

The Senior Lawyers Conference and Pro Bono: A Happy Union

by Senior Justice Harry L. Carrico

When Frank O. Brown, Jr., then immediate past chair of the Senior Lawyers Conference of the Virginia State Bar, asked me to write an article for the conference's dedicated issue of the *Virginia Lawyer*, he said I could write on any subject. That made the selection of a topic easy for me, as the pro bono effort in Virginia is near and dear to my heart.

Although the conference is already a strong supporter of pro bono, it has decided to involve more of its members.* The conference's more than 8,000 members are a wonderful pool of talented, experienced and able lawyers. They represent a valuable and virtually untapped resource for providing legal representation to those who cannot afford it. The additional help will go a long way in alleviating the plight of the unrepresented poor.

The necessity to provide legal services to the poor is not new. When I began to practice law more than 60 years ago, there was no formal provision for legal services to the poor—either criminal or civil. On the criminal side, public defenders had not

yet been heard of, and, prior to the *Gideon v. Wainwright* decision in 1963 (372 U.S. 335), state courts, unlike their federal counterparts, generally were not required to appoint counsel for indigent defendants. When lawyers were appointed to defend the poor, they took such assignments seriously, even though they were paid nothing in federal court and only a nominal amount, usually \$10 per case, in state court.

I thought I had struck it rich one day in Fairfax, where I started out, when I had the last criminal case on the docket call and was the only lawyer left in the courtroom after the last case was set for trial. The judge asked me to represent ten prisoners who were being brought from the local prison camp for trial on escape charges. We disposed of all ten cases on pleas of guilty in less than an hour, for which I was paid the munificent sum of \$100. It's a good thing ineffectiveness of counsel hadn't been invented yet, or I would have had to plead guilty for not having spent more time with my clients, even though I got them all suspended sentences.

On the civil side, there was neither a legal services corporation nor were there legal aid offices. The pro bono effort had not yet begun—assistance given the poor in civil matters was the result of the generosity of individual practitioners who felt obligated to help the less fortunate.

Lewis F. Powell, Jr., was the inspirational leader of the pro bono movement in this country. As a young lawyer, he helped provide legal services to the underprivileged and he contributed substantial time to the Family Service Society of Richmond, whose goal was to provide



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such services. He felt it was necessary to assure indigents that they could get a fair shake from a legal system they often perceived as unfriendly. He once said, “[R]espect for law is at its lowest with underprivileged persons. There is a natural tendency for such persons to think of the courts as symbols of trouble and of lawyers as representatives of creditors or other sources of ‘harassment.’” He also said the poor should be provided suitable representation to “engender increased respect for the law.”

Lewis Powell's greatest contribution came when, as president of the American Bar Association in 1964–65, he induced the ABA to endorse a federal program proposed by the Office of Economic Opportunity to provide legal services to

*As part of its expansion effort, the Senior Lawyers Conference, in conjunction with the Young Lawyers Conference, is seeking a rule amendment that would permit “emeritus members,” of the Virginia State Bar, as defined in the proposed rule amendment, to provide pro bono legal services subject to certain conditions without paying State Bar dues. At least ten states have adopted “emeritus” rules.

the poor. It was by no means an easy task for him to secure the ABA's endorsement of the OEO proposal. Indeed, the odds against such a happening seemed overwhelming. Many ABA members wanted the organization to use its influence to kill the OEO proposal outright.

But Lewis Powell would not be dissuaded. By force of his charismatic personality and his strong persuasive powers, he won the unanimous vote of the ABA's Board of Governors and a similar solid vote of its House of Delegates—a magnificent tribute, indeed, to Lewis Powell's leadership. With this boost, the Legal Services Corporation was created and a federal legal services program became a reality.

Lewis Powell was then appointed to the National Advisory Committee on Legal Services to the Poor, which guaranteed the independence of the program. One of his associates on the committee, an African-American graduate of Yale Law School and a dedicated poverty activist, later supported his nomination to the Supreme Court of the United States. In a letter to the Senate Judiciary Committee, she wrote:

My support [of Lewis Powell] is based upon the fact that I am drawn inescapably to the sense that [he] is, above all, humane; that he has a capacity to empathize, to respond with humanity to the plight of a single human being to a degree that transcends ideologies or fixed positions. And it is that ultimate capacity to respond to individualized instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

We should recall Lewis Powell's contributions to the pro bono effort. The fate of legal aid to the poor on a national scale was seriously jeopardized when Congress apparently decided to cancel or dramatically reduce funding for the Legal Services Corporation. In 1996, LSC's appropriation

was reduced from \$400 million to \$278 million. The appropriation inched back over the years to \$338 million, but, in real dollars, current funding is one-half of what it was in 1980. One small ray of hope shines through: Last winter, although many other programs were cut, Congress increased LSC's appropriation by \$9.5 million. But it is still an "iffy" situation, and to ensure continued federal funding for legal services to the poor, we need leadership of the kind Lewis Powell displayed almost 40 years ago.

No one knows the outcome of the fight in Washington over legal services to the poor. Whatever the outcome, there will still be a need to expand the pro bono program in Virginia. Indeed, the necessity for expansion is even greater.

Why do I say this? A Virginia State Bar survey conducted several years ago proved the need for legal services to the poor beyond all reasonable doubt, and the survey results were just as certain in showing that the need was not being met.

Of the 203,770 households surveyed, 41%, or 83,545, had experienced legal problems in the past three years. Eighty-four percent of those experiencing legal problems, or 70,177, lacked a lawyer to help them face such problems at least once in the past three years. Of all the respondents having legal problems, only 20% retained lawyers, and those who did not cited inability to afford legal services as a major reason. Three-fourths of those surveyed were unaware that some free legal services are available to indigent persons with non-criminal legal problems.

Since the State Bar survey, much has been accomplished to relieve the plight of the unrepresented poor, and the bar can feel very proud. But the survey identified many, many poor persons who were not being reached, and their numbers have undoubtedly increased due to the depressed economy. Because the need of all these unrepresented people is no less compelling and their plight no less deserving of relief than the ones who have been reached, we must increase our efforts to

make legal services available to all those who cannot afford to pay.

Why should we help people like this? I could compose no better reason than that given by Justice John A. Buchanan in the 1895 case of *Barnes v. Commonwealth*, 92 Va. 794, 803. Although *Barnes* was a criminal matter and the case is more than 100 years old, what Justice Buchanan wrote applies with equal force to today's needs of the poor for legal services of all kinds:

If a prisoner is unable to employ counsel, the court may appoint someone to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid, nor spare his best efforts in the defence of one who has the double misfortune to be stricken with poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so.

The duty recognized in *Barnes* to render legal aid to the poor is expressed today in Rule 6.1 of the *Virginia Rules of Professional Conduct*, which provides that "a lawyer should render at least two percent per year of the lawyer's professional time to pro bono public services." A comment to Rule 6.1 states that "[e]very lawyer, regardless of professional prominence or professional work load has a personal responsibility to provide legal services to those unable to pay."

Please note that Rule 6.1 says a lawyer "should," not "shall," render at least two percent of his or her time to pro bono work. Other states are considering mandatory pro bono programs, but I hope we in Virginia can keep ours voluntary. I think pro bono services rendered willingly from a spirit of compassion are more effective and meaningful than those rendered under compulsion.

Another persuasive reason why we should help the poor was expressed in an article

that appeared recently in *The Judges' Journal*:

We know that the affluent, the advantaged, the powerful, retain lawyers to challenge actions that they believe violate [their rights]. If the poor and powerless are to continue to work within the system, then they too must have the help of a lawyer . . . [E]very citizen at least should have the right to be heard. Without the right to be heard, the poor and the disadvantaged will no longer believe that they can work through the system. And if this occurs . . . then we will have lost something very precious in our democratic society.

We are in danger of losing something very precious to the legal profession—the public's respect. Our profession was once perceived as being dedicated to the public good, placing service to others above self-gain. But, today, public confidence in the legal profession is at a shockingly low ebb, as demonstrated by an article appearing in a recent issue of the *Journal of the American Bar Association*. Reporting on a survey commissioned by the ABA, the article states that substantial majorities of the persons surveyed think today's lawyer is no longer “a leader in the community, . . . a defender of the underdog, . . . and a seeker of justice.” A mere 22% think the phrase “honest and ethical” describes lawyers today, and only 40% give lawyers a favorable rating overall, ranking them third from the bottom among the nine vocations listed and placing them 16 percentage points behind bankers and 12 points ahead of stockbrokers—who came in next to last.

In my opinion, the lack of respect for the legal profession is due in large part to the public's belief that lawyers are more interested in making money than in performing a public service. We must, therefore, find ways to change the public's attitude toward the bar and restore the public's perception of a lawyer as a “leader in the community, . . . a defender of the underdog, . . . and a seeker of justice.”

I can think of no better way of changing the public's attitude than to send out the message loud and clear that substantial numbers of the bar's membership, including the senior lawyers, are engaging voluntarily in providing legal services to the poor. This may seem a selfish reason for participating in pro bono work, but it will serve both the needs of the poor for adequate legal services and the necessity for the bar to improve its public image. Both are worthy objectives, and we should go about both tasks post haste.

Yet, in face of the need for expansion of our pro bono effort, we are met with several counterproductive phenomena. It seems that some law firms are paying new associates such outlandish salaries that they have discontinued their practice of allowing credit for pro bono work on billable hours quotas. If this phenomenon spreads, it could have a serious effect upon our effort to enlist new participants in the pro bono program.

Further, in the survey conducted by the state bar, 30% of the lawyers surveyed reported they had not participated in pro bono activities in the preceding twelve months. Of this number, half said pro bono work did not fall within their area of practice, 36% said they were prohibited by company or governmental policy from participating, and, surprisingly, more than one-fourth said they had not been asked to render pro bono service to needy persons. I say “surprisingly” because I have to wonder where the people in this last category could have been hiding during the past ten or fifteen years. On more than one occasion, I have addressed letters to every lawyer in the state soliciting support for the pro bono effort, and several statewide bar groups have made similar appeals over the years. Besides, given Rule 6.1, lawyers should not wait to be asked to do pro bono work, but should volunteer their services without requiring someone to beg them to participate.

I would suggest to the nonparticipating members of our profession that they should read the first person accounts of the needy persons reported in the survey conducted by the VSB. Some of the stories

would tug at the heartstrings of even the most cynical of our members. Typical is the story of the 64-year-old woman who was working part-time but would soon have to undergo open-heart surgery and have to quit her job. She had no health insurance. She had house payments and a grandson to support. Her husband had been dead for three years. She had some proof he died as a result of asbestos contamination on his job at a power plant, but she said she had not been able to proceed with her case involving her husband's death because she could not afford a lawyer.

Another woman had been evicted from her home and was living with her sister. She was on indefinite sick leave from her position at a nursing home, could not afford a divorce, owed money to many people, had lost her car through repossession and was having trouble enforcing visitation rights with her children.

I would also suggest to our nonparticipating members that they take a moment and look within themselves. We are all human beings, but some, through hard work or simple good luck, are able to accumulate more of the world's riches than are others. Out of concern for their fellow human beings, those in the more fortunate group must give something back in return for their good fortune by rendering assistance to those who are in trouble and in need of help.

Finally, I would say to our nonparticipating members that they are missing something very special—the great sense of satisfaction that comes from being of service to others. A comment to Rule 6.1 states that “personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”

I would also tell our nonparticipating members of a conversation I had recently with a young lawyer who had worked with the Supreme Court of Virginia for several years but had left to engage in a promising business venture completely disassociated from the practice of law. After a very short time, he began to feel

there was something missing from his life, and he attended a pro bono conference with the idea of filling the void by doing some pro bono work on the side. Sitting there in the conference, moved by what he heard, he decided to ask the Court to allow him to return to his old job, and he was welcomed back with open arms. What was missing from his life was the great feeling of satisfaction that comes from being of service to others.

This is what John Oakey, the recipient of the Richmond Bar Association's 2003 John C. Kenny Pro Bono Publico Award, had to say of his pro bono work since he retired from active practice at the end of 1999: "The pro bono work I've done in the last three years is perhaps the most rewarding part of my 40-year career as a lawyer. . . . I honestly regard the chance to do pro bono as a gift—a gift to me."

And here is what a Norfolk attorney, Richard Ottinger, the recipient of the 2003 R. Edwin Burnette, Jr., Young Lawyer of the Year Award, had to say about the pro bono work he has done on behalf of victims of natural disasters: "This is very rewarding I receive a great deal of joy and satisfaction in helping people It is a privilege to practice law and volunteer for my community."

Our members who do not participate in pro bono work don't know what they are missing. It is time they came aboard and found out. It is their bounden duty as members of a great profession to thus serve the public. As Justice Sandra Day O'Connor said in her dissent in *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 488-89 (1988):

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails *an ethical obligation* to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in

the traditional view of professional life. But the special privileges incident to membership and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. *That goal is public service.* (Emphasis added.)

I applaud the decision of the Senior Lawyers Conference to enhance its involvement in pro bono work. I am sure those receiving the additional assistance will be most grateful.

On the other hand, I doubt that we who are neither poor nor burdened with legal troubles can appreciate the feeling of helplessness that must be experienced by those who are not only stricken with poverty but also weighed down with problems they cannot solve for themselves. I think we can imagine, though, the great sense of relief these troubled people must feel when they are able to grasp the helping hand that pro bono extends to them in their time of strife. We just need to make sure every poor person is extended that helping hand and experiences that

same sense of relief. This is what the pro bono effort is all about, and the decision of the Senior Lawyers Conference to elevate its level of participation makes it more likely that the overall effort will succeed.

Something Lewis Powell once said is still pertinent today:

Equal justice under law is not merely a caption on the façade of the Supreme Court Building [in Washington]. It is perhaps the most inspiring ideal in our society. It is one of the ends for which our entire legal system exists. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.

With this ideal as the goal of the pro bono effort, I wish the members of the Senior Lawyers Conference and the bar as a whole great success in expanding the program of legal assistance to the poor. I also hope that all the participants will come away with the same sense of satisfaction John Oakey has experienced and that, as he has, they will regard the chance to do pro bono as a gift—a gift to them. 🙏



Senior Justice Harry L. Carrico became a member of the Supreme Court on January 30, 1961, and Chief Justice on February 1, 1981. He retired on January 31, 2003, as the longest-serving Chief Justice in the history of the Court and the longest-serving member since the reorganization of the Court in 1788. He was educated in Fairfax County public schools and received his J.D. from George Washington University. He was judge, trial justice court (now general district court) from 1943–1951 (includes service in the Naval Reserve in World War II). He

was in private practice from 1951–1956, and a judge, Sixteenth Judicial Circuit from 1956–1961; a member of the Judicial Council of Virginia from 1970–1981, and its chair from 1981–2003; president of the Conference of Chief Justices from 1989–1990 and chair of the National Center for State Courts from 1989–1990. His awards include: LL.D., University of Richmond; LL.D., George Washington University; LL.D., College of William and Mary; the Distinguished Service Award, Association of Family and Conciliation Courts; Herbert Harley Award, American Judicature Society; the Paul C. Readon Award of the National Center of State Courts; and Virginia Military Institute's Harry Flood Bryd, Jr. Public Service Award. Joint Resolutions of the Virginia Senate and House of Delegates, in 1990, commended then-Chief Justice Carrico for his service on the Supreme Court and gave him the honorary title of Chief Justice of Virginia. Justice Carrico co-founded the VSB *Mandatory Course on Professionalism* and created the Virginia Domestic Violence Coordinating Council.