary capacity); (d) Canon 5F (judge should not practice law); and (e) Rule of Judicial Administration 2.060(c) (same limitations apply to judicial clerks).
>
> These prohibitions are designed partially to prevent judges and staffs from taking time away from their judicial duties. More importantly, however, the prohibitions are to prevent them from placing themselves in positions where their actions could directly or indirectly be influenced by matters that could come before them or could provide the appearance that certain parties might be favored over others. As a result, members of the judiciary and their law clerks are unable to participate

> in providing pro bono legal services to the poor absent a broadening of the definition of those services to such an extent that the services would no longer be limited to legal services. As discussed above under the definition of legal services, we believe that 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. Consequently, we find that members of the judiciary and their staffs should be deferred at this time from participating in the program.
>
> We emphasize, however, that judges and their staffs may still teach or engage in activities that concern non-adversarial aspects of the law. Canon 4. Although those activities would not be governed by these rules, we strongly encourage the participation of the judiciary in those activities and request the judicial conferences to consider appropriate means to provide support and allow participation of judges and law clerks in pro bono activities.

Id.

In its opinion, the Court recognized that, even in 1993, judges were engaged in numerous activities which advanced "the principles of pro bono service." Id. at 504, n.3. Further, in her concurring opinion, Justice Barkett emphasized the importance of the judicial conferences examining which pro bono activities would be appropriate for judges and judicial staff:

> As the court recognizes, there are many things that judges and their staffs can do to advance the principles of pro bono service. I am confident that discussion of this issue by the judicial conferences will reveal many activities that would not run afoul of ethical considerations. It may be true that judges and law clerks would only be subject to modified and restricted pro bono service, but that should not preclude the effort to explore what the parameters of that service should be.

Id. at 506 (Barkett, J., concurring). In the years since the Court's

adoption of Florida's pro bono plan, there has been little consideration concerning the "appropriate means to provide support and allow participation of judges and law clerks in pro bono activities." Id. at 504.

As stated in the Administrative Order creating the Task Force, the Court appointed the Task Force to address the continued necessity for the judicial deferment and propose a plan that will facilitate participation in pro bono activities by the judiciary and judicial staff. *In Re: Pro Bono Activities by Judges and Judicial Staff*, Administrative Order No. AOSC00-7 (Fla. 2000). The Court specifically directed the Task Force to:

> a) Study how a pro bono commitment, or similar undertaking, can be carried out by judges and judicial staff;
>
> b) Collect information on non-traditional pro bono activities by judges and judicial staff in Florida and other states;
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> c) Consider the need for rules relating to pro bono service by judges and judicial staff; and
>
> d) Report its findings, conclusions and recommendations to the Supreme Court.

Id.

The Process of the Task Force and Committee

The Task Force and Committee held its organizational meeting on December 14, 2000 and reviewed the responsibilities of the Task Force and Committee, received presentations and information on judicial

ethics opinions and judicial involvement with pro bono and in Florida and other states, received a presentation and information on the development of the pro bono rule in Florida generally and the judicial and judicial staff deferral from the rule specifically. The Task Force and Committee then divided into three subcommittees to gather and review more information and to develop recommendations: Pro Bono by Judges Subcommittee, Pro Bono by Judicial Staff Subcommittee and Judicial Support of Pro Bono by Attorneys Subcommittee. The subcommittees completed their work and presented their recommendations to the full Task Force and Committee on April 9, 2001.

Final recommendations and proposed language changes to Rule 4-6.1, Rules Regulating The Florida Bar, and to Canons 4(B) and 4(D) of the Code of Judicial Conduct were developed and were sent in September 2001 with a explanatory memorandum to:

Judge Joseph P. Farina, Chair, Conference of Circuit Judges
Judge Jeffrey Colbath, President, Conference of County Judges
Judge Jerry R. Parker, Chair, Conference of District Court of Appeal Judges
Judge Charles J. Kahn, Jr., Chair, Judicial Ethics Advisory Committee
Chief Judges of the District Courts of Appeal of Florida
Chief Judges of Florida Judicial Circuits
Terrence J. Russell, President, The Florida Bar

The memorandum and recommendations were also sent to the federal judiciary and the federal magistrates in Florida.

The Task Force and Committee conducted a conference call with

Judge Scott Silverman, Chair, Judicial Ethics Advisory Committee (JEAC) on February 4, 2002 to discuss the concerns of the JEAC and the petition to the Supreme Court of Florida filed by JEAC regarding Florida's Code of Judicial Conduct. The Task Force and Committee reviewed all comments received at a meeting held on March 27, 2002. By a vote of (12) twelve in favor, (0) zero in opposition and (1) one abstention, the Task Force and Committee approved the proposed modifications to the rule and canons and the final recommendations in this report. There were no dissenting views by members of the Task Force and Committee.

The Considerations of the Task Force and Committee

Members of the judiciary are prohibited from practicing law by article V, section 13 of the Florida Constitution and Canon 5G of the Code of Judicial Conduct. Members of the bar employed by the judiciary are prohibited from practicing as an attorney before any court or agency of the government by Rule of Judicial Administration 2.060(b).[1] These prohibitions, however, have not prevented a large

[1] Rule 2.060(b), Florida Rules of Judicial Administration states:

> **(b) Clerks and Secretaries Not To Practice.** No one serving as a research aide or secretary to a justice or judge of any court shall practice as an attorney in any court or before any agency of government while continuing in that position, nor participate in any manner in any proceeding that was docketed in the court during the term of service or prior thereto.

number of judges and judicial staff attorneys from engaging in pro bono activities. During the course of gathering information on current pro bono activities by judges and judicial staff in Florida and in other states, the Task Force learned that many members of the judiciary and their staff are currently engaged in pro bono activities which do not constitute the practice of law or practicing before a court or agency of the government, yet still qualify as pro bono service under Rule 4-6.1, Rules Regulating The Florida Bar.

Examples of such pro bono services being provided by the judiciary include training of pro bono and legal aid lawyers, participating in Teen Court, providing general community education, and participating in pro se clinics explaining court procedure and decorum. In addition, staff attorneys in some courts provide client screening, advice and referral at legal aid offices and homeless shelters. Further, a number of organized pro bono programs in Florida have established specific projects to provide appropriate opportunities for members of the judiciary and their staffs to participate in pro bono activities. A more detailed description of these judicial and judicial staff pro bono activities is included in Appendix 2. Typically, under the pro bono plan, these judges and staff attorneys are reporting that they are deferred from the pro bono rule, but they also frequently report their hours of pro bono service and/or their monetary contributions to legal aid

organizations.

Notwithstanding the current judicial involvement in pro bono activities, the Task Force and Committee have concluded that currently there is substantial uncertainty about the type and extent of pro bono service that is ethically permissible for judges and their staff attorneys. The proposals included in Appendix 1 are intended to address that uncertainty and to provide guidance to judges and their staff in this area.

Recommendations

Pro Bono Activities by Judges and Judicial Staff attorneys.

The Task Force and Committee recognize that public service is the very essence of the work of a judge. Thus, to some it may seem strange that judges would have an additional aspirational duty to perform pro bono service, which is another type of public service. These considerations also apply to many attorneys, however, including attorneys working in the offices of the state attorney, public defender, or legal aid providers. Nevertheless, the Court has not exempted such attorneys from the aspirational obligations under Rule 4-6.1.

Because the obligations created by Rule 4-6.1 involve "pro bono legal services," which require, in many cases, the practice of law to satisfy, the Task Force and Committee recommend the creation of a separate aspirational pro bono service obligation under Canons 4(B)

and 4(D), applicable only to judges and judicial staff.

If a separate pro bono obligation is to be successful, however, the Task Force and Committee believes that it is important to facilitate aspirational judicial pro bono service by defining broadly the types of service that would constitute pro bono service for judges and judicial staff and providing specific examples of such service. Because judges and their staff attorneys are prohibited from practicing law, the proposals include a wide array of pro bono service activities which may not be considered traditional pro bono legal services, but are nevertheless appropriate pro bono service reportable under Rule 4-6.1, Rules Regulating The Florida Bar, and which, we believe, many judges have traditionally undertaken as a part of their judicial role.

Further, while the Task Force and Committee believe that it is important to encourage judges and judicial staff to be involved generally in community and charitable activities, our focus has been limited to pro bono activities that relate to improving access to the justice system for the poor and working poor, including activities which also improve access to the justice system for all people. We concluded that our focus should be so constrained because the Court so clearly limited the focus of The Florida Bar pro bono plan to services that related to the legal needs of the poor. See 630 So. 2d at 503. As the Court explained:

> The entire focus of this action has been to address the *legal needs of the poor*. That objective is distinguishable from other types of uncompensated public service activities of the legal profession. Clearly, this Court has the constitutional responsibility to ensure access to the justice system. Although other public service by the legal profession is important, no authority exists for this Court to address, through the Rules Regulating The Florida Bar, uncompensated public service activities not directly related to services for the courts and the legal needs of the poor. As such, we find that the proposed rules should be modified to eliminate any reference to services not related to the legal needs of the poor. Additionally, we find that the rules should clearly indicate that their purpose is to establish aspirational goals and to motivate the legal profession to provide necessary legal services to the poor. To accomplish these purposes, we find that the definition of legal services to the poor should be narrow, expressing simply that Florida lawyers should strive to render (1) pro bono legal services to the poor or (2) to the extent possible, other pro bono service activities that *directly* relate to the legal needs of the poor. It is also our intention that the definition include legal services not only to indigent individuals but also to the "working poor."

Id. (emphasis theirs).

Taking these factors into consideration, the Task Force and Committee proposes that the following language be added to Canon 4(B):

> Further, judges and members of The Florida Bar employed by the judiciary are encouraged to perform pro bono service activities which relate to improving access to the justice system for the poor, including the working poor, but which do not involve the practice of law and are otherwise consistent with the requirements of this Code.

Further, to provide more detailed guidance, the Task Force proposed that the following be included in the commentary to Canon

4(B):

> Involvement in pro bono activities by judges and attorneys employed by the judiciary, as permitted by Canon 4(B), is subject to all the requirements of this Code. Thus, in undertaking pro bono service activities, a judge or members of the bar employed by the judiciary may not practice law; and such pro bono activities may not reflect adversely on the judge's impartiality, may not interfere with the performance of judicial duties, and may not detract from the dignity of the judge's office. The aspirational goal of performing pro bono service may be satisfied by providing at least 20 hours of pro bono service related to improving equal access to justice for the poor, including the working poor, or by an annual contribution of at least $350.00 to a legal aid organization.
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> Pro bono service by judges and members of the bar employed by the judiciary may include (a) participating in activities that encourage or support pro bono legal services by attorneys; (b) teaching, speaking, writing or participating in presentations regarding the rights and responsibilities under the law which relate to improving access to the justice system for the poor and the working poor; (c) participating in activities that relate to improving the fair administration of justice and/or equal access to the judicial system; (d) participating in authorized continuing legal education programs which relate to improving access to the justice system by the poor and the working poor; and (e) participating in activities to educate students about the legal system and the law, including such activities as teen court and practice court. Each judge shall annually report his or her pro bono service on the reporting form that is made a part of The Florida Bar's annual membership fee's statement.

As the Court noted in its 1993 pro bono opinion, see 630 So. 2d at 504, under Rule 2.060(b), Florida Rules of Judicial Administration, members of the bar employed by the judicial system are restricted in their practice of law. That rule prohibits

judicial staff attorneys from practicing "as an attorney in any court or before any agency of government" or participating "in any manner in any proceeding that was docketed in the court during the term of service or prior thereto." Rule 2.060(b), Fla. R. Jud. Admin. Although broad, Rule 2.060(b) does not expressly prohibit all practice by judicial staff attorneys, but limits its prohibition to practice in courts or before government agencies. Thus, under the express provisions of this rule, judicial staff attorneys should be permitted to satisfy their pro bono obligation by, for example, screening clients for a legal aid office or providing pro bono legal advice that neither involves nor is likely to involve a proceeding before a court or government agency. In addition, if Rule 2.060(b) is limited to state courts and state government agencies, judicial staff attorneys could assist clients in obtaining federal benefits, such as social security, supplemental security income and medicare, and on immigration matters.

In the 1993 pro bono opinion, however, the Court cited to Rule 2.060(c)(now Rule 2.060(b)) and parenthetically described the rule as applying to judicial clerks the full limitations imposed on judges by article V, section 13 of the Florida Constitution, and Canons 5BCD, 5D an 5F of the Code of Judicial Conduct. See 630 So. 2d at 504. If the Court has expanded the coverage of Rule 2.060(b) to be identical to the restrictions imposed on judges, of course, judicial clerks

and staff may not provide even limited legal advice in a matter not involving a court or government agency proceeding. Our recommendations assume that Rule 2.060(b) imposes the same restrictions on members of the bar employed by the judiciary, as the constitution and Code of Judicial Conduct imposes on judges. We urge the Court to consider, however, whether the limitations on judicial staff in rendering pro bono service should be read so broadly. The providing of limited legal advice by judicial staff in matters that do not involve and are not likely to involve state court or government agency proceedings, would not seem to raise ethical concerns for the judicial system.

Additionally, the Task Force and Committee proposes amendments to Rule 4-6.1, Rules regulating the Florida Bar to specify that the aspirational responsibility to provide pro bono service by the judiciary and members of the bar employed by the judiciary is prescribed in Canons 4(B) and 4(D) of the Code of Judicial Conduct and to establish in the rule a separate reporting provision for members of the judiciary and members of the bar employed by the judiciary.

The Task Force and Committee are further recommending an addition to the comment on Rule 4-6.1 which clarifies that the primary purpose of pro bono service is overall a public one and therefore appropriate for the judiciary and judicial staff.

Encouraging Pro Bono Legal Service by Attorneys. The Task Force and Committee also reviewed Judicial Ethics Advisory Committee (JEAC) Opinion No. 2000-06, issued February 11, 2000. In this advisory opinion, JEAC concluded that a chief judge violated the Code of Judicial Conduct by authoring a letter to lawyers within the judge's circuit, which solicits those lawyers to join specific legal aid organizations to perform pro bono work, or pay $350.00 as a contribution to the specific legal aid organizations. Based on information provided by judges and legal aid programs throughout Florida, the opinion is having a chilling effect on judicial participation in encouraging members of the Florida Bar to fulfill their professional obligation to provide pro bono legal services to the poor. We share the concern of JEAC that a judge should not engage in fund raising for any particular legal aid organization. We do not believe, however, that the intent of Opinion No. 2000-06 is to prohibit judges from encouraging lawyers to fulfill their aspirational pro bono obligations set forth in Rule 4-6.1, Rules Regulating The Florida Bar.

It is widely recognized that encouraging lawyers to provide pro bono legal services is an important activity of the judiciary, which both improves the administration of justice and furthers the judiciary's constitutional responsibility to ensure access to the

justice system.[2] As Judge Patrick Bowler, a Michigan trial judge, has stated:

> Judges, no less than attorneys, share in the responsibility to see that advocates are available for [pro bono] representation. Both judges and attorneys must work with legal services programs to ensure that judges are aware of how to enlist pro bono volunteers who are anxious and willing to step forward and provide legal assistance to unrepresented indigents in need. [M]embers of the judiciary should adopt as their personal code that judges have a duty and responsibility to engage in activities that guarantee that there are attorneys to meet the legal needs of the poor and underprivileged of our communities. . . .
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> The effort to meet the exigence of the poor in civil cases should not be one-sided. Judges also have a responsibility to offer their time and talents to developing the framework that supplies access to justice and support for the pro bono lawyers who actual provide equal justice under our law. Judges can provide needed training, education, and monies to support the Bar's efforts to access justice. The court has many tools and processes available to it to ensure that the lawyer representing the pro bono client is spared time, money, and needless effort in accomplishing their representation of their client. Systemic changes can easily be made to streamline pro bono cases, e.g., pro bono cases could have priority on the docket or courthouse parking could be set aside for pro bono

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[2] *See, e.g.,* Honorable Patrick C. Bowler, *Access to Justice - The Judge's Role*, 79 Mich. B.J. 79 (2000); Honorable Randall T. Shepard, *Moving the Rock: The Constant Need to Re-Invent the Profession Using the Nation's Judiciary as Leaders*, 32 Ind. L. Rev. 591 (1999); Honorable Michael G. Harrison, *Judges Should Encourage Pro Bono*, 77 Mich. B.J. 1314 (1998).

attorneys.

Honorable, Patrick D. Bowler, Access to Justice - The Judge's Role, 79 Mich. B.J. 79, 81 (2000).

Indiana Chief Justice Randall Shepard has explained the judiciary's important leadership in a broader context and discussed the experience in Indiana, as follows:

> As elected or appointed officials, judges at the trial and appellate level are natural recruits for any effort at reform. To be sure, there is risk of criticism in any decision to step outside classic roles. They will need some help. "If judges are to feel comfortable with a leadership role in promoting public understanding of the courts, a balance must be reached between that role and the need to maintain the appearance and reality of impartiality." A judicial education curriculum developed by the American Judicature Society last year may give judges the means to find that balance.
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> We have had many . . . instances where Indiana judges have devised creative ways to reach out and into the community. In addition to the normal range of Law Day activities, judges have run "Saturday School" sessions to improve the study habits of juvenile delinquents. Others have held a "Parent University" to assist parents in improving decision-making skills. The Noble County bench has sponsored one-day seminars with national speakers that are designed to help the local legal community service its clients better.

> Many have viewed these "out from behind the bench" efforts as vital to the continued strength of the judiciary for, "[i]f judges are truly committed to the rule of law and an independent judiciary, it is their obligation to reach out to the public about these important concepts. If judges do not reach out, no one else is going to do it for them."

Honorable Randall T. Shepard, Moving the Rock: The Constant Need to Re-Invent the Profession Using the Nation's Judiciary as Leaders, 32 Ind. L. Rev. 591, 594-595 (1999). (Footnotes omitted; quoting Frances Kahn Zemans, From Chambers to Community, JUDICATURE, Sept.-Oct. 1996 at 62, 63).

The Task Force's and Committee's review of successful pro bono programs in Florida demonstrates that Judge Bowler and Justice Shepard are correct, judicial facilitation and encouragement of pro bono legal assistance by lawyers in the community are crucial to success in building a pro bono culture within the legal community.

Judicial activities such as speaking, writing, lecturing and teaching on the importance of pro bono legal service; participating in events to recognize lawyers who provide pro bono legal services; establishing procedural or scheduling accommodations for pro bono counsel; participating in circuit pro bono committees; and serving in an advisory capacity to pro bono programs, all clearly demonstrate the importance of fulfilling the lawyer's professional responsibility

and would further the goal of ensuring equal access to our legal system. Thus, the proposed revision to Canon 4(B) expressly authorizes judges to support and encourage lawyers to perform pro bono legal services, including encouraging lawyers to discharge their professional responsibility to provide services through organized programs of voluntary bar associations or legal aid providers or to make a monetary contribution; provided the judge may not suggest that a monetary contribution be made to any particular legal aid organization. Finally, as suggested by Justice Shepard, judicial education curricula should be developed to provide judges with the tools to assume the leadership role anticipated by the proposed revisions to the canons.

Government Lawyer Deferral. The Task Force and Committee are aware that the Standing Committee on Pro Bono Legal Services (Standing Committee) in its December 2001 report recommended that Rule 4-6.1 should be modified to remove the deferral of government lawyers from the rule. However, the government lawyer deferral was not included in the scope of responsibility of the Task Force and Committee. Thus, we do not propose a specific rule change with regard to the government lawyer deferral. Nevertheless, the Task Force supports the Standing Committee's recommendation in concept.

Conclusion

The Task Force and Committee thank the court for the opportunity to study and report on pro bono service by the judiciary and members of the bar employed by the judiciary. The task Force and Committee believe strongly that the adoption of these recommendations will materially enhance the continuing efforts of the entire legal community in Florida to develop a strong culture of pro bono service.

DATED this 30th Day of April, 2002

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