

Lawyering and the Low-Income Taxpayer

By Robin Westbrook

Robin Westbrook is a practitioner in residence at the Janet R. Spragens Federal Tax Clinic at American University Washington College of Law. She is also the publications officer and co-communications officer of the Pro Bono and Access to Justice Committee of the International Bar Association. The contribution of Jacek Kowalewski, law graduate from Warsaw University, is gratefully acknowledged. Responsibility for the contents is solely the author's.

Tax lawyers can readily find pro bono opportunities. There is ample peer support for the effort, both in the form of stated professional responsibility and through numerous facilities that match low-income taxpayers with available attorneys. While there are always practical difficulties, systemic impediments are largely theoretical, at least in this country. (Elsewhere, pro bono legal service can be subject to VAT,¹ or, if offered to individuals, prohibited altogether.²) This article briefly summarizes the rationales for an ethical obligation to perform pro bono service, discusses considerations that might discourage pro bono work, and reviews some of the many resources that assist lawyers who wish to undertake pro bono service.

The Obligation to Provide Pro Bono Service

By some accounts, a lawyer's ethical obligation to provide pro bono service is long-standing and arises from a historical commitment to the principle that all members of society should be able to obtain necessary legal services.³ Others point out that broad acknowledgment of a lawyer's professional responsibility to provide pro bono service is a recent phenomenon.⁴ From the latter perspective, the profession began addressing substantial attention to the subject in the 1950s, culminating in the 2002 revisions to American Bar Association Model Rule 6.1, "Voluntary Pro Bono Public Service," which states that "every lawyer has a professional responsibility to provide legal services to those unable to pay." While adoption of this language is far from universal, most state bar ethics rules urge pro bono service, although not necessarily for the benefit of those unable to pay. The

most stringent rules require reporting⁵ (with public access in some cases) of otherwise voluntary pro bono service.⁶

Commentators derive the obligation to provide pro bono legal service from attorneys' central role in the justice system.⁷ Justice is a fundamental social value, and equality before the law is its key element. For a person to participate in a complex, adversarial justice system such as ours, a lawyer's expertise is indispensable. The state acknowledges and enables this expertise with various entitlements — most significantly, a monopoly, regulated by lawyers themselves, on the practice of law and access to courts. Monopoly pricing is deemed to result, and pro bono service is considered an appropriate acknowledgment of the power to price services beyond the reach of many.⁸ Some observe, perhaps more philosophically, that the self-regulation that secures the monopoly — the ability to determine who can join the club — itself secures important social values which imply a service obligation.⁹ Thus, an independent, self-regulating legal profession, free to admit members of its own choosing who can exercise their profession without government direction, best preserves the rule of law.¹⁰ As society's self-regulating guardians of justice, lawyers are best positioned to secure its fundamental value of equality of all before the law and to work toward universal access.¹¹

⁵Rules of seven states require reporting. See <http://www.abanet.org/legalservices/probono/reporting.html> (last visited on July 24, 2009).

⁶See, e.g., Md. R. P. 16-903: "This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions."

⁷See David Fagelson, "Rights and Duties: The Ethical Obligations to Serve the Poor," 17 *Law & Ineq.: A J. of Theory & Prac.* 171, 182-189 (Winter 1999). See generally Rhode, *supra* note 4.

⁸Rhode, *supra* note 4, at 28-29; Fagelson, *supra* note 7, at 188. Fagelson submits that if the monopoly has the effect of denying access to justice to many, they (and society at large) will be better served by deprofessionalization and representation by the less competent.

⁹Admittedly, many trades and professions are self-regulating and aren't obliged to render pro bono service. An ethical obligation to provide pro bono service doesn't spring to mind when considering proposals for return preparer self-regulation, for example. See, e.g., Jeremiah Coder, "Will Self-Regulation of Preparers Take Root?" *Tax Notes*, July 6, 2009, p. 10, Doc 2009-14922, or 2009 TNT 126-1, in which the absence of discussion of preparers' pro bono obligations from an otherwise complete review hardly seems an oversight. The fundamental importance of access to justice perhaps heightens the expectations placed on lawyers and distinguishes the rationale for pro bono legal service from any that might arise for pro bono return preparation.

¹⁰See ABA Model Rules of Professional Conduct, Preamble paras. 10 and 11 (2002), available at <http://www.abanet.org/cpr/mrpc/preamble.html> (last visited on July 25, 2009); Fagelson, *supra* note 7, at 183.

¹¹While this may seem rather lofty, consider recent developments in Fiji where, as of June 30, all lawyers must apply for a practicing certificate from the newly installed, military-backed regime, which moved the licensing of lawyers from the law society to an army-appointed major. See Rowan Callick, "Fiji's Military-Led Judiciary No Paradise for Business," *The Australian*

(Footnote continued on next page.)

¹See *infra* text accompanying note 23.

²See *infra* text accompanying note 14.

³D.C. Rules of Professional Conduct R. 6.1 cmt.1 (2007).

⁴Deborah L. Rhode, *Pro Bono in Principle and in Practice: Public Service and the Professions*, 12-13 (Stanford University Press 2005).

Reliance on a self-evident, self-enforcing ethical obligation is seen as too mild by some and too stringent by others. Some argue that pro bono service should be mandatory and urge bars to impose (and employers to enable) compulsory pro bono service.¹² Others deconstruct the quid pro quo approach, asserting that lawyers' incomes derive not from their privileged status or from a monopoly, but from other skills. They suggest that the use of fee-shifting regimes, rather than mandatory pro bono service, might instill a more utilitarian, market-driven basis for securing legal assistance for needy persons with meritorious claims.¹³

Impediments to Pro Bono Service

In some cultures and under some scenarios, pro bono service is discouraged, taxed, or outlawed altogether. In some instances, either because of fee-shifting arrangements or government subsidization of legal work for underserved populations, the availability of pro bono service is deemed detrimental to the interests of lawyers who might profit from the work. Understandably, they protest. For example, until recently Brazil's federal bar association and its state bar associations considered pro bono work illegal and unethical on grounds that lawyers offering pro bono services would capture new clients through unfair competition.¹⁴ (Some 47,000 members of the São Paulo Bar Association are paid by the state to defend the poor.) A pro bono working group requested an advisory opinion from São Paulo's ethics tribunal on whether pro bono work is indeed illegal. The tribunal ruled that pro bono work is allowable if performed for nongovernmental organizations; it remains prohibited if performed for individuals.¹⁵

(June 5, 2009), available at <http://www.theaustralian.news.com.au/business/story/0,28124,25588281-36418,00.html> (last visited July 20, 2009). A lawyer was prevented from delivering a speech to the Fiji Institute of Accountants Congress, scheduled for June 12, 2009, because of the speech's discussion of Fiji's political and financial crisis and the recent coup's impact on human rights. See "An Experiment in Nation Building," Remarks by Graham Leung, available at "Lawyers as Society's Self-Regulating Guardians of Justice," <http://intprobono.blogspot.com/2009/07/lawyers-as-societys-self-regulating.html>, posted July 17, 2009 (last visited on July 24, 2009). Against this backdrop, a correlation between lawyers' autonomy and an ethical obligation to further access to justice does not seem extreme.

¹²Tom Lininger, "From Park Place to Community Chest: Rethinking Lawyers' Monopoly," 101 *Nw. U. L. Rev. Colloquy* 155 (2007). Fagelson, *supra* note 6, at 196, observes that the notion of a voluntary obligation is an oxymoron. He points out that the authority of an ethical obligation is independent of enforcement and that a lawyer committed to the rule of law obeys a rule for its own sake, not out of fear of sanction.

¹³David McGowan, "Is There a Utilitarian Case for Mandatory Pro Bono?" available at http://www.legalethicsforum.com/blog/2007/04/mandatory_pro_b.html (last visited July 24, 2009).

¹⁴Marco Fuchs, "Access to Justice in Brazil," available at http://www.internationalprobono.com/resources/folder.213735-IBA_Annual_Conference_Buenos_Aires_2008 (last visited July 24, 2009).

¹⁵*Id.*

In the United States, public interest law practices that rely on fee-shifting arrangements are thought to be at risk if pro bono service is enforced.¹⁶ Judicial "stinginess"¹⁷ in allowing private attorneys to recover from defendants in successful civil rights litigation is attributed to the view that civil rights litigation is charity.¹⁸ It has been observed that a mandate for pro bono service "will only encourage [judges] in the belief that lawyering for the public interest is a form of charity, and it may lead them to tighten the rules for statutory attorneys' fees even further."¹⁹

Prevailing taxpayers can, in limited cases, recover legal fees if the government fails to establish that its position was substantially justified.²⁰ The prospect that tax work on behalf of indigent clients might otherwise be compensated arguably makes pro bono tax work controversial. Government support for low-income taxpayer clinics (LITCs)²¹ likewise might discourage a practice based on fee recoveries. No complaint about LITC or pro bono tax litigation has been observed in these pages from lawyers cultivating a commercial tax practice based on fee recoveries under section 7430.²² Thus, although practices in other substantive areas that rely on fee-shifting statutes (and practices in other countries that rely on government payment for work on behalf of indigent

¹⁶Samuel R. Bagenstos, "Mandatory Pro Bono and Private Attorneys General," 101 *Nw. U. L. Rev. Colloquy* 182 (2007).

¹⁷*Id.* at 189.

¹⁸*Id.*

¹⁹*Id.*

²⁰Section 7430 (2006). For example, the IRS could not show substantial justification for its position that an information return issued by the Social Security Administration was correct (and taxpayers recovered fees) when the IRS had failed to investigate the return, as section 6201(d) requires. *Fitzpatrick v. Commissioner*, T.C. Summ. Op. 2009-102, *Doc 2009-15474*, 2009 TNT 129-32.

²¹Section 7526.

²²Any such complaint would be dimmed by the fact that the IRS Restructuring and Reform Act of 1998 (P.L. 105-206) which authorized grants to LITCs also liberalized free recoveries under section 7430. Indeed, an attorney serving pro bono in a tax dispute might include a claim for fees under section 7430. Such a claim is contemplated by section 7430(c)(3)(B). LITCs are required to maintain time records for their employees, students, and volunteers so that "if the situation arises," they can substantiate claims under section 7430. Publication 3319 (rev. May 2009), *Low Income Taxpayer Clinic: 2010 Grant Application Package and Guidelines*, at 19, *Doc 2009-11380*, 2009 TNT 96-40. ABA Model Rule 6.1 states that "the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from counting toward the expected 50 hours of pro bono work. Lawyers who do receive fees in those cases are encouraged to contribute an appropriate portion of those fees to organizations or projects that benefit persons of limited means." Model Rules of Professional Conduct R. 6.1 comment 4 (2006). In Britain, by contrast, court-ordered fees paid to successful litigants with pro bono attorneys go to the Access to Justice Foundation. See Jeremy Morgan, "QC, Section 194 Legal Services Act 2007," available at http://www.accesstojusticefoundation.org.uk/downloads/Article_on_secti_on_194_by_Jeremy_Morgan_QC.pdf (last visited July 25, 2009).

clients) might be disadvantaged by pro bono work, those concerns haven't been asserted regarding pro bono tax work.

The Polish Ministry of Finance has taken the position that its VAT²³ applies to providers of pro bono legal services.²⁴ The ombudsman has challenged that position,²⁵ asserting that free legal help to the poor is exempt from VAT under EU regulations,²⁶ provided there is no detriment to free competition.²⁷ The Pro Bono Declaration of the International Bar Association urges rescission of existing taxes on pro bono services.²⁸

The U.S. VAT proposed by the Fair Tax Act of 2009²⁹ would apply to "gross payments" for services³⁰ and thus would likely not apply to pro bono work — or to any uncompensated legal work. In contrast, British Columbia imposes a VAT on the "purchase price" of legal services; the tax applies to the amount of fees charged, whether collected or not.³¹ A lawyer who represented needy clients challenged the tax as an impermissible burden on the constitutional right of access to justice.³² His bank account had been garnished to collect the tax, which was imposed on unpaid legal fees. The Supreme Court of Canada upheld the tax, determining that the British Columbia legislature can impose conditions on the right of access to justice.³³

Resources That Facilitate Pro Bono Tax Work

Various programs facilitate pro bono assistance to low-income taxpayers at every stage of the return and

²³"Act on Tax on Goods and Services of 11 March 2004," *Journal of Laws* No. 54, item 535, as amended, Art. 8, Sec. 2.

²⁴The tax applies to donations; taxpayers (any person carrying out economic activity) are obliged to deliver VAT invoices. See generally Tomasz Hatylak, *Poland Tax Deskbook*, Gide Loyrette Nouel (Warsaw, 2005), available at <https://www.lexmundi.com/images/lexmundi/PDF/tax-Poland.pdf> (last visited July 20, 2009).

²⁵Statement of Janusz Kochanowski, Feb. 2 2007, available at (in Polish) <http://www.sprawny-generalne.brpo.gov.pl/pdf/2004/04/472486/1181261.pdf> (last visited on July 25, 2009).

²⁶See Sixth Directive of the Council of the European Communities (17 May 1977), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0388:EN:HTML>.

²⁷See Posting of Jacek Kowalewski available at <http://intprobono.blogspot.com/2009/06/should-pro-bono-legal-services-be.html#comments> (June 9, 2009) (last visited July 24, 2009).

²⁸See paragraph 6 of the October 2008 declaration, available at <http://www.internationalprobono.com/declarations/> (last visited July 24, 2009).

²⁹H.R. 25, 111th Cong. (2009).

³⁰See *id.* at section 101(b)(1).

³¹See Social Service Tax Amendment (No. 2) 1993, British Columbia. The tax is intended to fund legal aid for indigent citizens, but the revenue collected goes to the state's general fund. See *Christie v. Attorney General of British Columbia*, 2005 B.C.S.C. 1222 (Sup. Ct. B.C.).

³²See Posting, available at <http://intprobono.blogspot.com/2009/06/should-pro-bono-legal-services-be.html#comments> (June 13, 2009), last visited July 24, 2009.

³³*British Columbia (Attorney General) v. Christie*, 1 S.C.R. 873, 2007 SCC 21 (2007), available at <http://csc.lexum.umontreal.ca/en/2007/2007scc21/2007scc21.html> (last visited July 24, 2009).

controversy process. A prime opportunity arises with each Tax Court calendar call, at which the presiding judge calls cases docketed for trial in the upcoming session and asks taxpayers (and opposing counsel) about the status of the cases. This may be the first time the taxpayer has responded to opposing counsel's requests for information, and the assistance of a third party can greatly reassure the taxpayer. The volunteer lawyer may choose to enter an appearance and represent the taxpayer in negotiations or at trial, or she may simply offer brief advice during the calendar call. Six state bar associations have programs that the Tax Court has certified for this purpose. Participating lawyers that attend the calendar call are identified by the presiding judge for the benefit of petitioners who may wish to speak with an attorney before their cases are called.³⁴

Some of the LITCs, which are partially funded by the IRS under section 7526, maintain referral networks. The Janet R. Spragens Federal Tax Clinic at American University in Washington offers training for attorneys who wish to accept referrals. The training consists of a one-day seminar, to be given this year on August 26.³⁵ Similarly, the ABA Section of Taxation has an LITC match program to connect qualified attorneys with LITCs in need of extra assistance.³⁶

The IRS's Volunteer Income Tax Assistance (VITA) program trains individuals who assist taxpayers in return preparation. Under an agreement between the IRS and the ABA Pro Bono Committee, attorneys can do much of the training online or through self-study.³⁷ Although government attorneys cannot undertake work that might be adverse to the government, they can assist in training volunteer return preparers who work on military bases. The training for these positions under the Military VITA program includes a four-hour course on tax issues unique to members of the armed forces and their families.³⁸

The tax controversies most common to low-income taxpayers involve family status matters,³⁹ as the credits and deductions associated with family members can substantially mitigate or eliminate tax liability at lower

³⁴The Tax Court's guidelines for certifying a bar association program require that there be a designated program director/coordinator and that participating attorneys be members of the Tax Court bar. *Requirements for Participation in the United States Tax Court Clinical, Student Practice & Pro Bono Program by Bar-Related Pro Bono Programs*, July 13, 2009, available at http://www.ustaxcourt.gov/clinics_bar_related.htm (last visited July 25, 2009).

³⁵One can register by calling Laura Kushner at 202-274-4144 or e-mailing lkushner@wcl.american.edu.

³⁶See <http://www.abanet.org/tax/probono/> (last visited July 24, 2009).

³⁷See http://www.abanet.org/tax/vita/vitahowtobecomea_volunteer.pdf (last visited July 24, 2009).

³⁸See http://www.abanet.org/tax/probono/08Washington_DCLettertoVolunteers_letterhead_.pdf (last visited July 24, 2009).

³⁹For a review of the common areas of controversy, see Bruce Kayle, "Pro Bono Matters (Not a Contradiction in Terms): A Primer," *Tax Notes*, Aug. 15, 2005, p. 777, *Doc 2005-16221*, or 2005 TNT 157-28.

COMMENTARY / VIEWPOINTS

income levels. Refunds of the earned income tax credit can represent a major portion of a taxpayer's resources and, predictably, can lead to concerns well beyond tax analysis. Disputes over entitlement to the credit can be the major battleground in a relationship's breakup, giving the seemingly mundane tax case unexpected dimensions. Identity thieves can invent income for their victims sufficient to qualify the thieves for the credit. The victims can then face deficiency procedures to recover the funds

wrongly disbursed. In a different arena, low-income employees can be asked to serve as business officers by employers who then disappear with employment tax trust fund assets, leaving the semiskilled employees to dispute massive trust fund recovery penalties.

The pro bono tax lawyer thus can receive many rewards, meet few impediments, and obtain a good deal of assistance in launching his involvement in the effort to provide access to justice for low-income taxpayers.