Rochester Federalist Society
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Pro Bono for Fun and Profit

I am deeply flattered to be speaking at the inaugural event of the Rochester chapter of the Federalist Society Lawyers Division. The reason so many people come to the Federalist Society events all over the country, is that, by tradition, the debates are lively and fairly matched and the talks are provocative and free of the usual stuff one hears at meetings of the bar associations. In honor of this occasion, I am going to make some remarks that are perhaps more than usually provocative.

When lawyers gather and judges speak, you can count on hearing something on the subject of pro bono service. It is always praise of all that is done, with encouragement to do more. This evening I am going to articulate a view that you may not have heard: I will touch on some of the anti-social effects of some pro bono activity; I will try to explain why such observations are virtually never made by judges; and I will encourage the kind of pro bono activity that is an aspect of traditional American volunteerism.

My point, in a nutshell, is that much of what we call legal work for the public interest is essentially self-serving: Lawyers use public interest litigation to promote their own agendas, social and political--and (on a wider plane) to promote the power and the role of the legal profession itself. Lawyers and firms use pro bono litigation for training and experience. Big law firms use public interest litigation to assist their recruiting--to confer glamor on their work, and to give solace to overworked law associates. And it has been reported that some firms in New York City pay money to public-interest groups for the opportunity of litigating the cases that public-interest groups conceive on behalf of the clients they recruit.

There are citizens in every profession, craft and walk of life who are active in promoting their own political views and agendas. When they do this, it is understood that they are advancing their own views and interests. But when lawyers do it, through litigation, it is said to be work for the public interest. . . . Well, sometimes yes, and

sometimes no. When we do work of this kind, a lot of people would see it as doing well while doing bono. Prosperous law firms that prevail in pro bono litigation do not hesitate to put in for legal fees where the law allows, and happily collect compensation--often from the taxpayers--for work they have touted as their service to the public. And even if the firms donate all or part to charity, the charities are usually groups that have as their charitable object the promotion of litigation rather than (say) medical research or hurricane relief.

Whether a goal is pro bono publico or anti, is often a policy and political judgment. No public good is good for everybody. Much public interest litigation, often accurately classified as impact litigation, is purely political, and transcends the interest of the named plaintiffs, who are not clients in any ordinary sense.

Pro bono activity covers a host of things, but I'm going to limit myself to two major categories, which overlap, and which seem to me to call for a close look, and re-appraisal. First, litigation against governments and officials; second, so-called impact litigation.

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A lot of public interest litigation is brought against governments, and against the elected and appointed officials of government. I do not delude myself that governments function all the time (or even very often) for the public benefit; and there is no doubt that people who are elected and appointed to government posts are imperfect, make mistakes, and promote themselves, their parties, or the interest groups that support them. But we should sometimes consider that in pro bono litigation, the government itself often has a fair claim to representing the public interest--and often a better claim. Everyone in government is accountable to the public (to the extent the public exacts accountability), either because they are directly elected by the people, or are appointed by elected officials, or hold their positions by virtue of civil service rules that have been created and administered over time by elected and appointed officials.

It is therefore odd that judges, juries and even the public often form the impression that the legal coalitions that sue governments and government officials are the ones who are appearing on behalf of the public interest. Representation of the public interest is high moral ground, the best location in town; so everyone struggles to occupy that space. The field is crowded: the activists and public interest lawyers, the professors and law school clinics, and the pro bono cadres in the law firms. They're in competition with government lawyers, and they often overwhelm government counsel with superior resources. But their standing to speak for the public is self-conferred, nothing more than a pretension. As a group, they (of course) do both good and harm. But, unlike public officials, they never have to take responsibility for the outcomes--intended and unintended--of the policy choices they work to impose in the courts.

I have an apt example. In the 1980s, six environmental organizations brought suit objecting to the Sicily Island Area Levee Project, a federal project to abate backwater flooding in Catahoula Parish, LA. The pro bono activists claimed, among other things, that levee construction could not proceed without an additional environmental impact statement. The District Court dismissed the complaint; but the Fifth Circuit Court of Appeals vacated and remanded on the impact claim, holding that the Army Corps of Engineers was required, in light of an intervening judicial decision, to go back and reconsider assumptions underlying its environmental impact statement, and if necessary issue another one. Circuit Judge Alvin Rubin dissented on the ground that plaintiffs failed to carry their burden of proof as to necessity of a supplemental statement. Judge Rubin pointed out that the project had been planned in 1975, that after several environmental evaluations, litigation began in 1983, and that the Court's 1985 remand would result in more lost time, further litigation attacks on whatever the Army Corps of Engineers come up with, and the possible frustration of the project. As he pointed out:

> The effect of the course my brethren follow is likely, if pursued in other cases, to be disastrous. . . . [N]o project could ever be completed if the opposition is determined.

I've Googled the Sicily Island Area Levee Project. The environmental groups succeeded. As late as 2002, the Army Corps of Engineers was still seeking funds to complete the project. Sicily Island was one of the areas hardest hit by Hurricane Katrina. You can look it up: Louisiana Wildlife Federation, Inc. v. York, 761 F.2d 1044 (5th Cir. 1985).

I have attended so many luncheons, banquets and cocktail parties honoring public interest lawyers. Many of the public interest groups and pro bono departments honor each other, sometimes over and over. It is very rare for anyone to question the usefulness of public interest lawyering. I was present one day many years ago at a law banquet at which then-Mayor Koch did just that. Unfortunately, the object of the retaliation was my law firm--and we were there in force because we had a table. Mayor Koch said that pro bono lawyers in the law firms frequently act to vindicate interests that are anti-social. He began to describe the case of a woman who (as I recall) had several dozen birds in her City-owned rental apartment. The City sought to evict her on the ground that she was impairing the premises and creating a health menace involving some kind of bird-caused disease that I cannot spell or pronounce. Anyway, the City was doing alright until a lawyer at my old firm became involved--pro bono--and several years of litigation ensued in which the resources of a Wall Street litigation department were brought to bear. As the Mayor started talking about crazy pro bono litigations that were bedeviling the City, my colleague leaned over and said to me: "My God; he's going to talk about the bird lady." Mayor Koch described the issues in the litigation and its very long and expensive course, in a way that seemed to be quite amusing, at least to people at the other tables.

I thought what Mayor Koch was doing was asserting the authority of his elected office as against pro bono lawyers who have neither a general responsibility for public health, nor an interest generally in the conditions or amenities enjoyed by residents of public housing.

The lady with the birds was entitled to a defense of her interests, as I recognized then and today. But, it is an entirely separate question whether in rendering that

service, pro bono lawyers may be said to represent the public interest in any real sense.

When public interest lawyers sue governments and officialdom, they have some natural advantages. What a government does in its operations is often limited by what it can spend, by the civil service employees who carry out its mandates, and by legitimate political considerations. Consequently, it is often the case that in litigation concerning government services, the government is arguing for a program that is not as effective as it would be if there were limitless resources, or on behalf of an agency that could (hypothetically) be improved--such as if every police officer had a degree in Constitutional law. Public interest lawyers, on the other hand, are often arguing for something that is better--which often means more expensive--than what the government is providing (or even can provide). So a judge may well wonder: Why rule for the town or the state in order to achieve a less than optimal result for the people who live there?

Also, I think judges tend to assume that a government would itself wish to be ordered to spend more money and provide more services--particularly if the money comes from somewhere else. And sometimes a government administration may be politically well-disposed to the objective of the public interest counsel, and may be willing to succumb and be ordered to do what it would wish to do anyway.

To my observation, government lawyers rarely argue that *they* are representing the right of the people to make decisions through their elected representatives: about governance, about the balancing of significant values and interests, and about priorities in the spending of public money and the deployment of public resources. In any particular case, the government may be right or it may be wrong; but it is odd that government lawyers so easily yield the distinction and prestige of representing the public.

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Now, let me turn to what is called impact litigation.

Some years ago I was on a panel of my Court on a case that went to the Supreme Court, called Valasquez v. Legal Services. The record in that case offered an extraordinary look into the mechanism of public interest litigation. In a nutshell, Valasquez was a challenge to part of a federal statute governing the Legal Services Corporation, which operates by giving out grants to legal clinics and pro bono groups. The statute said that the grantees could serve individual clients seeking benefits under statutes as written, but could not bring class actions, or challenge the constitutionality of statutes. The kicker was that the statute *also* provided that any grantee that challenged that proviso would get no grants; this presented a problem for the lawyers in finding a plaintiff--and they set to work on the plaintiff problem.

The attorneys challenging the legal services statute were at the Brennan Center in my old law school, NYU. In order to assure that *someone* might have standing to challenge this statute, a scatter-shot approach was used; there were a score of plaintiffs, each one citing by affidavit the role he or she played in the prosecution of public interest litigation and therefore the interest that each had in overturning the statutory restraint on the ability of grantees to bring class actions and conduct impact litigation. The affidavits submitted to establish standing shed a bright light on a mechanism that is often in shadows, and showed how public interest litigation promotes political interests of lawyers and activists, often altogether apart from any felt need by clients, who are marginalized or rendered superfluous altogether.

The plaintiffs' affidavits show that the use of LSC funds for client service to individual needy persons with legal problems is at best a secondary interest to them (a bore) as they work with indefatigable hands to channel public money toward political ends.

What do the affidavits say?

- A New York City Councilmember was deprived of a body of lawyers who would "influenc[e] legislation, including engaging in lobbying activities and testifying before legislative bodies. [He] can no

longer call upon various attorneys to assist" him in drafting legislation, (**JA 218**) or rely on them "to enforce the legislation" that he and they drafted together. (**JA 217**).

- A plaintiff with a farmworkers group relied on a grantee to conduct "educational workshops . . . to inform [farmworkers] of their rights," to represent them in "judicial, administrative and/or legislative proceedings," and to give "legal advice and training in connection with advocacy programs." (**JA 262-65**).

- A plaintiff employed by a grantee said that she has as "an integral component of her work" to educate disabled and elderly persons about their legal rights, and then represent them in vindicating those rights. (**JA 283**).

- The managing attorney of another grantee averred she has "no interest in practicing law except on behalf of poor people, persons with disabilities, or other groups of oppressed people." (**JA 186-87**).

- The director of special litigation at another grantee had as part of her work identifying issues and undertaking class actions "in the program's highest priority areas," "and to reach out and maintain communication with client groups to determine problems where intensified advocacy is needed." (**JA 134-35**).

- The general counsel to a grantee averred that his group has for decades worked with legal services offices, serving as a client for briefs amicus curiae, as a donor of policy analysis in class action litigation, and as a provider of expert testimony. (**JA 194-95**).

- Another plaintiff averred that he had "donated money" to a legal services program for the elderly, with the hope that it could be spent "without any restrictions on the type of legal action taken or clients represented." The donor was, incidentally, of counsel to that organization in at least one other litigation. [See [redacted]

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- One of those witnesses explained that "[a]n essential part" of her work has been "public testimony and comments, bill and regulation drafting, and advocacy in legislative and regulatory forums and conducting community legal education." (**JA 149**).(**JA 150-51**).

The affidavits of the plaintiffs in the Valasquez case thereby described a reciprocating motor of political activism that ties together policy research and lobbying, litigation and briefs amicus, and the arousing of politically-targeted demographics in which lawyers go shopping for useful clients. In a couple of ways, this resembles how industries in the private sector lobby and litigate, and there is nothing unethical about these initiatives. At the same time, *private*-sector lobbyists don't finance their efforts with public money, do not claim or get the prestige of doing their work in the public interest--and they have honest-to-goodness clients. Lots of people work hard on political initiatives and campaigns, on every side. But they are not acting pro bono (and do not deserve that pretension): Neither are lawyers who are promoting their political agendas in the courts.

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When I started talking I said that I would be articulating some views that you don't hear from judges, and I said that I would explain why this occasion--on which a judge says a single word critical of public interest litigation--is so rare. The fact is, most judges are very grateful for public interest and impact litigation. Cases in which the lawyers can and do make an *impact* are (by the same token) cases in which the judges can make an impact; and impacts are exercises of influence and power. Judges have little impetus to question or complain when activist lawyers identify a high-visibility issue, search out a client that has at least a nominal interest, and present for adjudication questions of consequence that expand judicial power and influence over hotly debated issues. If the question is sufficiently important, influential and conspicuous, it matters little to many judges whether the

plaintiff has any palpable injury sufficient to support standing or even whether there is a client at all behind the litigation, as opposed to lawyers with a cause whose preparation for suit involves (in addition to research and drafting) the finding of a client--as a sort of technical requirement (like getting a person over 18 years old to serve the summons).

Similarly, you will hear no criticism of public interest litigation or impact litigation at the bar associations, and I submit that is for essentially the same reason. When matters of public importance are brought within the ambit of the court system, lawyers as well as judges are empowered. True, we have an adversary system, but the adversary system is staffed on every side by lawyers. There is a neutral judge, but judges are lawyers too; and it is hard for a judge to avoid an insidious bias in favor of assuming that all things important need to be contested by the workings of the legal profession, and decided by the judiciary.

In the courtroom, advocates advocate, and judges rule, but lawyers as a profession encounter no competitors for influence and power. In the solution of political, social, moral and policy questions, everyone else is subordinated: public officials, the voters, the rate-payers, the clergy, the teachers and principals, the wardens, the military and the police. The lawyers and judges become the only active players, and everything that matters--the nature of the proceedings, how the issues are presented, what arguments and facts may be considered, the allowable patterns of analysis--are all decided and implemented by legal professionals and the legal profession, and dominated and ordered by what we think of proudly as the legal mind.

Great harm can be done when the legal profession uses pro bono litigation to promote political ends and to advance the interests and powers of the legal profession and the judicial branch of our governments. Constitutionally necessary principles are eroded: the requirement of a case or controversy; the requirement of standing. Democracy itself is impaired: The people are distanced from their government; the priorities people vote for are re-ordered; the fisc is opened. These things are done by judges who are

unelected (or designated in arcane ways), at the behest of a tiny group of ferociously active lawyers making arguments that the public (being busy about the other needs of family and work) cannot be expected to study or understand.

And, on those rare occasions when our competitors protest, when elected officials and the public contend that the courts and legal profession have gone too far and have arrogated to themselves powers that belong to other branches of government, to other professions or other callings, or that would benefit from other modes of thinking (such as morals or faith), the Bar forms a cordon around the judiciary and declares that any harsh or effective criticism is an attack on judicial independence.

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When I was in practice, I met my firm's benchmark hours for pro bono service, and I am as appreciative about work done for the public good as anybody else. The Second Circuit often reaches out to prevail on lawyers to represent parties and points-of-view that lack other representation, and we are grateful for such services rendered. To the extent that lawyers act as volunteers for the relief of those who require but cannot afford legal services, lawyers' work is beyond praise. I am grateful (and I think the public should be grateful) to lawyers who serve people and institutions that otherwise would be denied essential services and opportunities. I think of wills for the sick, corporate work for non-profit schools and hospitals, and the representation of pro se litigants whose claims have likely merit. (Perhaps less is done in the way of assistance to small businesses and individuals who could use help in coping with the web of regulation they encounter.) My colleague, Judge Robert A. Katzmann, has called for lawyers to step forward to assist aliens who are working their way through our immigration system, and I subscribe entirely.

These services are in a great tradition of American volunteerism. Indeed, the overwhelming weight of important volunteer services are provided by non-lawyers outside any legal context: volunteers in hospitals, hospices and nursing homes; individuals who mobilize for disaster relief; volunteers for military service; people who take care of the

old and sick and children in our own families; volunteer teachers in churches and schools and prisons; members of PTAs; poll-watchers; volunteer firemen and people who maintain forests and trails; coaches in community centers; people who serve on school boards, and other local government bodies, including block associations--not to mention philanthropists. Of course, lawyers do many of these things side by side with other citizens. When lawyers contribute their professional services, they are making a contribution on a par with what countless volunteers do in other professions, crafts, and walks of life. By the same token, we are doing no more than acting in the spirit of volunteer service that animates people in every walk of life and field of endeavor.

So I encourage such work. But in the policy area, we should as a profession consider dispassionately whether some public interest litigation has become an anti-social influence, whether the promotion of social and political agendas in the courts is in any real sense a service to the public, and whether the public interest would be best served by initiatives to abate somewhat the power of judges and lawyers and the legal profession as an interest group.

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