Pro Bono Conference: The Access to Justice Crisis in the U.S. and the Obama Administration Response Adelaide, South Australia

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Thank you Justice McMcMurdo, Mr. McCoy and Glenn for inviting me here today and it is good to see my friends Esther Lardent and other pro bono leaders from the States. Having spent the last nine months being introduced as a "recovering lawer," I feeI like I slipped off the wagon today. I actually billed my daughter for four figures. But it feels very good to be able to discuss an issue that I have been passionate about for the past two decades; as opposed by say, dairy exports. It also feels very good to be back among my people – fellow lawyers. In the State Department and Diplomatic circles now, whenever I enter a room everyone stands up. When I enter a room of lawyers, they all look at their blackberrys. So it's good to have things back to normal.

I've been passionate about pro bono for a number of reasons. What I'd like to talk to you about today is two things. First, I'd like to briefly share my own experience doing pro bono work, as a way of helping others make the case for pro bono. And second, I'd like to offer some thoughts about why – at least in the U.S. – doing pro bono the way we've been doing it is no long enough. We need to start delivering pro bono and non-profit legal services in different ways if we are going to reverse the widening the justice gap.

First, my own experience. No one here needs an explanation why pro bono is good, unless they wandered into this conference by accident. You wouldn't be here unless you shared the view that lawyers should be doing unpaid work for underserved communities. The challenge is always to convince others – particularly clients or partners who think pro bono is merely charity and that they shouldn't be forced to subsidize your charity work. I was lucky that my old firm had a great tradition of supporting pro bono. But we all have different audiences to convince, and so, I've often had to make the economic case for pro bono.

The economic case is this: people who believe that practicing law is only about earning profits should do pro bono because it is a good investment. Here are five reasons:

First, it gives young lawyers early experience and training they'd never received and so they can do more sophisticated work and bill a higher rate earlier in their career.

Second, it raises the profile and standing of a firm and is one of the best and least expensive forms of advertising.

Third, it makes lawyers remain at firms long, feel more positive about their firm, and in turn be more productive, which enhances the bottom line.

Fourth, it impresses judges which long-term improves lawyer performance in paying cases, and attracts business.

And finally, it frequently leads to referrals to paying clients from each of these sources.

Let me give you one example from my own experience. When I first started at Munger, Tolles & Olson, the firm had only 3 other lawyers in San Francisco. I wasn't planning to practice with a private firm for long; I just wanted to get some good experience, pay off my student debts and get out. I thought joining a small office in a good firm would help me do that.

I had only been practicing 9 months when I got the Matrix case. 10,000 homeless people in S.F. and only 800 shelter beds. I represented a class of homeless people for two years. All of the things I said happened. I had phenomenal experience. I took over 20 depositions, including the mayor and chief of police, and argued cases in the ninth circuit and as amicus in the California Supreme Court in high stakes litigation. Training I'd never have received because no paying client would have trusted me with it. I made partner in 3 years.

It raised the profile of our firm. We won awards from the State Bar, the American Bar Association, and various other groups. Moreover, by raising our pro bono numbers we moved way up the American Lawyer rankings, and in fact by the time I left we had been ranked the No. 1 law firm in the Country three years in a row.

It made me stay. I was happier and more productive because I was proud of the work I was doing. It made me more efficient, more positive, and it made other people at the firm feel better about what we did. I ended up staying almost 20 years.

The judges I appeared before later appointed me to various committees and recommended me for things, and in general, it helped build my reputation with the bench which helped other clients.

And it actually directly attracted new paying clients or referrals. My favorite was a client that I had for the next 20 years that probably paid over $100 million in billables over that time. He'd heard me on the radio while he was driving into work. He thought that it was a righteous case and that I seemed to be making some sensible arguments. So he called me and asked me to make a pitch to his company.

But these are the reasons to convince colleagues to support pro bono work. It is not what makes the people in this room passionate about pro bono. Our emotional connection is much simpler: it is the right thing to do and it is our duty. It is the right thing to do because there are people suffering and we have the unique skill to help them. This is not simple charity. It is a duty of being a lawyer. When I used to swear people into the California bar, I'd remind them that the public was giving them a special gift that day: it wasn't just a license to make money, or a certificate that they had passed test. From that day forward they were granted the ability to hear people's deepest secrets and fears in confidence, to take responsibly their most important rights, and help define the laws that govern their lives. What is more, they define the laws that govern other people's lives, too. Not just their clients, but the lives of everyone living under that law. In return for all of this, lawyers assumed one duty: to uphold the system of justice. If we aren't working to ensure that all people have real access to the justice system, we aren't doing our duty, and we are betraying that public trust.

Which brings me to my second point. The system isn't working. Pro bono is critical; but it only meets a small fraction of the unmet need. Despite efforts to encourage more lawyers to do more pro bono for more hours, every year the gap keeps growing. In the U.S., today, we have a legal system in which the majority of Americans cannot afford adequate legal service. Because we have such a complicated and cumbersome system, people who don't have lawyers, can't navigate the system and get the justice to which they're entitled. A lot of this is based on the mark: many legal claims are worth less than the cost of legal service, and so the public can't justify paying a lawyer to pursue them. In some cases there just aren't enough lawyers to do that sort of low paying work. In other cases it is language barriers, or other impediments, including courts that are clogged. This is why so many of those who can afford justice go through private mediations with paid mediators and arbitrators. In effect, justice is now available principally only to the wealthiest people or to some of the poorest people who are lucky enough to get legal help. That is not a justice system. It is fundamental that justice must be the same, in substance and availability, without regard to economic status.

No matter how much pro bono work we do or how much money we put into legal services, we have not closed the gap. They say one definition of insanity is to keep doing the same thing wrong over and over again and expect a different result. In my view,

either we'll need to adapt our system to actually meet more of society's needs, or the system will ultimately collapse.

The Justice Gap

To really address the justice gap, I think we need to first conform it and acknowledge it. The Legal Service Corporation, which is established by Congress, found that in most states more than half of the public cannot get legal representation. It should not come as any surprise that – as a profession – lawyers are not meeting the needs of a good portion of the public. I can give U.S. statistics, but most of us already know this from our own lives. Most of us have friends or relatives who have gone without a lawyer, or chose someone outside of their field, or settled a case that they shouldn't have simply because they couldn't afford the right lawyer. A quarter of all attorneys in my home state of California earn less than $50,000 per year, and so if they faced a serious legal problem, they likely could not afford themselves. The problem is even worse for those living near the poverty level. I routinely counseled friends that they would be better off absorbing some slight or injustice rather than face the cost, risk and pain associated with full litigation.

Now what does this say? We would consider it intolerable if a large number of Americans had to choose an unqualified doctor, forego needed treatment, or perform surgery on themselves because they could not get proper medical care.

But every day, people who are at risk of losing things just as precious — their homes, their livelihood or their families — arrive at our courthouses having no idea what they need to do to protect themselves, and unable to hire someone else who could help them out. Too many make poor choices or face bad results, not because of the merits of their case, but because they never had meaningful access to legal services.

The problem of access is as much a middle class problem as it is a problem for the poor. Most of the time, when we talk about access to justice, we focus only on the neediest members of society, but the statistics make clear that the problem extends to all but the wealthiest parts of society.

The vast majority of unrepresented parties in the United States at all income levels are in family court, housing disputes and consumer credit claims. Their lives and their families' futures — their living arrangements, their security, their homes and their possessions — depend on these cases. And yet – in California at least – 8 out of 10 times only one side has a lawyer, or in some cases neither side has one.

Solutions

So what is the solution? For one thing, it is not simply money. While the system is underfunded in the U.S. in part based on federal restrictions on funding certain types of legal services. President Obama has proposed lifting those restrictions which would free up another $500 million in private funds that must be rejected to comply with federal funding requirements. But even with another half a billion dollars, there would likely never be enough money to ensure full legal services to every litigant (our Congress would need to quintuple the funding of legal services just to help the poorest sector). Moreover, in some cases even money or having more lawyers would not solve the problem. There are language barriers, mobility problems and shortages of lawyers in rural communities.

But more fundamentally there is the fact that sometimes litigants need something less than a fully trained lawyer but more than what they can do themselves. And while our legal systems and procedures are designed well for criminal cases and certain types of civil cases, for other claims they are too complex, time-consuming and confusing for their and our own good.

And so if we are to meet our duty to deliver justice, we need to consider not simply the traditional idea of increasing legal services funding, but also to consider some bold changes in that system so that we could increase the impact of pro bono work.

Here are three.

Right to counsel

Some countries have guaranteed counsel to all parties in certain types of proceedings. The United States guarantees counsel in criminal cases, but not in all legal proceedings. There is growing momentum in the United States to reconsider this. In my home state of California, the Chief Justice has proposed a pilot project that would grant litigants in important types of cases, such as child custody and elder abuse, the right to counsel in a few counties as a way of gauging the value of such a program. Other countries, such as Canada, have actually found that by providing counsel to all citizens in divorce cases, they actually increased public appreciation for the value of lawyers and support for other legal services.

Alternative models

Another method would be to move away from the traditional model of requiring adversarial litigation and develop more cost effective models for non-criminal cases. We have a picture in our mind of what court cases should look like, two lawyers presenting two sides to a neutral judge or jury. This model works very well, but it is so costly and time-consuming that it becomes a barrier for resolving many kinds of disputes. There is

nothing that requires that civil cases be treated the same way as criminal cases or that all civil cases be treated alike.

The Bellow-Sacks project at Harvard has proposed some alternatives. First, lawyers could provide training – either to non-lawyers or social workers – to help people avert litigation over household crises in the first place. Second, some types of cases – particularly in housing or family disputes — could be handled through optional procedures. For example, instead of each side paying a lawyer, for instance, courts could deputize – pro bono – a specialist who knows the field to impartially collect information and present a report to the court on their findings. Instead of two lawyers fighting each other for months or years, one lawyer could resolve the issue quickly. This would free up courts to conduct adversarial trials with appointed counsel for cases in which a person might lose his liberty – involuntarily commitment, TROs, etc.

Alternatives to lawyers

Finally, we may need to consider changing our system of licensing lawyers to meet demand. For example, we might consider allowing some legal services to be performed by less-than-full-service lawyers including students, specialists (sort of the legal equivalent of nurse practitioners) or apprentices. We could also have people trained to mediate disputes who are not judges.

Even more radically, we might consider certifying some foreign lawyers to perform certain types of work that can be done over the Internet and which does not require broad knowledge of all national law. For example, in the U.S., lawyers are licensed by state. Many types of federal tax issues can be resolved simply by mastering the federal tax code, federal patent prosecutions do not necessarily demand state experience, and other such advice can be outsourced to the extent that it is in too short supply in a particular region. One of projects I have advanced would make it easier for U.S. and Australian lawyers to practice in one another's jurisdictions.

I am not advocating these particular reforms. My point is only this: the system cannot afford to treat all cases the same with the resources we have, and so part of our pro bono effort should be dedicated to crafting a better system.

To keep things in perspective, America still has one of the best legal systems in the world. But we are slipping further and further from our ideal of equal access and equal justice for all. If the systems we have in place are not allowing lawyers to deliver justice to all, then it is up to lawyers to introduce new systems.

I am hopeful that as lawyers dedicated to equal justice, we will work not only to address the needs of our pro bono clients, but to consider new ideas to fix this justice gap, and to

champion them. It may seem an impossible task. But as justice Albie Sachs once said, all great social change is impossible, until it happens; and then it was inevitable.