

THE IDAHO PRO BONO COMMISSION: A CALL TO JUSTICE

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In Fond Remembrance

The Idaho Pro Bono Commission honors the many and varied contributions of our friend Allyn Dingel to pro bono and the rule of law.

"I feel sad for Idaho attorneys who have never taken up the mantle of pro bono representation. I continue to be honored and awed by the experience and responsibilities involved."

—M. Allyn Dingel, Jr. December 12, 2008

"To him friendship never was egocentric, never was what you would do for Allyn. It always was what he would do for you"—Hon. George David Carey, May 1, 2009.

Nationwide a pro bono "renaissance" is underway.¹ A major effort to spur such a revival in Idaho has been a joint Resolution by the Idaho Supreme Court, the United States District Court for the District of Idaho and the Idaho State Bar to create the Idaho Pro Bono Commission.²

At the Commission's first meeting on April 14, 2008, Idaho Chief Justice Daniel Eismann voiced concern for those who cannot afford legal services, and reminisced about his years in private practice in Owyhee County where pro bono service was "a daily fact of life." U.S. District Chief Judge B. Lynn Winnill spoke of the 80% of federal court litigants who are pro se, and the critical contribution made by members of the federal bar who take those cases.

Idaho Attorney General Lawrence Wasden related the importance of pro bono work in forming his own concept of justice and of a society based on the rule of law. University of Idaho College of Law Dean Donald Burnett spoke of pro bono initiatives at the College of Law and noted that every Idaho lawyer takes an oath "never to reject, for any consideration personal to myself, the cause of the defenseless or oppressed." It is with these words of justice and compassion for those in need that the Commission began its work.

WHAT IS THE TASK OF THE COMMISSION?

The Commission identified three goals necessary to create a culture of pro bono service in Idaho:

1. To increase pro bono participation by private sector attorneys, both in private firms and in corporate legal departments.
2. To increase pro bono participation by public sector attorneys, including deputy attorneys general, prosecuting attorneys, public defenders, city attorneys, and judicial clerks.
3. To have judges adopt "best practices" encouraging and supporting pro bono participation by the attorneys under their jurisdiction.

GOAL 1— INCREASING PRIVATE SECTOR PRO BONO - PRO BONO POLICY TEMPLATES

The Commission adopted two pro bono policy templates, one for private firms and one for corporate law departments. These template policies encourage firms and corporations to discuss and to clarify such issues as:

- (a) How pro bono hours will be treated in organizations with billable hour requirements;
- (b) How an attorney's pro bono work will be treated in advancement and partner and associate compensation decisions;
- (c) Annual goals regarding the number of pro bono hours contributed by the law firm; Establishment of

systems ensuring that firm pro bono programs are managed effectively, that participating attorneys are trained adequately, and that the highest levels of firm management oversee and participate in their programs.

The Commission encourages all private law firms and corporate law departments, large and small, to adopt an in-house pro bono policy tailored to their own unique legal culture and needs. The templates, which are based largely on policies already adopted by Idaho firms, are available from the Idaho State Bar³ and can be used as firms and law departments see fit. Some of the issues the Commission worked through in drafting its template policies may be of interest as private sector lawyers consider their own policies.

Should Pro Bono Hours Count as Billable Hours?

The ABA Report identified "limited time" and the fact that lawyer status is "measured by billable hours" as the greatest obstacles to pro bono service in private law firms. The response of the ABA House of Delegates is to urge law firms to adopt policies that

- (a) count pro bono hours as billable hours;
- (b) consider attorneys' commitment to pro bono activity as a favorable factor in decisions affecting compensation and advancement; and
- (c) set annual goals for hours contributed through law firm pro bono programs.⁴

The Commission template incorporates these ABA recommendations. But it also provides two other alternatives. One is based on an Idaho firm policy that does not prescribe a specific number of billable hours, but that has a comprehensive program which produces similar results. Another alternative commits to treating pro bono work positively when considering compensation and advancement.

What "Counts" as Pro Bono

One issue that Commission members debated was: What should "count" as pro bono? The policies supplied by private firms tended to count only work done free of charge for the needy and for organizations that provide legal services to the needy – what commentators on Idaho Rules of Professional Conduct Rule 6.1 (IRPC 6.1) call "Tier 1" pro bono services.

The Commission was torn between following the commendable lead of firms that want to stick to "Tier 1" service, and providing the full spectrum of services allowable under IRPC 6.1. Commission members chose the latter alternative in order to provide as many options as possible. Thus, the final template also "counts" as pro bono:

- Legal services for charitable, religious, civic, community, governmental and education organizations in matters designed primarily to address the needs of persons of limited means.

- Representation of businesses owned by persons of limited means for the purpose of community economic development.
- Legal education and bar activities, designed to assist individuals of limited means or to prevent social or civil injustice.
- Participation in activities for improving the law, the legal system or the legal profession

The Commission found it helpful to identify a list of things that do *not* count as pro bono:

- Legal services rendered to clients who did not pay
- Community and church volunteer work of a non-legal nature
- Work undertaken on a contingency fee basis unless done with the up-front intent to donate the fee to the client or to a legal services organization
- Legal services provided to friends or family members who are able to pay

The “Malpractice” Question

Another issue the Commission discussed was the frequent objection, “I cannot do pro bono work (usually meaning family law) because I’d be committing malpractice if I work outside my area of expertise.” Three responses are worth considering. First, pro bono is not synonymous with family law. A broad spectrum of pro bono work is available under Rule 6.1

Second, attorneys are life-long learners. We often find it necessary to cope with major changes even within our own specialty areas (think of recent revisions to the bankruptcy code, the tax code, health law, etc.). An attorney or firm may gain the necessary expertise through CLE⁵ programs or through self study.

Finally, a firm can adopt its own in-house “signature program” and develop the expertise necessary to run it. Examples include:

- A law firm carves out an area (say, immigration law), invites an expert in that area to train attorneys and makes them available when the need arises.
- A law firm investigates an area of poverty law and puts together in-house its own manual of law and legal forms necessary for firm members to practice comfortably in that field.

GOAL 2—PUBLIC SECTOR ATTORNEY POLICIES

The Idaho State Bar’s 2007 membership survey listed 18% of its responding attorneys as government employees. Virtually all responded that they did not do pro bono because government attorneys are “not allowed to accept” pro bono work.⁶ Fortunately, this is not the case. For example, both the U.S. Attorney’s Office and the Office of the Attorney General have policies encouraging pro bono work, provided certain conditions are met. Those conditions focus on conflicts of interest and acceptable use of government time and resources.

The broad range of allowable pro bono activities means that there are many types of pro bono work that involve no conflict at all. The dilemma presented by using government resources to do pro bono work can be resolved. For example, many government resources -- such as using a computer to type a document or using a phone to make a local phone call -- have zero or *de minimis* incremental cost.. The policy template addresses more complex issues and provides a roadmap insuring that public sector attorneys can make significant contributions to the field of pro bono service.

GOAL # 3 - JUDICIAL SUPPORT AND ENCOURAGEMENT OF PRO BONO

In 2001, The U.S. Conference of Chief Justices adopted Resolution No. 23, which states that “the Judicial Branch, in our constitutional structure, shoulders primary leadership responsibility to preserve and protect equal justice and to take action necessary to ensure access to the

justice system.” The Chief Justices urge judges throughout the country “to establish partnerships with state and local bar organizations, legal service providers, and others” to take the actions necessary to open the doors of the courthouse to those least fortunate in our society.

The Commission’s judicial members -- Idaho Supreme Court Justice Jones, U.S. District Judge Candy Dale and Magistrate Judge Rick Carnaroli -- are exploring ways in which Idaho judges can carry out their responsibility of assuring access to justice for all.

Actions under consideration include: taking direct action to urge law firms to adopt pro bono policies and pledge to engage in pro bono work; serving on award panels and presiding at award ceremonies for attorneys who do extraordinary pro bono work; serving on CLE panels in their areas of expertise in poverty law. In addition the judges will be exploring possibilities for accommodations for those engaging in pro bono such as special calendaring for pro bono cases.

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The Idaho Supreme Court, the U.S. Federal District Court and the Idaho State Bar are committed to ensure that justice reaches the poorest, most under-represented and most hidden corners of our society. The Idaho Pro Bono Commission hopes that our efforts will assist your efforts in achieving our common aspiration. Please contact a Commission member if you wish your voice to be heard in our deliberations.⁷

ABOUT THE AUTHOR

John J. “Jack” McMahon, is a member of the Idaho Pro Bono Commission and presently serves as the University of Idaho College of Law Pro Bono Program Director. He is a past Idaho State Bar Commissioner and President, and former Idaho Chief Deputy Attorney General.

ENDNOTES

¹ The term refers to the work of the ABA House of Delegates in August 2006 and to a dozen resolutions on pro bono enacted at that time. For a summary of the work and the text of the resolutions see:

<http://www.abanet.org/renaissance/downloads/finalreport.pdf>

² http://www2.state.id.us/isb/advocate/advocate_online.htm; *The Advocate*, 51(5):31, May 2008.

³ The private sector templates are available on the Idaho State Bar website http://www.isb.idaho.gov/ilf/ivlp/join_ivlp.html - once on the page click on the Pro Bono Commission in the left column.

⁴ Resolution 121A, ABA House of Delegates, August 2006. See fn. 1 *supra* for full text.

⁵ To respond to the need for attorney training, the Commission has partnered with the Family Law Section to bring CLE training in family law to non-specialists in October 2009.

⁶ The survey questionnaire was in multiple-choice format. This answer, while being the closest pertinent option, may not have reflected the sentiments of those who chose it.

⁷ Commission members from the judiciary are: Idaho Supreme Court Justice Jim Jones, U. S. District Court Magistrate Candy Dale, and Idaho Sixth District Court Magistrate Judge Rick Carnaroli. Private bar and public sector members are: David E. Alexander, Sunrise A. Ayers, Susie Boring-Headlee, Richard C. Boardman, Donald F. Carey, Peter C. Erbland, Trudy Hanson Fouser, Mary S. Hobson, Lorna K. Jorgenson, Linda Judd, Brian P. Kane, James L. Martin, John J. McMahon, Terry Michaelson, Michelle R. Points, B. Newal Squyres, John Tait and Terry Uhling.