

1. *"Tension at the Border": Pro Bono and Legal Aid*, CBA Standing Committee on Access to Justice (2012)

There is an increasing and widespread acknowledgement among justice system participants that the problem of unmet legal needs in Canada is serious and growing, and significant effort is being dedicated to finding creative new approaches to solve the problem. Certainly, both pro bono and legal aid are aspects of that discussion, and the legal profession is an important participant. One unfortunate response has been to point the blame and responsibility elsewhere – lawyers at governments, demanding new money for legal aid, or judges and governments at lawyers, demanding an undefined and seemingly unlimited amount of pro bono work. Underlying the finger pointing are uncertainty and confusion regarding key issues that require further discussion and analysis.

2. Questions

- Why does Jewish law permit a lawyer to charge for helping people?
- Is it appropriate for the community to rely on pro bono work, rather than increase Legal Aid funding?
- How does a lawyer choose pro bono cases?

The right to charge

3. Mishnah, Nedarim 4:4

המודר הנאה מחבירו... מרפאהו רפואת נפש אבל לא רפואת ממון

One who is not permitted to benefit another due to a vow... is permitted to heal him, but not to heal his property.

4. Talmud, Bechorot 29a

דאמר קרא ראה למדתי אתכם וגו' - מה אני בחנם אף אתם בחנם.

Deuteronomy 4:5 says, "See, I have taught you." Just as I taught you for free, so you must teach for free.

5. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Yoreh Deah 336:2

הרופא, אסור ליטול שכר החכמה והלימוד, אבל שכר הטורה והבטלה, מותר.

A doctor may not take payment for conveying knowledge and teaching, but he may take payment for strain and time lost [from other remunerative pursuits].

6. Rabbi Yaakov Yeshayah Blau (21st century Israel), Pitchei Choshen I 1:14

בעל חנות שעיקר פרנסתו בכך, אינו חייב לתת סחורתו בהקפה.

A store owner whose main support is from this source is not obligated to give his merchandise on credit.

Communal and Private Values

7. Michael Millemann, *Mandatory Pro Bono in Civil Cases*, Maryland Law Review 18 (1990)

The *patroni* were eminent private citizens who also were governmental leaders. As word of a patron's oratory skills spread, the number of his legal "clients" grew, including many who were not part of his household. The result was a new profession of trial lawyers, born in the dependency of Roman classes cultivated by the state, that was one segment of the developing bar. Patrons represented their dependents without fee, and this pro bono tradition was difficult to dislodge when *patroni* represented clients who lived and worked outside the household. Indeed, one commentator notes that during the Republic and early Empire "we find no serious complaints that advocates' fees prevented the small man from litigating."

8. Poor's Roll, Scottish Parliament, 1424 (adapted for modern English)

If there be any poor person, for want of sophistication or expenses, that cannot or may not follow his cause, the King for the love of G-d shall order the judge, before whom the cause shall be determined, to obtain and get a loyal and a wise advocate, to follow such poor person's causes; and if such causes are successful, the wrongdoer shall compensate both the party wronged, and the advocate's costs and travel.

9. CBA Pro Bono Working Group (2003)

WHEREAS the CBA has called for each member of the legal profession to strive to contribute 50 hours or 3% of billings per year on a pro bono basis;

10. Melina Buckley, *Moving Forward on Legal Aid* (2010)

Although there is clearly some overlap between the work of legal aid and pro bono, they have developed out of somewhat different traditions. Early pro bono work by private lawyers was largely based on two principles: charity and professionalism. The rise of legal aid, on the other hand, was based on a concept of rights – that is, people are entitled to legal information and assistance.

11. Maimonides (12th century Egypt), Mishneh Torah, Laws of Gifts to the Needy 9:3

מעולם לא ראינו ולא שמענו בקהל מישראל שאין להן קופה של צדקה...

Never have we seen or heard of a Jewish community which lacked a [communal] tzedakah fund!

12. Leviticus 25:35

וכי ימרו אחיך ומטה ידו עמך והחזקת בו גר ותושב וחי עמך:

And if your brother becomes needy and his hand falls among you, you shall hold him, stranger or settler, and he shall live with you.

13. Deuteronomy 15:7-8

כי יהיה בקרבך אביון מאחד אחיך באחד שעריך בארצה אשר ד' אלוקיך נתן לך לא תאמץ את לבבך ולא תקפץ את ידך מאחיק האביון: כי פתח תפתח את ידך לו והעבט תעביטנו די מחסרו אשר יחסר לו:

When there is a pauper among you, one of your brethren in one of your gates, in your land which Hashem your Gd is giving you, you shall not harden your heart and you shall not clench your hand, from your brother the pauper. For you shall surely open your hand to him, and you shall lend to him that which he lacks, which is lacking for him.

14. Rabbi Chaim Soloveitchik (19th-20th c. Russia), per Reshimot Shiurim to Bava Kama 36b

שתי פרשיות אלו הן שני חיובים נפרדים, שחובת היחיד במצות הצדקה נלמדת מהפרשה בראה הכוללת העשה של פתח תפתח והלאוין של לא תאמץ ולא תקפץ. ואילו בפ' בהר, "והחזקת בו גר ותושב וחי עמך", מדובר על חובת הציבור

These two sections involve two separate duties. The *tzedakah* duty of the individual is learned from Deuteronomy, which includes the command of "you shall surely open" and the prohibitions of "you shall not harden" and "you shall not clench." Leviticus, "you shall hold him, stranger or settler, and he shall live with you," speaks of the community's duty.

15. LSUC Rules of Professional Conduct (2014), Rule 2.1-2 and Commentary [1](b)

A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as...

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

16. David Scott, Address at 3rd Annual Pro Bono Conference, September 15-17, 2010, Calgary, Alberta

Occupying the field, and controlling the delivery of services as we do, we have traditionally recognized a responsibility to serve the public within reason, regardless of ability to pay

17. LSUC Rules of Professional Conduct (2014), Rule 4.1-1 and Commentary [2]

A lawyer shall make legal services available to the public in an efficient and convenient way.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

18. Leviticus 24:22

מִשְׁפֵּט אֶחָד יִהְיֶה לָּכֶם כְּגֵר כְּאֶזְרָח יִהְיֶה כִּי אֲנִי ד' אֱלֹהֵיכֶם:

You shall have one justice for yourself, like stranger like citizen, for I am HaShem your Gd.

19. Erika Heinrich, *Canadian Jurisprudence Regarding the Right to Legal Aid* (2013)

Indeed, in limited circumstances, in both criminal and civil proceedings, courts have recognized that individuals may have a right to government-funded counsel. Nevertheless, Canadian courts have rejected arguments that there is a general constitutional right to legal aid.

20. Talmud, Ketuvot 105a

גזרי גזירות שבירושלים היו נוטלין שכרן תשעים ותשע מנה מתרומת הלשכה.

The authors of decrees in Jerusalem would collect wages of 99 *maneh* from the half-shekel collection.

21. Rabbeinu Yaakov ben Asher (13th-14th century Germany/Spain), Tur Choshen Mishpat 9

וכתב הר"י ברצלוני נהגו ברוב מקומות לעשות לב"ד קופה שפוסקין מזון ב"ד ופרנסתם לכמה עולה בשנה ומגבין אותו בתחילת השנה או בסופה.

Rabbi Yehudah of Barcelona wrote: The practice in many places is to make a collection for the court, dispensing their food and support as needed per year. They collected it at the start or end of the year.

22. Talmud, Bava Batra 8a

א"ר אסי אמר ר' יוחנן הכל לפסי העיר ואפי' מיתמי, אבל רבנן לא, דרבנן לא צריכי נטירותא. אמר רב פפא: לשורא ולפרשאה ולטרזינא אפילו מיתמי, אבל רבנן לא צריכי נטירותא. כללא דמילתא: כל מילתא דאית להו הנאה מיניה אפילו מיתמי.

Rabbi Asi cited Rabbi Yochanan: Everyone, even minor orphans, gives to the city's defenses – but not rabbis, as they do not require protection. Rav Pappa said: For a wall, patrols and armour guards, even minor orphans pay, but not rabbis, as they do not require protection. The general rule: Whoever benefits pays, even minor orphans.

23. Summary

- Communal duty of Access to Justice
- Personal duty of Philanthropy
- Communal duty of Philanthropy – but only for basic survival, not for legal aid

Is it appropriate for the community to rely on pro bono work, rather than increase Legal Aid funding?

24. Three questions

- May a lawyer shift the burden to Legal Aid? May the community require lawyers to serve pro bono?
- Is the community required to take steps to encourage pro bono, such as by providing tax deductions/credits?
- If pro bono services will be inferior to legal aid, is the community obligated to pay for better representation?

25. Talmud, Bava Kama 85a

ואי א"ל: מייתינא אסיא דמגן במגן, א"ל: אסיא דמגן במגן - מגן שוה.

If an assailant says, "I will bring you a doctor for nothing," he may reply, "A doctor who heals for nothing is worth nothing."

Is pro bono work an act of tzedakah? How might that shape a lawyer's decisions about taking pro bono cases?

26. Two questions

- How much time must a lawyer commit to pro bono work?
- How does a lawyer prioritize causes?

27. Rabbi Moshe Feinstein (20th century USA), Igrot Moshe Even haEzer 4:26:4

מסתבר לי שהוא ג"כ שיעור מעשר עשירית הזמן שיש לו ללמוד תורה ואולי יכול להוסיף עד חומש וצ"ע לענין השיעור.

To me, it seems logical to say it is the same threshold as for *maaser* - 10% of the time he has available to learn Torah. Perhaps he could add up to 20%; the threshold requires thought.

28. Talmud, Bava Metzia 71a

תני רב יוסף... ענייך ועניי עירך - ענייך קודמין, עניי עירך ועניי עיר אחרת - עניי עירך קודמין.

Rav Yosef taught...If you have a choice between your own poor and those of your city, choose your own poor first. If you have a choice between the poor of your city and the poor of another city, choose the poor of your city first.

29. Rabbi Moshe Heinemann's Baltimore Guidelines

<https://web.archive.org/web/20100306080534/http://www.just-tzedakah.org/guidelinesCommunity.asp>

- At least 50% is used locally
- Dividing into thirds:
 - 1/3 – Needy individuals, or institutions for the needy, locally
 - 1/3 – Moral obligations (relatives, close friends, benefactors), wherever they may be
 - 1/3 – Any qualified individual or institution