NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #10

REQUESTED ACTION: Approval of the resolution of the Executive Committee regarding mandatory pro bono reporting.

At the January 31, 2014 meeting, the House of Delegates considered a resolution submitted by the Executive Committee to express the Association's opposition to the May 2013 amendments to Part 118 of the Rules of the Chief Administrator requiring lawyers to report hours of pro bono service and contributions to legal services organizations. After lengthy discussion, a motion was adopted to postpone further consideration of the resolution to the June 21, 2014 meeting of the House. A scheduling resolution was adopted at the April 5, 2014 House meeting to govern submission of comments, submission of members' intentions to speak at the June meeting, and rules for consideration of the resolution at the June meeting. Pursuant to the scheduling resolution, all comments and proposed amendments to the resolution were to be submitted by June 9, 2014 in order to be distributed to the House in advance of the meeting.

Attached are the Executive Committee resolution, the scheduling resolution, and proposed motions/amendments submitted by the following House members: A. Thomas Levin, Glenn Lau-Kee, Michael Miller, Robert L. Ostertag, and Steven H. Richman. Also attached are comments received from several members and bar associations.

The resolution will be presented by Executive Committee member Scott M. Karson.

NEW YORK STATE BAR ASSOCIATION
RESOLUTION OF EXECUTIVE COMMITTEE
AS AMENDED JANUARY 31, 2014

WHEREAS, the New York State Bar Association strongly supports and encourages voluntary pro bono services by its members to poor and underserved clients, and for adequate public funding of organizations engaged in providing legal services to poor and underserved clients; and

WHEREAS, the Appellate Divisions of the Supreme Court amended Rule 6.1(a)(1) of the New York Rules of Professional Conduct by increasing the aspirational number of pro bono hours to be provided annually by all lawyers from 20 to 50, effective May 1, 2013; and

WHEREAS, the Appellate Divisions of the Supreme Court amended Rule 6.1(a)(2) of the New York Rules of Professional Conduct by providing that lawyers should aspire to make annual financial contributions to organizations that provide legal services to poor persons in an amount at least equivalent to: (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time, effective May 1, 2013; and

WHEREAS, concurrent with the amendments to Rule 6.1 as set forth above, section 118.1(e)(14) of the Rules of the Chief Administrator was enacted, effective May 1, 2013, requiring lawyers to report the following information on their biennial registration forms: (a) the number of hours that the lawyer voluntarily spent providing unpaid legal services to poor and underserved clients during the previous biennial registration period; and (b) the amount of voluntary financial contributions the lawyer made to organizations primarily or substantially engaged in providing legal services to the poor and underserved during the previous biennial registration period; and

WHEREAS, the Committee on Standards of Attorney Conduct ("COSAC") of the New York State Bar Association (the "Association") has proposed an amendment to the Comment to Rule 6.1 which would make the Comment consistent with the black letter text of Rule 6.1 as amended by the Appellate Divisions, to reflect the increase from 20 hours to 50 hours; and

WHEREAS, this amendment to the Comment to Rule 6.1 is ministerial only, and does not in any way constitute or reflect support, endorsement or approval by the Association of the amendments to Rule 6.1 of the New York Rules of Professional Conduct, nor of section 118.1 of the Rules of the Chief Administrator, which were promulgated without consultation with the Association and, to the extent they require mandatory reporting of pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved, are contrary to established policy of the Association; it is therefore

RESOLVED, that the amendment to the Comment to Rule 6.1 proposed by COSAC be and hereby is adopted: and it is further

RESOLVED, that the Association reiterates and reaffirms its opposition to mandatory reporting of pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved; and it is further

RESOLVED, that the Association shall continue to express its opposition to such mandatory reporting to the Chief Judge of the State of New York and the Presiding Justices of the Appellate Divisions of the Supreme Court of the State of New York, and shall pursue such other and further actions as may be appropriate, for the purpose of achieving the repeal of Rule 118.1(e)(14) of the Rules of the Chief Administrator.

RESOLUTION ADOPTED APRIL 5, 2014 TO GOVERN CONSIDERATION OF THE EXECUTIVE COMMITTEE RESOLUTION ON MANDATORY PRO BONO REPORTING

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the June 21, 2014 meeting of the House of the Executive Committee Resolution on Mandatory Pro Bono Reporting:

1. The resolution will be circulated with other materials for the meeting to members of the House, sections and committees, county and local bar associations, and other interested parties, as well as on-line and in the *State Bar News*.

2. **Comments on or amendments to resolution:** Any comments on the resolution, or any proposed amendments to the resolution, should be submitted in writing to the Secretary of the Association at the Bar Center by June 9, 2014. All comments and proposed amendments complying with this procedure shall be distributed to the members of the House in advance of the June 21, 2014 meeting.

3. **Speaking on the resolution:** Those members of the House intending to speak on the resolution are requested to provide notice to the Secretary and whether they intend to speak for, or against, the resolution by June 9, 2014. This notice is a courtesy for scheduling purposes and will not prevent the chair from recognizing speakers on the issue who fail to provide such notice.

4. **Consideration of the resolution at the June 21, 2014 meeting and any subsequent meetings**: The resolution will be scheduled for formal debate and vote at the June 21, 2014 meeting and considered in the following manner:

a. A representative of the Executive Committee shall be given an opportunity to present the resolution.

b. All those wishing to speak with regard to the resolution may do so only once for no more than three minutes.

c. The Executive Committee representative may respond to questions and comments as appropriate.

d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.

A. THOMAS LEVIN
PROPOSED AMENDMENTS TO NEW YORK STATE BAR ASSOCIATION RESOLUTION OF EXECUTIVE COMMITTEE
AS AMENDED JANUARY 31, 2014

WHEREAS, the New York State Bar Association strongly supports and encourages voluntary pro bono services by its members to poor and underserved clients, and for adequate public funding or organizations engaged in providing legal services to poor and underserved clients; and

WHEREAS, without first seeking input from the organized Bar, the Appellate Divisions of the Supreme Court amended Rule 6.1(a)(1) of the New York Rules of Professional Conduct by increasing the aspiration number of pro bono hours to be provided annually by all lawyers from 20 to 50, effective May 1, 2013; and

WHEREAS, the Appellate Divisions of the Supreme Court amended Rule 6.1(a)(2) of the New York Rules of Professional Conduct by providing that lawyers should aspire to make annual financial contributions to organizations that provide legal services to poor persons in an amount at least equivalent to: (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time, effective May 1, 2013, or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.; and

WHEREAS, concurrent with the amendments to Rule 6.1 as set forth above, section 118.1(e)(14) of the Rules of the Chief Administrator was enacted, effective May 1, 2013, requiring lawyers to report the following information on their biennial registration forms: (a) the number of hours that the lawyer voluntarily spent providing unpaid legal services to poor and underserved clients during the previous biennial registration period; and (b) the amount of voluntary financial contributions the lawyer made to organizations primarily or substantially engaged in providing legal services to the poor and underserved during the previous biennial registration period; and

WHEREAS, also concurrent with the amendments to Rule 6.1 as set forth above, the Rules of the Chief Administrator were revised, so that the foregoing information reported on attorneys' biennial registration forms would be publicly available on request; and

WHEREAS, the Committee on Standards of Attorney Conduct ("COSAC") of the New York State Bar Association (the "Association") has proposed an amendment to the Comment to Rule 6.1 which would make the Comment consistent with the black letter text of Rule 6.1 as amended by the Appellate Divisions, to reflect the increase from 20 hours to 50 hours; and

WHEREAS, an ~~this~~ amendment to the Comment to Rule 6.1 would be appropriate so that the Comment would be consistent with the Rule, and such ~~is ministerial only,~~ Comment

~~and~~ does not in any way constitute or reflect support, endorsement or approval by the Association of the amendments to Rule 6.1 of the New York Rules of Professional Conduct, nor of section 118.1 of the Rules of the Chief Administrator, which were promulgated without consultation with the Association and, to the extent they require mandatory report of pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved, are contrary to established policy of the Association, or public disclosure of the same; it is therefore

RESOLVED, that the amendment to the Comment to Rule 6.1 proposed by COSAC be and hereby is amended, and adopted to read as follows:

"[2] With the support of the New York State Bar Association, this Rule formerly urged all lawyers to provide a minimum of 20 hours of pro bono legal services annually without fee or expectation of fee. Without seeking input from the organized Bar, the Appellae Divisions have amended Rule 6.1(a)(1) to increase this aspirational goal to 50 hours of pro bono legal service annually without fee or expectation of fee, either directly to poor persons or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's career, the lawyer should render on average per year, an appropriate number of hours of such services. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases." ; and it is further

RESOLVED, that the Association reiterates and reaffirms its opposition to mandatory reporting of pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved; and it is further

RESOLVED, that the Association opposes any rule or regulation which would make any such information reported voluntarily or pursuant to mandate publicly available with respect to any identified individual attorney or group of attorneys; and it is further

RESOLVED, that the Association urges the Chief Judge of the State of New York, the Presiding Justices of the Appellate Divisions, and the Chief Administrator promptly to amend the foregoing Rule and regulations in accordance with this resolution; and it is further

RESOLVED, that the Association further urges the Chief Judge of the State of New York, the Presiding Justices of the Appellate Divisions, and the Chief Administrator to explore and implement other methods of obtaining information regarding the nature and extent of pro bono legal services provided by New York attorneys, or financial support of such services, without requiring any attorney to disclose such information under penalty or threat of discipline; and it is further

RESOLVED, that the Association shall continue to express its opposition to such mandatory reporting to the Chief Judge of the State of New York and the Presiding Justices of the Appellate Divisions of the Supreme Court of the State of New York, and shall pursue such other and further actions as may be appropriate, for the purpose of achieving the repeal of Rule 118.1(e)(14) of the Rules of the Chief Administrator and any other rules or regulations which require any attorney to report to any government agency or official the nature or extent to which such attorney provides pro bono legal services or contributes financial support for such legal services.

Attached please find various proposed amendments to the Executive Committee resolution schedule for discussion at the June meeting in Cooperstown. It is my hope that the Executive Committee would review these changes, and incorporate as many of them as possible into an amended resolution to be placed before the House of Delegates. Should that not be the case, it is my intention to offer these amendments from the floor, either as a package or as a series of amendment resolutions.

As you can see from the attached, my proposed amendments track the following points:

1. The resolution more fully and accurately describes the adopted Rule 6.1 amendment;
2. The COSAC proposed Comment amendment should be revised, to reflect that this amendment is solely for the purposes of making the Comment consistent with a Rule amendment adopted without input from the organized Bar;
3. The resolution now includes references and opposition to the regulations which allow public disclosure of the pro bono services and financial contributions of individual attorneys. For some reason, the Executive Committee resolution omits any reference to this odious change. Even though the Chief Administrator has announced a voluntary "freeze" on the implementation of this regulation for a limited period of time, the regulation remains on the books and can be reinstated at any time. This should be addressed proactively;
4. The amendment add language which implicitly recognizes a laudable desire on the part of the Chief Judge and Chief Administrator to gather data on voluntary pro bono legal services and financial contributions, and urges them to pursue this by means which involve reporting mandates and which do not permit the public and press to intrude upon personal privacy of attorneys.

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To the Secretary of the New York State Bar Association:

I submit this motion to postpone and request to speak in accordance with the scheduling resolution adopted by the House of Delegates of the New York State Bar Association at its April, 2014 meeting regarding the resolution of the Executive Committee of the Association dated January 31, 2014 (the "Resolution") regarding mandatory pro bono reporting requirements.

In a letter to Chief Judge Jonathan Lippman dated June 2, 2014 submitted in my capacity as President of the New York State Bar Association, I requested a meeting at which I, together with President-Elect David Miranda, would be able to discuss the mandatory pro bono reporting issues with the aim of finding common ground and possibly forging a resolution of these issues. In his reply, Chief Judge Lippman agreed to such a meeting and has directed Chief Administrative Judge A. Gail Prudenti and Helaine M. Barnett, Esq., Chair of the Chief Judge's Task Force to Expand Access to Civil Legal Services in New York, to meet with David Miranda and me. A first meeting has been scheduled for June 17, 2014. However, it is unlikely that the issues involved can be resolved in a single meeting.

Accordingly, I hereby submit a motion to postpone the Resolution until the meeting of the House of Delegates scheduled for November 1, 2014, to allow adequate time for discussions to take place and for a possible resolution to be formulated. I further request the opportunity to speak to this motion to postpone from the floor of the House meeting.

Thank you.

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Dear Kathy,

Pursuant to the scheduling resolution pertaining to the Resolution concerning Mandatory Pro Bono Reporting which is scheduled for debate at the June 21, 2014 meeting of the House of Delegates in Cooperstown, I write to inform Secretary Makofsky that I plan to speak on the Resolution concerning Mandatory Pro Bono Reporting at the June 21, 2014 meeting of the House of Delegates and that I also intend to propose an amendment to the Resolution.

I believe that it is time to move forward and adopt the Resolution, as its principle effect would be to put the commentary in line with Rule 6.1, however, I believe that the Resolution would be improved if there is a relatively modest amendment to the Resolution. My proposed amendment to the Resolution calls for the broadening of the definition of Pro Bono service to its historical definition, which would include all of the good works that lawyers do. My proposed amendment to the Resolution is to add the following clauses to the Resolution:

"WHEREAS, the definition of Pro Bono Publico has historically included all forms of public service performed by attorneys;

RESOLVED, that the Association urges the Chief Administrator to revise broadly the narrow definition of Pro Bono service set forth in 22 NYCRR Part 1200, Rule 6.1(b) to include all of the good works lawyers do for the betterment of the public, the indigent and the community."

Very truly yours,

Michael Miller

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PROPOSED RESOLUTION
FOR CONSIDERATION BY THE
NEW YORK STATE BAR ASSOCIATION'S
HOUSE OF DELEGATES

(Submitted by Robert L. Ostertag)

WHEREAS, by 2013 amendment of aspirational Rule 6.1 of New York State's Rules of Professional Conduct and the concurrent promulgation of new Rule 118.1(e)(14) of the Rules of New York State's Chief Administrative Judge, the judicial leadership of this state has increased from 20 to 50 the minimum number of hours per annum that New York lawyers are expected to contribute pro bono, and has mandated the individual biennial reporting of such hours to the Office of Court Administration together with the amount of money annually contributed by each lawyer to organizations serving the legal needs of the poor and underserved, and

WHEREAS, in so doing, the judicial leadership elected not to follow its unwritten but long-standing standard of protocol with this Association of seeking our comment prior to its amendment and promulgation of rules that substantially affect practitioners and the manner by which they practice law, and

WHEREAS, the practicing attorneys of New York have never before been required to report the extent of their totally voluntary pro bono service and monetary contributions to any governmental branch or agency of government for any reason whatever, and

WHEREAS, Rule 118.2 of the Chief Administrator's Rules, coupled with the aforesaid rule-making amendment and promulgation of Rules 6.1 and 118.1(e)(14) now make such pro bono service and monetary contribution information available to the general public upon request which, in turn, unavoidably exerts a coercive effect upon practitioners, at the risk otherwise of jeopardizing their professional and personal reputations and earning abilities, to do and report what was and still is specifically stated to be aspirational and voluntary pro bono, and

WHEREAS, the coercive and mandatory impact of these currently operative rules is destructive of the Bar's centuries long and totally voluntary efforts professionally and monetarily to service and provide in substantial part for the legal needs of the poor and underserved in this state, which voluntary efforts and contributions over many years and even most recently have been the subject of specific praise and commendation by none other than the Chief Judge of the State of New York, and

WHEREAS, the implementation of such rules is particularly discriminatory toward solo and small firm practitioners throughout the state who are acknowledged to represent approximately 63% of those among the 166,000 lawyers certificated to practice law in New York who are private practitioners and whose generally recognized earning capacity is most frequently a fraction of that of non-solo/small firm practitioners throughout the state, and

WHEREAS, the purpose stated by the Chief Judge of the State of New York for the collection of such information is the acquisition of statistics intended to more accurately determine our profession's current response to the state's pro bono needs, and

WHEREAS, there exist alternative methods by which such information may be acquired by the Chief Judge without requiring individual attorneys to disclose such personal and proprietary information, and to be exposed to undeserved public ridicule and potential economic harm, which alternatives the judicial leadership has apparently never considered, has ignored or has declined to consider for reasons perhaps having to do with the future attempted state-wide imposition of involuntary mandatory pro bono service and contributions, and

WHEREAS, the New York State Bar Association has long and consistently stated its policy and opposition to the imposition of any rules requiring involuntary pro bono service and continues at this time to disapprove of any such requirements, and of any such efforts on the part of the judicial leadership directly or indirectly, whether coercively as here or otherwise, and whether currently or prospectively, to mandate the explicitly aspirational characteristics of Rule 6.1, including its amendment to require a minimum of 50, rather than 20, hours of pro bono service, or by any other means whatever.

NOW, THEREFORE, IT IS HEREBY

RESOLVED, that this Association resolutely reiterates and reaffirms its abiding opposition to mandatory pro bono service in any form and however sought to be imposed upon the practicing bar of New York, and it is further hereby

RESOLVED, that this Association resolutely asserts its firm opposition to any requirement for mandatory reporting of pro bono service and financial contributions as effectively currently imposed upon the bar by the combined provisions of Rules 6.1, 118.1(e)(14) and 118.2; and it is further hereby

RESOLVED, that this Association opposes any rule or regulation now existent or however hereafter sought to be imposed that would make any such reported information, whether voluntarily or pursuant to mandate, publicly available with respect to any identified individual attorney or group of attorneys; and it is further hereby

RESOLVED, that this Association urges the judicial leadership of this state promptly to repeal the latest amendments to the newly promulgated Rules 6.1 and 118.1(e)(14) in accordance with this resolution; and it is further hereby

RESOLVED, that this Association does hereby further urge the judicial leadership of this state, in cooperation with this Association, to explore other methods of obtaining information regarding the pro bono needs of this state, the nature and extent of pro bono legal services provided by New York attorneys, or their financial support of such services, without requiring any attorney to disclose his or her identity or such proprietary and personal information under penalty or threat of discipline or adverse, deleterious, derogatory, detrimental or potentially economically injurious consequences; and it is further hereby

RESOLVED, that this Association, in its continuing opposition to both the current rules and any potential rules regarding mandatory reporting, monetary contributions and public disclosure, reserves unto itself now and in the future the right to pursue such action and forms of

relief on behalf of the practicing bar of New York as may be necessary or appropriate in this regard; and it is further hereby

RESOLVED, that this Association hereby does request of the judicial leadership that it now and hereafter grant to this statewide Association the basic courtesy of conferring with and submitting comment to the judicial leadership or its representatives upon issues and proposed rule making that substantially impact upon practitioners' personal and professional lives and practices, as here.

STEVEN H. RICHMAN

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VIA – E-MAIL [kbaxter@nysba.org] & First Class Mail

May 27, 2014

Secretary
New York State Bar Association
One Elk Street
Albany, NY 12207

To the Secretary of the New York State Bar Association:

In accordance with the Scheduling Resolution adopted at the April meeting of the House of Delegates to govern the consideration of the January 31, 2014 Resolution of the Executive Committee regarding Mandatory Pro Bono Reporting, I submit herewith five (5) amendments to the Executive Committee Resolution for consideration at the House meeting on Saturday, June 21, 2014.

I submit these amendments as a Member of the House of Delegates representing the Entertainments, Arts and Sports Law Section.

The issue before the House is of paramount importance. I have communicated my fervent opposition to the amendments to Part 118 of the Rules of the Chief Administrator to Chief Judge Lippman as well as the Presiding Justice of the Second Department which urged that the amendment be repealed immediately.

As we all know, these amendments were promulgated without any meaningful consultation with the organized bar. It is remarkable that when the State's Judiciary sought to increase their own salaries, they

sought the support of the organized bar. However, when the amendments were adopted, the Chief Administrator did so without even the courtesy of notice and an opportunity to comment. For that process alone, the amendment should be repealed.

In addition, the imposition of this reporting requirement actually dilutes the voluntary nature of pro bono service. The State Bar Association believes in the value of pro bono service, both for indigent clients and for lawyers themselves; so do I. I have spent my entire professional career as an attorney serving the citizens of the State and City of New York, yet that public service is not recognized by this amendment.

Most lawyers believe that as a result of the failure of our government to provide sufficient funding for civil legal services, pro bono services are necessary to fill the gap. My fellow attorneys have and will continue to recognize the critical need for lawyers to assist in providing access to justice, if they are qualified to do so. They should not and must not be pressured into doing so by a reporting requirement.

I also strongly object to having my voluntary service and voluntary contributions made public in the future. Such service and charitable contributions are highly personal, and the laudatory goals of increasing voluntary pro bono service and legal services funding should not be achieved through violating lawyers' right to privacy. In addition, the amendment as now written is inequitable; the members of the judiciary are exempt from having to disclose how much they have done as well as contribute each year.

The Judiciary has failed to seriously consider these concerns which are shared among numerous members of the New York legal community. In fact, in a letter dated April 25, 2014, John W. McConnell, Counsel for the Unified Court System wrote me to stating with respect to the mandatory pro bono reporting requirement that:

> "The purpose of the amendments to Part 118 is very specific: to provide the Court System with a source of data about the legal profession's actual response to the inspirational guidelines of Rule 6.1 of the Rules of

> Professional Conduct. This data is crucial in formulating the Judiciary's policies to address the Justice Gap – the extraordinary and longstanding divide between the legal needs of the State's poor and vulnerable, and the resources made available to serve those needs by government, private providers, and volunteers."

It is clear to me from those statements that mandatory pro bono reporting is the next step in the Judiciary's determination to impose mandatory pro bono service requirements on the entire legal profession. [Note: They have already imposed it on future lawyers without so much as a whisper of opposition from the organized bar.

The amendments I propose herewith will provide clear and explicit direction to our Association in an effort to better serve and protect our colleagues and our profession.

The Members of the New York State Bar Association and its House of Delegates understand the serious unmet needs of the indigent. Many of us give of ourselves voluntarily on a regular basis. Our desire to give volunteer services must not be subject to pressure from coercive reporting requirements, imposed without meaningful discussion or consultation and contrary to the intent of the Governor and Legislature when they enacted Section 468-a of the New York State Judiciary Law.

Therefore, the New York State Bar Association must be in the forefront of preserving our profession and opposing arbitrary and unilateral actions by court administrators.

Respectfully submitted,

STEVEN H. RICHMAN

Attachment

AMENDMENT #1
Submitted by Steven H. Richman

TO THE RESOLUTION OF
THE NYSBA EXECUTIVE COMMITTEE
AS AMENDED ON JANUARY 31, 2014

[matter to be deleted with ~~strikethrough;~~ material to be added <u>underlined</u>]

The first Resolved clause is amended to read:

RESOLVED, that the amendment to the Comment to Rule 6.1 proposed by COSAC ~~be and hereby is adopted~~; <u>is adopted with the following addition:</u>

<u>The New York State Bar Association opposes mandatory reporting of voluntary pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved, believes that the imposition of such a requirement exceeds the authority conferred on the Chief Administrator by Section 468-a(3) of the New York State Judiciary Law and urges its members and all attorneys admitted to practice in the State of New York to omit reporting the same on the biennial registration form. ;</u>

and it is further

AMENDMENT #2
Submitted by Steven H. Richman

TO THE RESOLUTION OF
THE NYSBA EXECUTIVE COMMITTEE
AS AMENDED ON JANUARY 31, 2014

[matter to be deleted with ~~strikethrough;~~ material to be added <u>underlined</u>]

Add as the third Resolved clause:

<u>RESOLVED*, that in accordance with its established policy, the New York State Bar Association* adopt as one of its highest legislative priorities for 2014and 2015, the enactment of an amendment to Section 468-a(3) of the Judiciary Law, explicitly prohibiting the Administrative Board of the Courts and/or the Chief Administrator from promulgating any Rule requiring attorneys to report on the pro bono service the attorney provides or the financial contributions by an attorney to organizations engaged in providing legal services to the poor and underserved; and it is further</u>

AMENDMENT #3
Submitted by Steven H. Richman

TO THE RESOLUTION OF
THE NYSBA EXECUTIVE COMMITTEE
AS AMENDED ON JANUARY 31, 2014

[matter to be deleted with ~~strikethrough;~~ material to be added <u>underlined</u>]

Add as the fourth Resolved clause:

<u>RESOLVED, that in accordance with the Association's established policy, the President is directed to retain forthwith, counsel to determine the appropriate legal basis for a proceeding to enjoin enforcement of Rule 118.1(e)(4) of the Chief Administrator's Rules, including exceeding the statutory authorization set forth in Section 468-a of the Judiciary Law and the President is further directed to commence the appropriate proceedings upon receipt of the counsel recommendation no later than September 1, 2014; and it is further</u>

AMENDMENT #4
Submitted by Steven H. Richman

TO THE RESOLUTION OF
THE NYSBA EXECUTIVE COMMITTEE
AS AMENDED ON JANUARY 31, 2014

[matter to be deleted with ~~strikethrough;~~ material to be added <u>underlined</u>]

Add as the fifth Resolved clause:

<u>RESOLVED, that the Association is hereby directed that in the event that any active member of the Association is subjected to attorney disciplinary proceedings under Section 468-a(5) of the Judiciary Law, for failing to comply with the unlawful reporting requirements imposed by Rule 118.1(e)(4) of the Chief Administrator's Rules, it shall either provide counsel for the member or indemnify the member for the cost of counsel required to defend the member for acting in accordance with the recommendations of this Association;</u>

and it is further

AMENDMENT #5
Submitted by Steven H. Richman

TO THE RESOLUTION OF
THE NYSBA EXECUTIVE COMMITTEE
AS AMENDED ON JANUARY 31, 2014

[matter to be deleted with ~~strikethrough;~~ material to be added <u>underlined</u>]

The current third Resolved clause of the Executive Committee's January 31 Resolution shall become the sixth Resolved clause, and the following shall be added as the seventh and final resolve clause:

<u>Resolved, that the President of the Association shall communicate to each House member, Section Chair and local Bar Association President, a written status report on the implementation of this Resolution, every thirty (30) days, commencing on August 1, 2014 and continuing until Rule 118.1(e)(4) is no longer in effect.</u>

TOWNE, RYAN & PARTNERS, P.C.

ATTORNEYS AT LAW

June 6, 2014

Via Email to Kbaxter@NYSBA.ORG
David P. Miranda, Esq.

Re: House of Delegates

Dear David:

Please note that in accordance with the resolution regarding individuals desiring to speak on mandatory *pro bono* on this coming June 21, 2014 meeting that as I intend to speak at said meeting. I will be speaking in opposition to mandatory *pro bono* and mandatory reporting of financial contributions. As such, I support the NYSBA resolution regarding same.

Very truly yours,

TOWNE, RYAN & PARTNERS, P.C.

By: Elena DeFio Kean

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EDK/elz

Comments to the Proposed Resolution

Young Lawyers Section

Sarah Gold, Chair

The Young Lawyers Section strongly supports and encourages voluntary pro bono services. However, the Appellate Division's Rule 6.1 amendments, made without consulting the Association, dilute the voluntary nature of lawyers' pro bono service, and represent an invasion of attorneys' privacy. Moreover, the amendments, including mandatory reporting, and the increase in aspirational pro bono hours, would present a hardship to many young lawyers, who are already complying with the pre-license requirement, and many of whom are crippled by student loan debt, and lack, by nature of their newness to the profession, the experience, time, and/or malpractice considerations necessary to meet the aspirational pro bono and financial contribution goals.

The Young Lawyers Section supports the resolution as it is currently written.

Non-Resident NYSBA Members Opposed to Mandatory Pro Bono Reporting

A recent poll of non-resident NYSBA members—representing about 25% of the Association's total membership—reveals overwhelming opposition to the new mandatory pro bono reporting rule. As of June 6, 2014, twenty-two responses to a request for comment on the new rule had been received. Twenty-one were opposed to the rule; one response was neutral.

Criticisms were aimed at the extremely narrow definition of 'pro bono' services and the absence of a definition of 'poor and underserved.' One respondent is a non-practicing attorney who started a 501(c)(3) where he contributes most of his time. The narrowness of the new rule does not allow him to count this tremendous expenditure of time towards 'pro bono' services. Several respondents noted that the rule could have the unintended consequence of being a disincentive to doing volunteer work for civic and charitable organizations, which would not count as pro bono services.

The rule was also criticized as 'arbitrary' and a violation of an attorney's right to privacy. One respondent wondered: "Is this rule designed to shame me into resigning as an attorney and patent agent?" Another queried: "How does my reporting help those in NY?" A corollary to this criticism is what, if any, interest the State of New York has in the provision of pro bono services in other jurisdictions.

Many non-resident NYSBA members may not be licensed to practice in the state in which they live. In the words of one respondent: "Do the proponents of [the new rule] really expect out of staters to provide pro bono services in a state in which they are not admitted?" Arguably, the new rule this could put New York in the position of assisting in the unauthorized practice of law.

One commentator summed up the non-resident opposition to the rule in this simple phrase: "New York has gone crazy!"

RICHMOND COUNTY BAR ASSOCIATION

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June 4, 2014

Glenn Lau-Kee, Esq, as President
New York State Bar Association
1 Elk Street
Albany, New York 12207

Re: Rule 118.1 (e)(14) of the Rules of the Chief Administrator

Dear Mr. Lau-Kee:

I write to you as the President of the Richmond County Bar Association.

Please be advised that the Board of Directors of our Association has unanimously passed a resolution adamantly opposing the reporting requirements mandated by Rule 118.1 (e)(14) of the Rules of the Chief Administrator, and fully supporting the position taken by the New York State Bar Association pertaining to same.

Our members, many of whom are solo practitioners and small firms, have serious concerns about these reporting requirements, many of which have already been set forth by Past President of the New York State Bar Association, Robert Ostertag, Esq.

Thank you for noting the position taken by our Association.

Very truly yours,

C. J. Fitzpatrick

Christopher J. Fitzpatrick, Esq.
President of the Richmond County
Bar Association

Cc: Robert Ostertag, Esq.
(Via e-mail r.ostertag@verizon.net)

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LEROY WILSON, JR.
ATTORNEY AT LAW

June 3, 2014

ELLEN G. MAKOFSKY, ESQ.
Secretary
New York State Bar Association
One Elk Street
Albany, NY 12207

Re: Comments - Mandatory Reporting Pro Bono Rule

Dear Madam Secretary:

I wholeheartedly support Past President Ostertag's views[1] and support the resolution to be debated at the June 21 meeting of the House of Delegates, especially the portion which fastens the obligation on the Association to "pursue such other and further actions as may be appropriate, for the purpose of achieving the repeal of rule 118.1(e) of the Rules of the Chief Administrator." Over the lifetime of my practice I have represented many clients and organizations *pro bono a*nd for reduced or unpaid fees. However, this rule goes too far.

I submit these comments for distribution to the members of the House in advance of the June 21, 2014 meeting.

I think that the "Not Practicing Law in New York" rules that the NYSBA promulgated in 2005 will help me considerably with the CLE requirements, but I am not sure about the application of the new pro bono reporting requirements. I am uncertain as to how the new *pro bono* reporting rules will apply to me and to other lawyers who are not practising in New York.

If I have done a correct analysis, I think many other lawyers who are not practicing in New York will find themselves in the same boat.

There are 3 topics I wish to comment on; the effect of the rule: (1) on retired and semi-retired lawyers, (2) lawyers who will retire to a life in foreign countries, and (3) the cost of representing pro bono clients in litigated matters (Past President Robert Ostertag has already sagely covered the fact that a lawyer cannot switch off the representation at 50, or any given set of hours).

[1] NYSBA State Bar News, May/June 2014 at 8, 21.

1. Retired and Semi-retired Lawyers

I decided to close the office at the end of 2011 and to wrap up my outstanding matters from my home office. After I closed the office, I accepted no new matters, and closed down our website.

I will reach age 75 on June 16 of this year. Considering a number of factors, my wife and I made the decision to ultimately retire in Botswana. There is a possibility (but no assurances) that upon my relocation I will do some legal consulting (but short of practicing law as defined in Botswana), business consulting and some sales rep business to keep my self occupied. I intend to consult on business and legal matters, specifically where knowledge of the US Federal and NY State system can be helpful, and otherwise to assist potential clients generally. I intend to do that on a part time basis.

I intend to enjoy the rest of my life with my wife, children and family. As a profession, we talk about leading a balanced life, but that is an aspiration that usually evaporates into the ether before we die.

Rule 118(g) states the criteria for "retired" lawyers, but does not state the requirement for "retiring lawyers." What about those of us who are in transition? How will the mandatory pro bono reporting rules apply those of us who would be exempt from the CLE requirements under 22 NYCRR § 1500(b) (1)?

From the statement in section B of the biennial registration form, a lawyer is either practising or retired, since New York has no inactive status, or anything in between.

2. Lawyers Who Will Retire to a Life in Foreign Countries

If I select **Option 1** in Section B of the biennial form, I am required to satisfy the mandatory CLE requirements unless I am exempt from the CLE requirements under 22 NYCRR § 1500(b)(1)? Is this correct?

How do the mandatory pro bono requirements apply to me and to others who are "Not Practicing Law in New York"?

If I select **Option 2** in Section B of the biennial form, there are the following problems.

There was a possibility that I might have been able to meet the pro bono requirements of the Attorney Emeritus program, but there are some obstacles.

First, the pro bono program has to be "approved." Rule 118 (g). Who would approve any such program in Botswana?

Secondly, the description of the Attorney Emeritus program on page 5 of the biennial form states that it is designed to encourage experienced attorneys to volunteer their legal skills "on a pro bono basis to assist low-income New Yorkers..." By definition then, the Batswana and nationals of other African countries residing in Botswana are not New Yorkers. Thirdly, what risk would I be compelled to undertake, since I am not admitted to the Botswana bar, am not likely to qualify for or be admitted to the Botswana bar, and have not been trained in the legal systems used in Botswana? As I understand it, they use the Roman Dutch system, natural law, customary law and some application of common law.

How will the pro bono requirements be handled in any case, for attorneys who are "Not Practicing Law in New York?"

Nevertheless, there might be some people in Botswana or other countries who could use the benefit of what I have learned in 47 years of practice.

For example, in 2012, I was the guest speaker at the annual general meeting of the Law Society of South Africa ("LSSA"), where I gave a presentation on the organization and operation of American legal system. I think they found some value in the presentation since they printed a synopsis of the speech in DeRebus, their official bar publication.

Once I was asked by a South African colleague to address a vexing jurisdictional issue for the Constitutional Court of South Africa, and by the same colleague to address a freedom of speech issue involving the President of that country. Since they are a very young country, one of the jurisdictions they look to is the United States. We had pertinent authorities in the Alcoa antitrust case regarding an appeal to the United States Supreme Court when the Court did not have a quorum.

In a separate matter involving the President of an African nation, but which is an issue in many African nations, the colleague posed the following questions:

> *** During the Presidency of Bill Clinton how did the media react to his relationship with Ms. Lewinsky? If you have some material or cite references on this matter I will appreciate it. Lastly what is the law with regard to respect and disrespect for the office of the President? Is there limitation on the freedom of speech regarding the office of the President? Does the President have a right of privacy and dignity? How strong is satire around the person of the President? I know the cultures are different but one will be able to do a comparative analysis during debates. I know in France the office of the President is held in high esteem regarding his/her private life.

I forwarded a copy of Ken Starr, the Special Prosecutor's report to him to see how some of these questions were resolved.

There are other examples. I think there was some benefit to what I did and can do.

3. The Cost of Representing Pro Bono Clients in Litigated Matters

In his State Bar News commentary Past NYSBA President Robert Ostertag made the observation that a lawyer cannot automatically switch off representation when she reaches the magic aspiration 50 hours.

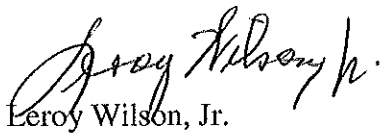
Likewise, she cannot switch off the costs and disbursements spigot, especially in litigated *pro bono* matters.

There are filing fees, fees for deposition reporters and transcription, fees for process servers, sometimes fees for translators and interpreters, and so forth. How are these costs to be covered, especially by lawyers who are not taking any new cases in New York? (I would be trying to limit my services to those matters that have a connection to African countries).

If the rule is not changed or repealed, then perhaps the Appellate Divisions might consider a waiver or modification provision similar to what they allow for CLE requirements. See part C.3 of the biennial form.

I thank you for your kind consideration of these issues.

Very truly yours,



Leroy Wilson, Jr.

Onondaga County Bar Association

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May 28, 2014

David M. Schraver
President
New York State Bar Association
One Elk Street
Albany, New York 12207

Re: Mandatory Reporting of Pro Bono Services and Charitable Contributions

Dear President Schraver:

The Onondaga County Bar Association ("OCBA") has a rich tradition in providing pro bono legal services to benefit poor persons under Rule 6.1 of the Rules of Professional Conduct. Each year, hundreds of our members volunteer their time to further the mission to "do the public good" and assist individuals who cannot afford legal representation. Our members take their responsibility to provide these services very seriously.

The Onondaga County Volunteer Lawyers Project ("VLP") is a shining example of the continuing efforts in our county to provide such pro bono services. In 2013 the VLP was the recipient of the American Bar Association's prestigious Harrison Tweed Award for its excellence in providing pro bono services.

As a result, when the OCBA was asked to comment on the recent amendments to Part 118 of the Rules of the Chief Administrative Judge requiring attorneys to report on their biennial registration forms their voluntary pro bono service as well as voluntary financial contributions to organizations providing civil legal services, we discussed this matter with other county bar associations, and more importantly, we sought input from our own membership.

With that said, the OCBA opposes the Part 118 amendments in their current form. As a result, it is the consensus of our membership that the rule be changed.

The OCBA believes that such mandatory reporting is an invasion of our members' privacy, and of their rights, as any entry could potentially be subject to public disclosure. One particular concern is that if responses were made public, the fact that an attorney did not report any qualifying pro bono work, as currently defined, could be misleading and could lead to incorrect assumptions. The rule in its current form fails to recognize our members' additional volunteer activities and charitable contributions, as well as their free or discounted legal services which do not fall within the "definition" of pro bono service. Our solo and small firm practitioners – who make up about 60 % of our membership – feel especially adversely affected by this rule.

Lastly, the OCBA is concerned that this particular rule was announced without any opportunity for the organized bar to provide comment or input. It is our hope that in the future, comment, input and substantive participation will be afforded to our membership before any such rule changes are, and can be made.

The OCBA supports the creation of a task force composed of lawyers, judges, academics, etc., to work out the details of the implementation of pro bono reporting in a manner that would safeguard confidentiality for individual attorneys and determine the best ways to gather and report aggregate data. One such way is through the creation of a separate independent survey which would be completed anonymously by each member and returned to the Office of Court Administration.

Thank you for your attention to this most important issue and for your anticipated consideration of our members' requests.

Approved by Resolution of the Onondaga County Bar Association Board of Directors on Wednesday, May 15, 2014.

By: Nicholas J. DeMartino
President
Onondaga County Bar Association

c. Glenn Lau-Kee
President-Elect

BRONX COUNTY BAR ASSOCIATION

851 Grand Concourse, Bronx, New York 10451
718-293-2227

June 9, 2014

The New York State Bar Association
1 Elk Street
Albany, New York 12207

Attn: Kathleen R. Mulligan Baxter, Esq.

Dear Ms. Baxter:

The Bronx County Bar Association supports the resolution of the Executive Committee as amended regarding *pro bono* legal services to poor and underserved individuals. We recognize that the proposed amendment to the comment to Rule 6.1 of The New York Rules of Professional Conduct authored by the Committee on Standards of Attorney Conduct (COSAC) is ministerial in that it is designed to make the comment consistent with the black letter text of Rule 6.1. Providing *pro bono* legal services to the poor and underserved is laudable and consistent with the best traditions of the Bar.

At the same time, however, we endorse the resolution to the extent that it expresses its opposition to the mandatory reporting of *pro bono* services and financial contributions to organizations engaged in providing legal services to the poor and underserved pursuant to Section 118.1(e)(14) of the Rules of the Chief Administrator. Apart from having been promulgated without consultation with the New York State Bar Association (NYSBA) and being contrary to its established policy, we at the Bronx

County Bar Association believe that the mandatory reporting requirement is contrary to the true meaning of charity. In addition, requiring mandatory reporting of *pro bono* legal services and financial contributions to legal services organizations has the indirect and unintended effect of diminishing the importance of the many charitable efforts our members and the members of the NYSBA undoubtedly engage in during the course of the year including work done through our Bar Associations. Many of these charitable endeavors are equally vital to the poor and underserved communities of our county and state.

True charity is best performed when done voluntarily and with no expectation of recognition or praise. The amendment to Section 118.1 of The Rules of the Chief Administrator runs counter to the true spirit of charity.

Very truly yours,

_____
Steven Baker, President
Bronx County Bar Association

_____
Michael A. Marinaccio, Esq.
Chairperson of the Board