

To: Pro Bono Initiative Members

From: Robert Mathis

Date: July 14, 2014

Re: The Voluntary Standard and Pro Bono Policy--Pro Bono Credit for Attorneys Providing Alternative Dispute Resolution Services\*

### **A. Introduction**

Alternative Dispute Resolution (ADR) refers to several methods of resolving disputes outside of formal judicial process. In many circumstances, the ADR process has demonstrated that the legal issues of a client can be appropriately and efficiently resolved without litigation in the court system.<sup>1</sup> With the rise in the use of ADR and the increasing expectation that parties to a dispute will consider and use ADR,<sup>2</sup> this memorandum will explore the role that pro bono attorneys may play in providing free or reduced-fee ADR services to low-income people, and clarify when ADR services provided by an attorney qualify as pro bono service.

### **B. Michigan Court Rules Regarding ADR and Mediation**

Michigan Court Rules (MCR) 2.410 (ADR) and 2.411 (Mediation) provide primary guidance on the processes to resolve legal disputes in place of court adjudication. Per Michigan Court Rule 2.410(A)(2)<sup>3</sup>, ADR includes settlement conferences ordered under MCR 2.401, case evaluations under MCR 2.403, mediation under MCR 2.411, domestic relations mediation under MCR 3.216, and other procedures authorized by local court rules or ordered on stipulation of the parties. MCR 2.411 defines mediation as a “process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement.” This memorandum will refer to the broad definition of ADR inclusive of mediation.

While attorneys can participate in the provision of ADR services, under Michigan law, non-attorneys are also permitted to provide ADR services. Since attorneys are not required to provide ADR services, the question arises whether an attorney engaged in the provision of ADR services is providing legal services, a necessary component for an

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<sup>1</sup> See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.10 (on Alternative Dispute Resolution).

<sup>2</sup> MCR 2.410(A)(1): “All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule.”

<sup>3</sup> MCR 2.410 (A)(2) provides that “alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties.

attorney wishing to receive pro bono credit towards the State Bar of Michigan's Voluntary Pro Bono Standard (Standard).<sup>4</sup>

### **C. State Bar of Michigan Policies on Pro Bono Service**

In Michigan, what qualifies as pro bono is based in large part on the Standard. The Standard provides that active members of the State Bar of Michigan (SBM) should participate in the direct delivery of pro bono legal services to the poor, without charge, to low-income individuals or organizations; or professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations.

The Standard provides that besides service, an attorney's obligation may be fulfilled by contributing a minimum of \$300 (\$500 for those whose income allows) to not-for-profit programs organized to deliver civil legal services to low-income individuals or organizations.

The SBM Pro Bono Initiative (PBI) has also provided supplemental advisory opinions to provide additional guidance to Michigan attorneys on how to fulfill their professional responsibility to provide pro bono service.

Based on the Standard and additional guidance by the PBI, the following three-part pro bono service analysis is helpful in determining whether a Michigan attorney's activities are pro bono.

In Michigan, an attorney's activities are pro bono if an attorney provides:

- (1) legal services [as opposed to general community service];
- (2) provided for free or at a significantly reduced fee; and
- (3) to low-income individuals or to organizations providing direct services to low-income individuals.<sup>5</sup>

Therefore, for an attorney's ADR services to count towards Michigan's yearly aspirational pro bono service goal, an attorney must be able to demonstrate that the services provided satisfy all three parts of the analysis. An attorney's satisfaction of the second and third parts of the analysis can be demonstrated rather easily since it requires that an attorney provide the services for free or at a reduced fee and to low-

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<sup>4</sup> < <https://www.michbar.org/programs/ATJ/voluntarystds> > All websites in this memorandum were accessed on May 30, 2014.

<sup>5</sup> Historically, pro bono has always been focused on legal services to the poor, but has also included legal services to traditionally underrepresented groups (often low-income groups) who are socially or politically disadvantaged and without access to counsel—e.g., the elderly, the handicapped, racial and ethnic minorities, etc. Also, many programs provide services to groups that include both low income and non-low income persons. The PBI has adopted a rule that the program must be able to document that a majority of the persons benefited must have annual incomes under 200 percent of the Federal Poverty Level.

income individuals or organizations assisting low-income individuals. The first part of the analysis, however, can be more difficult to demonstrate since the definition of what is meant by the term legal services can be open to some interpretation. However, looking closer into current Michigan law and SBM policies can be helpful in clarifying the definition of legal services, also commonly referred to as engaging in the practice of law.

For direction as to what constitutes the practice of law in Michigan, we can look to the Michigan Supreme Court's decision in *Dressel v Ameribank*,<sup>6</sup> which concluded that a person engages in the practice of law when he counsels or assists another in matters that require using legal discretion and legal knowledge.

For additional guidance on what constitutes the practice of law, the SBM Unauthorized Practice of Law Committee (UPLC) concluded that the practice of law includes "[w]hen a person or company says or does something on behalf of another person that involves legal discretion or making a decision about legal matters."<sup>7</sup> With guidance from the Michigan Supreme Court and the SBM (PBI & UPLC), the definition of legal services (the practice of law) includes an attorney's counsel or assistance of another in matters that require using an attorney's legal discretion and legal knowledge.

So, to further clarify the first part of the three-part pro bono service analysis, for ADR services provided by a Michigan attorney to qualify as pro bono, the attorney must be able to demonstrate using legal discretion and legal knowledge in the delivery of the ADR services. Without the use of legal discretion and legal knowledge, the ADR services provided are not pro bono.

The PBI also considers participation in a court ordered or court facilitated mediation program as pro bono for attorneys and "other donated professional services" for non-attorneys<sup>8</sup>. As provided by MCR 2.410, and through State Court Administrative Office sponsored ADR programs, ADR is a part of the court system in Michigan. Also considering Michigan provides extensive legal-related training for its mediators, and that mediators cannot mediate a legal dispute without considering and relying on one's legal training and related legal experience, the ADR services in this capacity should be pro bono.<sup>9</sup>

#### **D. Pro Bono Service vs. Community Service**

Throughout this discussion, remember the distinction between pro bono work and "other community service." The SBM "A Lawyer Helps" (ALH) program recognizes and celebrates the broadest variety of service by lawyers, including both pro bono and

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<sup>6</sup> *Dressel v Ameribank*, 664 N.W.2d 151 (2003), 468 Mich. 557 (2003).

<sup>7</sup> <http://www.michbar.org/professional/upl>

<sup>8</sup> Per Proposed 45 CFR 1614.2, LSC pro bono rules will expand pro bono beyond attorneys to include law students, law graduates, and "other professionals."

<sup>9</sup> Historically, the PBI has recognized that attorneys can provide "services" in addition to "representation" and that these services, when primarily legal in nature, qualify as pro bono.

community service. Many activities not pro bono under the Standard can still be recognized and celebrated through ALH. If a lawyer volunteers at a community center mentoring high school students about the benefits of staying in school, that is not pro bono because the attorney is not providing “legal services.” However, the mentoring activity is valuable community service that should be recognized through ALH.<sup>10</sup>

#### **E. Michigan Pro Bono Assessment Report—Additional Opportunities for Pro Bono**

In 2013, The PBI conducted an assessment of pro bono in Michigan. The primary emphasis of the assessment was an examination on what legal aid providers can do differently to improve their work with pro bono, with a major focus on systems, coordination of resources, leadership, and support. The assessment identified projects and strategies that have proven successful in Michigan and nationally in engaging private attorneys in meaningful work. The information obtained was also analyzed to better understand the factors that enhance, and also impede, effective engagement of pro bono lawyers in responding to low-income communities' needs.

The assessment’s findings were memorialized in the Michigan Pro Bono Assessment Final Report (Assessment Report). The Assessment Report provides strategies and guidance for expanding pro bono in Michigan and improving the quality of pro bono efforts. Regarding the ADR discussion, the report provides that mediation programs are an area where new opportunities for pro bono lawyers may be appropriate.<sup>11</sup> Consistent with the report, the PBI should look for opportunities to include pro bono ADR services where appropriate.

#### **F. Current ADR Programs in Michigan**

ADR services are being provided by organizations all across Michigan, including Community Dispute Resolution Program (CDRP) centers,<sup>12</sup> overseen by the State Court Administrative Office’s Office of Dispute Resolution. The CDRP, created by Michigan Public Act 260 of 1988, otherwise known as the Community Dispute Resolution Act, authorized the establishment of the CDRP centers in Michigan. The CDRP has 19 centers throughout Michigan, covering 64 of Michigan’s 83 counties, providing services in Michigan’s top 10 most populated counties.

A unique aspect of CDRP is the participating mediators are all volunteers. The training standards for the CDRP mediators are among the highest in the nation, with Michigan being the only state that has implemented a training program for the trainers of mediators.

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<sup>10</sup> <<http://www.michbar.org/alawyerhelps>>

<sup>11</sup> See Assessment of Pro Bono in Michigan at page 17-18.

<sup>12</sup> <<http://courts.mi.gov/administration/scao/officesprograms/odr/pages/community-dispute-resolution-program.aspx>>

According to the CDRP, each year, over 10,000 Michigan citizens are having their disputes resolved through mediation services supported by the CDRP. Mediation services offered through CDRP centers are a voluntary process in which two or more parties meet with a trained neutral mediator and together find a solution resolving their problem. Mediators have no decision-making authority, and they do not render case evaluations as in the MCR 2.403 process. Instead, they are trained to assist the parties themselves in achieving resolution.

As reported by Doug Van Epps, Director of the CDRP, 76 percent of the case referrals to the community mediation centers in 2013 were court referred. Van Epps also confirmed that of the 85 mediators at the Lansing-based center, 80 percent are attorneys. While attorneys are not required to provide ADR services, as the numbers above illustrate, a large percentage of Michigan licensed attorneys are providing these services.

#### **G. ABA Policy on ADR Services and Pro Bono**

ABA Model Rule 6.1 (b)(3) provides that an attorney's "participation in activities for improving the law, the legal system or the legal profession" counts toward an attorney's professional responsibility of providing of pro bono legal services. For further clarification, Comment [8] to ABA Rule 6.1 provides examples of what types of activities fall within the above referenced provision, including "[s]erving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, **a mediator or an arbitrator** and engaging in legislative lobbying to improve the law, the legal system or the profession."

So far, 26 states have adopted the current or a similar version of ABA Model Rule 6.1<sup>13</sup> which recognizes an attorney's participation as a mediator or an arbitrator as an eligible pro bono activity as pro bono service. Besides the 26 states that have adopted the current or similar version of ABA Model Rule 6.1, other states (including Maine and Virginia), while adopting a different rule, recognize an attorney's work as a mediator or an arbitrator as pro bono service.

Further, in the *ABA Manual for Legal Services and Pro Bono Mediation Programs* (ABA Manual), the ABA encourages using pro bono and ADR services and makes the argument that ADR processes have several advantages, including being an additional strategy for assisting clients besides traditional representation and advocacy.<sup>14</sup> The ABA Manual also provides that ADR can help resolve client disputes more expeditiously, reducing staff attorney caseloads, and enabling programs to assist additional clients.

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<sup>13</sup> See current list of states that adopted the current or similar version of the ABA's Model Rule 6.1 at [http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html).

<sup>14</sup> See [A Manual for Legal Services and Pro Bono Mediation Program](#) (ABA 2007).

## H. A Few Examples of Pro Bono ADR Programs in Other States

- 1.) **Massachusetts.** The Northeast Chapter of the Association of Corporate Counsel started a [Mediation / Conciliation Program](#).<sup>15</sup> At two district courts in Massachusetts, the skills of in-house counsel are used to mediate and settle small claim cases. The program touts that the business and legal skills acquired by in-house counsel in the corporate world are utilized in their pro bono service as mediators.
- 2.) **Florida.** With the help of the mediators from the ADR Section of the Jacksonville Bar Association, low-income clients have access to mediation for their legal matters through the [Pro Bono Mediation Project](#).<sup>16</sup> The project is a partnership with Jacksonville Area Legal Aid, which refers appropriate cases to the project for resolution through mediation.
- 3.) **Ohio.** The [Mediation Assistance Project](#)<sup>17</sup> is a collaborative effort with Community Mediation Services, the mediation program at the Franklin County Domestic Court, the Columbus Bar Association, and The Legal Aid Society of Columbus. The project is designed to help address unmet needs in divorces with contested issues. The project uses the services of attorneys to answer legal questions that arise during the mediation process, review and explain the mediated settlement, and prepare and file the agreed settlement.
- 4.) **Pennsylvania.** The Jones Day law firm coordinates, facilitates, and manages the [Pro Se Pro Bono ADR Program in the U.S. District Court for the Western District of Pennsylvania](#).<sup>18</sup> In this program, the firm matches pro bono counsel with pro se litigants for the court's mandatory ADR sessions. Pro bono counsel advise clients on the merits of their cases and assist them in preparing for and attending the ADR sessions. The program promotes resolution of cases without expenditure of unnecessary judicial resources.

## I. Application of Three-Part Pro Bono Service Analysis to ADR Services

The three-part pro bono service analysis is helpful in determining whether ADR services provided by an attorney are pro bono. All three parts of the analysis must be satisfied for an activity to be pro bono. An attorney providing ADR services for free or at a significantly reduced fee, and to low-income individuals or to organizations that provide direct services to low-income individuals, satisfies the second and third parts of the three-part analysis. However, for an activity to be pro bono, the first part of the analysis must also be satisfied.

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<sup>15</sup> <<http://www.cpbo.org/wp-content/uploads/2012/02/Best-Practice-Profile-Northeast-Chapter-of-ACC-Mediation-Conciliation-Programs.pdf>>

<sup>16</sup> <[http://www.jaxdailyrecord.com/showstory.php?Story\\_id=541132](http://www.jaxdailyrecord.com/showstory.php?Story_id=541132)>

<sup>17</sup> <[www.ohiolegalservices.org/programs/mediation-assistance-project](http://www.ohiolegalservices.org/programs/mediation-assistance-project)>

<sup>18</sup> <<http://www.jonesdayprobono.com/experience/ExperienceDetail.aspx?exp=25766>>

Since Michigan Court Rules allow attorneys and non-attorneys to provide ADR services, when an attorney provides ADR services, it does not necessarily mean that the attorney is providing legal services. However, under PBI guidelines, ADR services are generally considered to be legal services, since most attorneys that provide ADR services rely on their legal discretion and legal knowledge.

## **J. Conclusion**

Michigan enjoys a strong system of support for pro bono, supported by the State Bar of Michigan and the Michigan State Bar Foundation. As new initiatives and policy directions are not undertaken without the consultation of key stakeholders, members of Michigan's ADR community were consulted in preparing this document and expressed a strong desire for ADR services to qualify as pro bono.

With the increased need for free legal aid to address the unmet legal needs of Michigan's low-income population, and continued threats to reductions in funding for legal aid programs, ADR, often provides several advantages when compared to traditional legal process. Advantages of ADR can include being more economical and faster, providing parties with greater participation in reaching a solution, and providing more control to the outcome of the dispute. ADR can also assist legal services programs with the reduction of caseloads, while providing, in many cases, an efficient and effective resolution to the legal issues of the programs' clients.

As discussed, ADR services play a significant part in Michigan's legal system, and Michigan attorneys are leaders in providing ADR services. Where possible, the PBI should encourage attorneys to engage in ADR services and allow the services to count towards Michigan's yearly aspirational pro bono service goal.

Under PBI guidelines, ADR services are generally considered to be legal services, since most attorneys rely on their legal discretion and legal knowledge when providing ADR services. When an attorney provides ADR services for free or at a significantly reduced fee to low-income individuals or to organizations providing direct services to low-income individuals, the ADR services count as pro bono legal services.

For questions on ADR and pro bono, please contact the SBM Pro Bono Initiative at (517) 346-6412 or [rmathis@mail.michbar.org](mailto:rmathis@mail.michbar.org)

**\*Note from Robert Mathis, SBM Pro Bono Service Counsel: Approved by electronic vote of the PBI, effective July 21, 2014.**