Bankruptcy Lawyers, Bankruptcy Judges and Public Service

James L. Baillie*
Fredrikson & Byron, P.A.
Minneapolis, Minnesota

I. Introduction

> *"Isn't the judiciary the quintessential entity that should be ensuring equal justice?"*
>
> *—Chief Justice Rosemary Barkett, Florida Supreme Court, February 1, 1993 at hearings on proposed rule changes in Florida*

Most of the legal needs of low income people are not being met. These needs cannot be met by the existing combined efforts of legal services organizations and volunteer attorney programs. These unmet legal needs include the need for assistance in bankruptcy cases as well as in the related areas of debtor-creditor and consumer law. There has been a dramatic increase in pro se filings of bankruptcy cases in many districts. In addition, many individuals appear pro se in bankruptcy court in hearings in the case and in adversary proceedings. A 1992 study estimated that 12.7% of bankruptcy cases were filed without the assistance of a lawyer, an increase of 300% in five years. More recent national statistics are not available but it is likely that the percentage of cases filed pro se is at least that high today. The level of pro se filings varies enormously from district to district with many districts below 5% but with some districts above 30%, according to a 1996 survey. This is ironic because in the 1970s the proposals for bankruptcy reform legislation, the Commission Bill and the Judge's Bill, provided that consumer bankruptcy cases would be handled primarily by administrative or clerical personnel without the substantial involvement of private lawyers. Lawyers, through the ABA, argued successfully for the importance of judicial resolution of issues in consumer bankruptcy cases and for the importance of private lawyers and recommended "court appointment of legal counsel for assistance to indigent consumer bankrupts."

Lawyers have an ethical responsibility to assist in the administration of justice and to provide legal services to those who cannot afford to pay. Lawyers should act to help those who are unrepresented in bankruptcy matters. Judges have a special responsibility for the administration of justice and a special opportunity to take leadership roles to achieve it. A recent trend in the legal profession is for specialized practice groups to undertake their own pro bono programs. That is beginning to occur in bankruptcy; a number of bankruptcy bar organizations have organized their own pro bono programs. This paper reviews the unmet needs, particularly for bankruptcy legal services, and describes the existing efforts to meet those unmet needs. It describes local bankruptcy pro bono programs in Minnesota, Philadelphia and South Carolina. This paper also provides

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*The author chairs the bankruptcy department of Fredrikson & Byron, P.A., Minneapolis, Minnesota. He is the former chair of the Bankruptcy Section of the Minnesota State Bar Association. He is a former chair of the American Bar Association's Standing Committee on Lawyers' Public Service Responsibility (SCLPSR). In 1984 he received the ABA's Pro Bono Publico National Award, one of four given in the first year these awards were presented. This paper is an updated version of materials that were presented at the annual meeting of the National Conference of Bankruptcy Judges in 1993.

specific suggestions for bankruptcy lawyers and bankruptcy judges regarding pro bono programs.

II. The Need

A. Legal Needs Generally

As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, whether rich or poor. However, because the legal problems of the poor often involve areas of basic need such as minimum levels of income and entitlements, shelter, utilities, and child support, their inability to obtain legal services in these areas, including bankruptcy matters, can have dire consequences. For example, the failure of a poor person to have effective legal counsel in an eviction proceeding may well result in homelessness. The failure to have legal counsel present at a public aid hearing may result in the denial of essential food or medical benefits. Inability to file a bankruptcy case can leave an individual without an economic future. A wrongly filed bankruptcy case can do serious damage to the debtor.

The inability of the poor to obtain needed legal services has been well documented: since 1983, at least one national and many statewide studies assessing the legal needs of the poor have been conducted. There has been a consistent finding that only about 10–30% of the legal needs of the poor are being addressed.

One consistent recommendation to address these unmet legal needs is that the private bar increase its level of pro bono service to help meet the need. For example, the Massachusetts study recommends that "private attorneys and bar associations in Massachusetts should continue to expand their activities in support of the delivery of free civil legal services to low income persons." In Maryland, it was recommended that bar associations "in coordination with legal services programs and others, expand private attorney pro bono delivery of civil legal assistance to low income persons through direct services, participation with legal services programs, training, community legal education, legal counsel to organizations serving low-income persons, and other appropriate approaches."

The private bar alone cannot be expected to fill the gap. The federal government, through adequate funding of the Legal Services Corporation (LSC), should bear the major responsibility for addressing the problem. Although the federal government has never provided sufficient funding for the LSC, during the past eighteen years funding has fallen even further, causing the crisis of unmet legal needs among the poor to be exacerbated. Specifically, in FY 1981, the annual budget for LSC was $321 million, while in FY 1999, the annual budget was only $300 million. Adjusted by the consumer price index the current level of funding represents only a small fraction of the previous budget.

B. Bankruptcy Legal Needs

The legal needs studies have generally not measured the specific need for bankruptcy services. Bankruptcy is generally treated as part of the broader category of consumer law. A number of studies have determined that approximately 12–15% of the total unmet need is in the consumer area. That typically places consumer law second or third on lists that usually have divided legal needs into ten or more categories.

It is generally, but not inevitably, true that individuals without non-exempt assets should not file bankruptcy cases. If they do have non-exempt assets, they should be able to pay an attorney. In addition, in most areas of the country, consumer bankruptcy prac-

tice is a high volume business with heavy advertising and low fees for basic Chapter 7 or 13 cases. Presumably for these reasons, pro se filings are still low in many districts. However, in some situations, there are good reasons to file a bankruptcy case even if the debtor does not have assets that can be reached by creditors or used to pay an attorney. For example, with the aid of § 525 of the Bankruptcy Code, bankruptcy filing can help protect valuable public benefits such as access to low cost public housing or other benefits (see section VI.C.).

Moreover, even in those districts where pro se filings are low there are many pro se appearances in relief from the stay motions and other motions, reaffirmation hearings and in adversary proceedings. That occurs because the attorney who handles the Chapter 7 or 13 case filing usually does so for a flat fee and is often unwilling to perform further services without additional payments, which the client is often unable to provide, having, by definition, no remaining non-exempt assets. In these cases presumably the lawyer who filed the case simply does not appear at a hearing or in the adversary proceeding. In some situations, the lawyer may make a motion to withdraw. A few bankruptcy courts have refused to permit withdrawal and required the attorney to continue to represent the debtor, for example, in dischargeability litigation. That was the result in *In re Edsall,* 89 B.R. 772 (Bankr. N.D. Ind. 1988) where the court said:

> The public responsibility on behalf of members of the bar, thus, compels the court to conclude that the non-payment of attorney fees, standing alone, does not constitute sufficient cause for the withdrawal of counsel, given the significance of the issues raised by Plaintiff's complaint.

For whatever reason pro se bankruptcy case filings are increasing dramatically. The Administrative Office of the United States Courts keeps the case statistics for the bankruptcy court system. Information on the number of pro se case filings has not been computed nationally since 1987. For the year ending June 30, 1987, there were a total of 36,377 pro se filings nationally representing a little less than 5.5% of the total case filings. For Chapter 7 cases there were 28,735 pro se filings representing 7.2% of the total. In September 1992 the Administrative Office, based on a sampling selection of fourteen districts, estimated that there were 86,360 pro se Chapter 7 filings annually representing 12.7% of the total Chapter 7 cases. In five years the total pro se Chapter 7 filings rose from 28,735 to 86,360, *an increase of over 300%.* As a percentage of the total filings, pro se Chapter 7 filings rose from 7.2% to 12.7%.

In 1996, the Ninth Circuit Judicial Council Subcommittee on Non-Prisoner Pro Se Litigation, with the assistance of the Administrative Office of the U.S. Courts, conducted a national survey. Seventy-four of the 89 clerk's offices responded. Of those, 56 kept some kind of statistics on pro se case filings. The study did not attempt to determine an overall national percentage of pro se filings. One of the major findings was that the variation from district to district is enormous. Seventy-one percent of the districts reported pro se filings of 10% or less with a few below 1%. (However, if there were 10,000 cases in a hypothetical district, 5% of that number would still be 500 pro se cases per year, a sizeable number in absolute terms for a single district.) Fourteen districts that responded reported they had more than 10% pro se filings in at least one chapter and some were overwhelmed—above 30%. The fourteen districts with pro se filings above 10% were: Arizona, Eastern District of California, Central District of California, Middle District of Florida, Southern District of Florida, Northern District of Georgia, Massachusetts, Nevada, New Jersey, Eastern District of New York, Southern District of New York, Oregon, Eastern District of Washington, and the Western District of Washington. The survey did not attempt to determine the number of hearings or adversary proceedings in which a party was pro se even in cases where the debtor was represented in the filing.

The survey and resulting report addressed a number of aspects of the pro se problem that are beyond the scope of this article. For example, most of the courts that had kept statistics showed a marked difference in success rates in Chapter 13 cases between pro se and counsel assisted cases. The report addressed the use of handouts, brochures, and handbooks available through the court, as well as foreign language and computer assistance. The report also addressed document preparation services, the formation of court committees concerning pro se litigants, special judicial procedures, and the like. There is a brief discussion of the survey responses relating to the availability of pro bono programs. The most common recommendation for the district was the improved use of handouts, brochures, and sample forms. The next most prevalent recommendation for improvement was "expanded use of legal service organizations and the bankruptcy bar to help litigants without counsel."

This situation is ironic, to say the least, in light of the fact that the Report of the Commission on the Bankruptcy Laws of the United States, July 1973, and its proposed "Commission Bill," recommended that consumer Chapter 7 filings be handled by an administrator, generally, without the involvement of an attorney except where disputes arose. An administrator could help prepare the petition and schedules and counsel the debtor. At the same time the so-called "Judges Bill" recommended that consumer bankruptcy cases be handled by clerical personnel, also without the substantial involvement of private lawyers. Lawyers vociferously disagreed and this became a controversial issue in the evolution of the law that became the Bankruptcy Code. The various committees of the Business Law Section presumably were unable to resolve this issue and the Section did not address it in its report and recommendation to the House of Delegates of the ABA. Minnesota submitted its own report to the ABA House of Delegates stating:

> . . . the inherently adversary character of consumer bankruptcies requires judicial resolution, and that consumer bankrupts or debtors, their creditors and the public will best be serviced by continued use of the judicial process, a judicial forum, and personal legal representation during the courts of bankruptcy or insolvency proceedings; . . .
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> Most lawyers working in the field know that nearly every consumer debtor or bankrupt needs continuous legal counseling and representation during the entire bankruptcy case, not just at the threshold, and that confidential interviewing, even if partly done by the lawyer's legal assistant under his supervision, is a needed professional task and service. Most such lawyers also know that administrative counseling could be helpful but ultimately is at least as expensive. Both bills establish administrative agencies for the service contemplated and ignore the superior capabilities of the private lawyer to render personal legal service to the consumer client at reasonable cost.

The Minnesota report also elaborated on the problems with conflicts of interest that would arise when bankruptcy cases and marital dissolution cases intertwine if both spouses and former spouses are assisted administratively. The ABA thus adopted a resolution concerning the Commission Bill and the Judges Bill that included the following:

> The American Bar Association favors incorporation of provisions in any bankruptcy legislation affecting consumer bankrupts to be adopted by the Congress that would: (1) retain a court-supervised judicial proceeding for consumer bankruptcies; (2) continue the system of private legal representation of consumer bankrupts; (3) establish an Administrative Office of the U.S. Bankruptcy Courts to provide necessary independent administrative support and support systems; and (4) provide for court appointment of legal counsel for assistance to indigent consumer bankrupts.

The fourth recommendation, has not been implemented and as described above, many consumer debtors are now without counsel. One consequence is unnecessary filings; probably many of the pro se cases should never have been filed. The pro se filings may damage credit, cost the debtor the right to use the privilege of a Chapter 7 bankruptcy filing for six years, or cause the loss of non-exempt assets or assets that could have been protected as exempt. Moreover, without assistance, those who file cases may become subject to criminal prosecution if they violate federal bankruptcy criminal laws in the process of filing and handling their own cases. That is now a more serious problem than ever before. Through an April 29, 1992 United States Attorney General's memorandum, the Justice Department was notified to give bankruptcy fraud high attention and priority. A number of special efforts have been taken and the number of cases under consideration for criminal prosecution is up more than 50%. See Brown, "Bankruptcy Fraud Prosecutions," *Bankruptcy Litigation,* Newsletter of the Bankruptcy and Insolvency Committee, Section of Litigation of the American Bar Association, January 1993, pp. 7-9.

For creditors, pro se filings are usually of no benefit. They take up an abnormal amount of attention without providing much payment to creditors. In many situations both debtors and creditors would have been better off dealing with each other outside of the bankruptcy arena.

These cases put special strain on the administration of the bankruptcy system because they require special attention from the clerks and judges. So much of what is done by the pro se debtor is wrong. How do clerks, trustees, and judges deal with these individuals? It is especially difficult for the judges who must remain in the neutral judicial role but who, to reach the correct judicial result, are tempted to leave that role to become a counselor or even an advocate for a pro se party.

Standing behind the pro se filings are a large number of other matters that call for the assistance of bankruptcy lawyers without involving the filing of a bankruptcy case. Individuals need counseling to deal with their debtor-creditor problems, asserting rights under the Fair Debt Collection Act, defending home foreclosures, evaluating whether there are legal rights to assert in response to collection actions, negotiating payment schedules in the best interests of the debtors and the creditors, and counseling debtors in handling their finances. These are services in the interests of administration of the bankruptcy judicial system and in the best tradition of our profession.

III. Lawyers' Obligation to Serve

A. Professional Tradition

Law, along with medicine and the clergy, started as a public profession. Its roots are service to the public and for long periods of time making an income sufficient to support continued public service was secondary to the service itself.

In such a professional ethos, no one is refused service because of inability to pay. In all, or almost all states, that is part of the oath that lawyers take when they are admitted to the bar. In addition, lawyers pledge through the ethical rules to serve the court: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ." See Rule 6.2 of the Model Rules of Professional Responsibility.

Public service is a core element in defining any profession:

> There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means

> of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.
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> —R. Pound, *The Lawyer from Antiquity to Modern Times*, 5 (1953).

These principles have been applied in bankruptcy court. In a case in which the bankruptcy court refused to permit withdrawal, *In re Edsall, supra*, the court also said:

> The need for legal assistance is not a function of the ability to pay. It is an unfortunate reality, however, that those most in need of legal services are often those who are least able to afford them. Yet a system of justice in which only the rich or well to do have meaningful access to the courts is no system of justice at all. Thus, it is imperative for legal assistance to be available not only to those who can afford the price but also to those who cannot . . . .
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> Attorneys must never lose sight of the fact that 'the profession is a branch of the administration of justice and not a mere money getting trade.'

See also *In re Pair,* 77 B.R. 976 (Bankr. N.D. Ga. 1987) and *Kriegsman v. Kriegsman,* 150 N.J. Supr. 474, 375 A.2d 1253 (1977), which are the sources of the inner quote above.

The most general statement of the lawyers' public service obligation is in the ethical rules of the profession. In these ethical rules, the public service rule is unusual because it is the only rule that is not enforceable by discipline. Its expression is generally referred to as *aspirational* rather than *mandatory.*

B. Applicable Rule

In most circumstances, lawyers are bound by the ethical rules adopted by the highest court of the state in which they practice. Practice in federal courts, however, is governed by local rules adopted by the local district courts, which sometimes adopt the ethical rules of the state in which the district is located and sometimes adopt the ABA Model Rules of Professional Responsibility. *In re Glenn Electronic Sales Corp.,* 99 B.R. 596 (D.N.J. 1988).

C. Canons

A number of states still follow the older Canons, the ABA Code of Professional Responsibility. Legal services to those unable to pay is addressed in Ethical Consideration 2-25:

> Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

D. Model Rules

More states follow the newer ABA Model Rules of Professional Conduct. As originally drafted by the Kutak Commission, public service was mandatory but that provision was later changed and until recently the rule remained both aspirational and general:

> RULE 6.1—PRO BONO PUBLICO SERVICE
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

E. 1993 Amendment of Model Rules

The ABA Model Rules of Professional Responsibility were modified in February 1993. The change originated with the ABA Standing Committee on Lawyer's Public Service Responsibility (SCLPSR) which studied the subject of mandatory and aspirational pro bono and the legal needs of the poor. It decided against a mandatory rule but recommended that the Model Rules be amended to incorporate the essence of two prior ABA resolutions in favor of a specific recommended number of hours and to emphasize the provision of legal services to persons of limited means. The new rule now reads:

> RULE 6.1—VOLUNTARY PRO BONO PUBLICO SERVICE
> A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
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> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.

A number of states have adopted this new model rule, some with a different number of hours. Other states that still follow the Canons have amended EC-25 to incorporate a recommended number of hours. A detailed list of the pro bono services nationwide is updated regularly by the Pro Bono Committee.

IV. Mandatory Pro Bono and Alternatives

A. Pro Bono Service and Reporting Rules

The question of whether public service ought to be mandatory is one that will not go away. Mandatory pro bono exists only in limited degrees in a few jurisdictions such as El Paso, Texas; Orange County, Florida; and Westchester County, New York and does not affect all of the lawyers in those jurisdictions. Mandatory pro bono has been seriously proposed either by the chief justice of the highest court, by a bar association or a committee of a bar association, or by legislation in at least six states: New York, Texas, North Dakota, Hawaii, Maryland, and Connecticut. New Jersey has adopted what might be described as a form of mandatory pro bono. In Florida, an alternative approach, described as comprehensive pro bono, has been adopted.

B. New Jersey

In *Madden v. Delran*, 126 N.J. 591 (1992), the New Jersey Supreme Court ruled that attorneys were subject to assignment to represent parties in municipal court cases. However, the court excepted attorneys who provided at least 25 hours of qualifying pro bono services of a type on a list maintained by the court. Services provided through a bankruptcy pro bono program were added to that list soon after the program was organized through the intercession of then Chief Bankruptcy Judge William Gindin.

C. Constitutional Issues

Arguments that mandatory service violates the Thirteenth Amendment (involuntary servitude) or the Fifth and Fourteenth Amendments (taking without compensation) have been rejected by the courts. *Butler v. Perry,* 240 U.S. 328 (1916); *Hurtardo v. United States,* 410 U.S. 578 (1973). At least one circuit court has ruled that assignment of uncompensated counsel does not constitute a taking without compensation. *United States v. Gellor,* 346 F.2d 633 (9th Cir. 1965). In *Mallard v. U.S. District Court for the Southern Dist. of Iowa,* 490 U.S. 296 (1989), the United States Supreme Court declined to address this issue when confronted with a challenge to a statutory court appointment. The court determined that the applicable statute did not mandate acceptance of the case but added:

> We emphasize that our decision today is limited to interpreting section 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to section 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.

D. New York

The Chief Judge of the Court of Appeals formed a special committee named the Committee to Improve the Availability of Legal Services. In its final report in April 1990, that Committee recommended a 20 hour pro bono annual requirement for all members of the bar. At the request of the New York Bar Association Special Committee to Review the Proposed Plan for Mandatory Pro Bono, consideration of the recommendation was

postponed for two years and then again for another year to give the bar a chance to increase its pro bono work voluntarily. A committee to monitor the response was created and statistical baselines and program reports have been submitted.

D. Florida

In Florida, a special bar committee headed by Talbot D'Alemberte, later ABA president, petitioned the Florida Supreme Court to establish a number of new pro bono rules. The sponsors have referred to this their approach as comprehensive pro bono. The 1990 decision, *In re Amendments to the Rule Regulating the Fla. Bar*, 573 So.2d 800 (Fla. 1990) is a landmark. It established the following rule:

> We hold that every lawyer of this state who is a member of the bar has an obligation to represent the poor when called upon by the courts and that each lawyer has agreed to that commitment when admitted to the practice in this state. Pro bono is a part of a lawyer's public responsibility as an officer of the court.

Two of the seven judges dissented, stating that mandatory pro bono should be imposed.

The court established an *expectation* of 20 hours per year or a contribution of $350. Service or monetary contributions are not mandatory but annual *reporting* is mandatory. The court also established a pro bono committee in each circuit. Each committee is chaired by the chief judge or the judge's designee. The duties of the committee are to prepare, implement, and report on a plan for each district.

Implementing the 1990 decision required changes in the rules regulating the practice of law in Florida. Those were addressed in hearings and in decisions in 1992 and 1993. In the most recent decision, the court determined that members of the judiciary and their staffs "should be deferred at this time from participating in the program." The court noted the restrictions on judges (requirement of full time judicial service; and prohibitions of service to charitable organizations likely to be engaged in litigation, service in a fiduciary capacity, and practice of law). The court went on to say:

> We emphasize, however, that judges and their staffs may still teach or engage in activities that concern non-adversarial aspects of the law. Canon 4. Although those activities would not be governed by these rules, we strongly encourage the participation of the judiciary in those activities and request the judicial conferences to consider appropriate means to provide support and allow participation of judges and law clerks in pro bono activities.
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> We note that there are activities that judges can do to advance the principles of pro bono service. For example, the Eleventh Judicial Circuit in Dade County, in a cooperative effort with the Dade County Bar Association, created a comprehensive pro bono program called "Put Something Back." More than forty judges participate in the program. They train attorneys, staff clinics, and prepare forms and handbooks. Additionally, such activities as teaching seminars for legal aid lawyers or serving on legal aid boards could count toward pro bono service for judges.

V. Organized Legal Services and Pro Bono Programs

A. The Structure of Legal Services to Persons of Limited Means

The ways in which persons of limited means who need legal assistance receive that assistance is a very complex patchwork system. This section and the next section will provide a very general background on that subject and will focus on the growing ten-

dency to organize programs around targeted needs or specific groups of volunteers and will describe some bankruptcy pro bono programs.

B. Legal Services Offices

In the latter part of the last century, communities began to develop legal aid societies to hire lawyers to provide services at no fee. The successors to these early community legal aid societies, which are now generally referred to as legal services offices, now often cover larger geographical areas, sometimes whole states. The main source of funding for most of these legal service offices is federal funds through the Legal Services Corporation. While the principal characteristic of these organizations is the use of full time professional poverty law attorneys, most of them either have their own volunteer attorney programs or assist separate volunteer attorney programs.

C. Legal Services Offices and Priority Setting

Because the staffed legal aid organizations do not have the funding to meet more than a small percentage of the legal needs of the poor, they all use priority setting to control case acceptance. Generally, the needs relating to sources of income and housing receive highest priority. Family law is usually the area of greatest need in terms of number of cases. Some offices have decided not to handle family law cases, except the most difficult cases—those with custody issues and abuse. Consumer law cases, including bankruptcy cases, are accepted much less frequently. With a few significant exceptions, most legal service offices do not have highly developed bankruptcy expertise. When a bankruptcy issue arises in a matter they have undertaken, lawyers in these legal service offices frequently look to the private bar for help.

D. Volunteer Attorney Programs

Historically pro bono service by private attorneys has been done on an individual basis. Much of that still occurs but the amount of that work is not subject to easy measurement. However, now probably the larger part of pro bono service is now provided through volunteer attorney programs (VAPs) organized in geographic areas. These began to be organized in the 1960s with most formed in the 1970s and 1980s. The American Bar Association through its Center for Pro Bono has historically assisted and encouraged the development of these VAPs and also provides technical assistance to approximately 900 VAPs. Although the statistics are not reliable because of the lack of uniform definition of the term "volunteer," in 1996 there were about 220,000 volunteers in these programs assisted by the ABA, representing about 23% of the bar. Many VAPs receive funding through the legal service offices but many VAPs rely heavily on funding through donations, United Way, county and state bar associations, governmental units, IOLTA, filing fee surcharges, and the like. While some of these programs set priorities and limit the scope of their service, others attempt to match every eligible client that comes to them with a volunteer attorney. As described above, they fall far short of meeting the need. Some of the larger programs have special panels and occasionally those panels are focused on bankruptcy. For example, Volunteer Lawyer Networks in Hennepin County (Minneapolis, Minnesota) has had a Bankruptcy Panel for at least 20 years. The primary part of the work of the panel is screening; bankruptcy attorneys talk by telephone with individuals who have debtor-creditor problems. Usually the conclusion is that bankruptcy is not needed and the attorneys often follow through by helping the individuals deal with their creditors.

E. Trend toward Specialized Pro Bono

As lawyers have become more specialized, pro bono service and pro bono organizations have begun to follow suit. For most people, their primary communities are not their neighborhoods but groups of people of similar work or interests. So for many lawyers their primary communities in the law are not their geographic neighbors but groups of lawyers with the same specialty. For many of them, the court system they associate with and feel most responsible for is not the local court of general jurisdiction but the specialty court in which they practice. Pro bono systems built around bankruptcy practice and the bankruptcy courts are beginning to appear locally. Within the American Bar Association there is no single section exclusively for bankruptcy law. Most bankruptcy lawyers are members of the Litigation Section or the Business Law Section, or both. Each section has its own pro bono programs.

F. ABA Litigation Section

The Litigation Section has a pro bono committee that sponsors the Litigation Assistance Partnership Project (LAPP). LAPP matches large litigation projects that are beyond the resources or expertise of a legal services office or other direct provider with a litigation law firm interested in taking on that litigation on a pro bono basis. The Litigation Section also has pro bono programs relating to the needs of children and other pro bono programs, and gives national awards—the John Minor Wisdom Awards—for public service. The Litigation Section joined as a co-sponsor with SCLPSR of the amendment to Rule 6.1 described in Section III.E above.

The Bankruptcy and Insolvency Committee of the Litigation Section has a Pro Bono Subcommittee which has helped sponsor several workshops on pro bono bankruptcy assistance. It developed a manual described as the "Starter Kit" to help in the development of local bankruptcy pro bono programs.

G. ABA Business Law Section

In 1993, the Business Law Section formed its own pro bono committee chaired by John Martin, general counsel for Ford Motor Company, and Maury Poscover, a member of the Section Council and a bankruptcy practitioner. The Committee was formed in part in response to the letter of Joseph Mullaney, vice chair and general counsel of Gillette Company who wrote:

> I believe that there will be no significant change in this situation unless lawyers, such as those involved in our Section and on our Committees, recognize the need and their responsibility and respond. Pro bono service has to become as much a part of our substantive efforts as corporate law, tax law, real estate law and all of the other aspects of law that form part of our business law practice. I could not help but believe as I heard discussions at the Council meeting of the ALI proposals, that if one half of the intelligence, effort and energy involved in that effort had been directed towards the problem of homelessness, for example, we would be one half way towards resolving the legal aspects of that problem.
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> I believe that our Section, one of the largest and most respected units of the ABA, should take a leadership role in its effort. Just as our Section and its Committees and Task Forces have distinguished themselves in various other areas, I am sure that our Section could act with equal distinction and provide an example to the other Sections and units of the ABA.

The Business Law Section matches requests for business law pro bono services with lawyers willing to provide those services. It also encourages the development of

specialized business law pro bono programs, and it awards National Public Service awards. The Business Law Section also joined as co-sponsor with SCLPSR of the amendment to Rule 6.1 described in Section III.E above.

The Business Bankruptcy Committee of the Business Law Section has a Pro Bono Services Subcommittee that has organized several workshops and taken other steps to assist bankruptcy pro bono programs. It has been primarily responsible for the preparation of a second edition of the Starter Kit.

H. ABA Law Firm Pro Bono Challenge

On April 30, 1993 the ABA announced the Law Firm Pro Bono Challenge, another significant recent development sponsored by the Pro Bono Committee, which may affect many bankruptcy lawyers. The Law Firm Pro Bono Project focuses on the nation's 500 largest law firms (approximately 60 lawyers or more). Those firms have issued a firm-to-firm challenge to adopt a statement of principles, which includes establishing a written pro bono policy involving a majority of both partners and associates in pro bono work, and committing either 3% or 5% of the firm's billable hours to pro bono service. Forty-seven firms became charter members and 155 firms are now committed. That commitment has resulted in an estimated 1.8 million pro bono hours of service in 1998. Firms that have previously made such a commitment have found that it can dramatically affect the culture of the firm and force the firm to actively seek pro bono work suitable for all of its attorneys, including bankruptcy attorneys.

VI. Bankruptcy Pro Bono Initiatives

A. Local Program

A number of local bankruptcy committees or sections as part of state or local bar associations have recently introduced their own programs as a vehicle for bankruptcy lawyers to use their specialized expertise to assist otherwise pro se clients with bankruptcy problems and to assist their court system. This section will discuss three: Minnesota, Philadelphia, and South Carolina.

B. Minnesota

In 1992, the Bankruptcy Section of the Minnesota State Bar Association launched a program for representation of individuals in adversary proceedings. All defendants in adversary proceedings are given a notice by the court that if they are unrepresented they may be able to obtain a volunteer attorney if they are financially eligible. Individuals who appear in court without representation may be referred by the judge to the screening agency. The potential clients are screened by Legal Advice Clinics, the pro bono program of the Hennepin County Bar Association, and if eligible, are referred to volunteers on a panel recruited by the Bankruptcy Section. Most of the cases were dischargeability cases. Most of the cases were favorably resolved for the defendants through settlement or dismissal of the claims against them.

C. Philadelphia

The approach of the Eastern District of Pennsylvania Bankruptcy Conference working with the local bankruptcy judges and the local legal services office and volunteer attorney program is quite different. In the summer of 1992, that group created the Consumer Bankruptcy Assistance Project, with the primary goal of filing Chapter 7 cases for

indigents. The program is called the "Fresh Start Clinic." In that district there were a growing number of pro se filings. More than one hundred people per month were asking the local legal services office for help in filing their cases. The representation through the Fresh Start Clinic is provided primarily by law students and new attorneys after extensive training and with the supervision by or mentoring of an experienced bankruptcy attorney. Those experienced bankruptcy attorneys either represent clients directly or serve only as trainers or mentors. Attorneys whose experience is primarily in business bankruptcy are given training on consumer bankruptcy issues or may call on a mentor.

Although most of these debtors were "judgment proof," they needed to utilize Chapter 7 or 13 to restore utility service or to avoid eviction from public housing. *Matter of Gibbs*, 9 B.R. 758 (Bankr. D. Conn. 1981); *In re Sudler*, 71 B.R. 780 (Bankr. E.D. Pa. 1987); *In re Yardley*, 77 B.R. 643 (Bankr. M.D. Tenn.); *In re Szymecki*, 87 B.R. 14 (Bankr. W.D. Pa. 1988). Accountants have volunteered to do intake and screening. This program has staff and a substantial budget. Philadelphia is also relatively unique in that many of its full time legal services lawyers have provided bankruptcy services. Still, the need has far surpassed the ability of that office to respond.

D. South Carolina

The statewide bankruptcy group, the South Carolina Bankruptcy Law Association, through its public service committee, works closely with the statewide volunteer attorney program. The Bankruptcy Law Association assists with recruiting bankruptcy lawyers as volunteers to handle particular cases if a volunteer cannot be found among registered volunteers. Ninety percent of the members of the Bankruptcy Law Association eligible to practice law are registered volunteers. The Association also conducts training for volunteers and has prepared a video on client interviews and software forms.

VII. What (Specifically) Lawyers and Judges Should Do

A. The Expertise Issue

Even with specialties there are subspecialties. Many bankruptcy lawyers who specialize in business cases are not comfortable with the idea of filing consumer Chapter 7 and especially Chapter 13 cases. There are a number of approaches to this issue. First, as the list below illustrates, there are a number of things that can be done that do not involve actually filing a bankruptcy case. Second, many larger VAPs include training for their volunteers. A seminar on consumer bankruptcy may be all that is needed. Third, many larger VAPs offer a mentor, someone to call with questions or to help through the first few cases. If no mentor is provided by the VAP, the volunteer could find his or her own mentor, pairing up with an experienced consumer law attorney. Probably both attorneys would be pleased with the networking. The experienced attorney would be able to do valuable work without actually having to file the cases, multiplying the value of his or her expertise. Fourth, the volunteer should consider that knowledge of Chapters 7 and 13 will broaden the volunteer's understanding and capability as a bankruptcy lawyer. Experience with Chapters 7 and 13 should be part of the business bankruptcy lawyer's own training program for professional development in any event. Fifth, the volunteer should consider that the same exceptional ability that brought these lawyers very successfully through law school, and to a mastery of a complex and difficult area of law, will also bring that volunteer lawyer to mastery of consumer bankruptcy. The lawyer might even consider going on to a different type of case altogether where the need is even greater, per-

haps family law. A variety of work can help with skills development and deepen the volunteer's satisfaction with his or her professional career.

B. For Bankruptcy Lawyers

1. Call the local VAP and volunteer to handle the bankruptcy cases or issues. Or go further and take on cases in a broader range, learning a new area of practice. In addition, many VAPs have a variety of tasks for attorneys without any poverty law expertise: for example, intake and screening, or interviewing at homeless shelters.
2. Call the local staffed legal services office and volunteer to be a resource to take referred cases or to assist a staff attorney on bankruptcy issues. As an example, one of the most interesting cases, pro bono or otherwise, for the author whose practice is in Chapter 11, involved representing clients of the legal services office who held a judgment against a notorious slum landlord who filed Chapter 11. Our office filed and confirmed a creditors' plan that transferred all of the remaining housing into a newly formed nonprofit corporation which worked with the city to rehabilitate the housing and to keep it as housing for low and middle income persons.
3. Become part of, or organize, a bankruptcy screening panel, as part of a VAP, to give advice-only bankruptcy screening and to follow through with letters to creditors and provide other simple but valuable assistance.
4. Help other attorneys in a bankruptcy pro bono program by research and drafting of pleadings or other assistance supportive of the attorneys who actually file the cases.
5. Represent pro se parties in adversary proceedings. As an example, one of the author's more satisfying cases was to win a new trial for a woman who had represented herself and lost on a student loan discharge case. After obtaining an order for a new trial, our office negotiated a settlement for a payment of one-half of the loan amounts for the woman whose only income was disability payments. For the new associate who worked on the case, it was her first chance to prepare for a real trial.
6. If you are in a large practice group, urge your group to take on a large project or a specific number of smaller cases as a team. Work together and learn together as you do in other matters. As an example, in our bankruptcy department, we have one lawyer serve as intake person through the local VAP. We take on the cases and assign the work as we do with all other cases.
7. Teach, train, or mentor students, young lawyers, legal services staff attorneys, or others.
8. Urge your bankruptcy section to form a pro bono committee. Study the needs in your community and design and implement a program to meet the needs.

C. For Bankruptcy Judges

Although, as described above, there are restrictions on the activities of judges, Canon 4 of the Code of Conduct for United States Judges is explicitly encouraging in this important area:

> A judge may engage in activities to improve the law, the legal system, and the administration of justice . . . .
>
> C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Note that Advisory Opinion No. 12 states that a judge may not serve on a board of a legal aid bureau whose representatives make appearances in the court in which the judge presides.

1. Form a committee to deal with the issue of pro se parties in bankruptcy court and perhaps the broader problem of legal services for the poor.
2. Give calendar preference to pro bono cases.
3. Be sure that the clerk's office is especially cooperative and supportive to attorneys handling bankruptcy cases pro bono.
4. Call on lawyers to serve. Consider direct appointments under Model Rule 6.2. While some judges have been reluctant to be involved in recruiting, many others believe that it is appropriate. In many states or districts the chief judge has written letters to all attorneys, or to all new attorneys, encouraging them to join volunteer attorney programs.
5. Help in training programs for the volunteers.
6. Help give recognition to pro bono service. Praise lawyers for taking a case and give recognition at seminars or other meetings of bankruptcy lawyers. In Minnesota, lawyers who meet 50 hours' service are recognized at the annual CLE Bankruptcy Institute and taken for dinner by the law firm that issued a challenge to other bankruptcy lawyers.
7. Become active in broader bar programs to help get legal assistance to the disadvantaged. As examples, Frank Gordon, Chief Judge of the Arizona Supreme Court received the ABA National Pro Bono Award for his efforts. Rosemary Barkett, Chief Judge of the Florida Supreme Court, now a member of the Eleventh Circuit court of Appeals, and Judith Billings, Justice of the Utah Court of Appeals, have been members of the ABA Standing Committee on Pro Bono and Public Service (formerly SCLPSR).

The ABA Center for Pro Bono has prepared a "Pro Bono Involvement of the Judiciary" InfoPak that gathers sample recruiting letters sent by judges, articles discussing ethics issues, and other materials useful to judges interested in doing more.

VIII. Conclusion

There is a vast unmet need for legal services and bankruptcy attorneys have the requisite knowledge and skills to meet much of that need. It is part of our professional heritage and professional ethics to help. For bankruptcy judges, while there are restrictions on what they may do, these restrictions need not prevent significant service. Judges should have a special interest in the topic because their responsibilities consist not only of the deciding of cases but of the administration of the system of justice. Bankruptcy judges should take leadership roles with the purpose of assuring justice.