

National Pro Bono Resource Centre

Phillip Kellow
Deputy Registrar
Federal Court of Australia
Level 18
Law Courts Building
Queens Square
SYDNEY NSW 2000

25 April 2003

Dear Mr Kellow,

Disclosure by legal practitioners

We refer to your letter dated 17 March 2003 seeking our comments on a draft Rule designed to ensure that the Court knows the identity of any legal practitioner who may have prepared a document that is used by an otherwise unrepresented litigant.

We have consulted widely in relation to the proposals with organisations involved in the delivery of legal services to disadvantaged people including pro bono referral agencies, lawyers and firms who undertake pro bono work, community legal centres and legal aid commissions.

We believe that the proposed amendments, in particular the proposed Order 45 rule 10, will have an adverse impact on access to justice through discouraging the provision of some forms of legal services to persons unable to afford legal representation. In this letter we provide some information on the circumstances in which assistance short of full representation is provided to disadvantaged persons, and then attempt to summarise the issues and arguments put to us in the course of our consultations.

The Provision of Legal Advice and Assistance to Disadvantaged Persons

The provision of legal advice and legal assistance short of full representation is a key means for increasing access to justice for disadvantaged people. The major form of such legal advice and assistance is that provided at advice clinics and outreach services offered by community legal centres, legal aid commissions, legal professional bodies and increasingly by major law firms in partnership with community organisations. Legal advice clinics typically involve a large number of clients being interviewed and advised by a small number of lawyers in a relatively short amount of time. Lawyers staffing such clinics include salaried lawyers, lawyers from private law firms, corporations and government agencies volunteering in their own time, and lawyers seconded to community legal centres by law firms.

Lawyers involved in clinic or outreach services are often called upon to advise on matters in which they do not necessarily have as much expertise as would be desirable in a perfect world. There are

University of New South Wales, The White House, UNSW, Sydney, NSW, 2052

p 9385 7381 f 9385 7375 e info@nationalprobono.org.au

www.nationalprobono.org.au ACN 102 444 557

of course forms of training, supervision, support and monitoring in place to ensure the quality of the legal services provided; these measures are dictated by the desire of those involved to provide a high quality service, the widely accepted principle that pro bono work should be undertaken at the same standard as work for paying clients and the dictates of professional indemnity insurance¹.

We acknowledge that unrepresented litigants raise particular problems for the Court. As you will be aware neither publicly funded legal aid, nor the resources of pro bono lawyers, are available to provide representation to all those who are entitled to bring matters before the Court. In general it is desirable that such litigants receive some assistance rather than none, and more rather than less. One of the principal concerns of those consulted was that volunteer lawyers would be deterred from preparing documents, or providing advice in relation to the preparation of documents if the proposed rule was adopted. Similarly those managing seconded or salaried lawyers may judge it prudent to at least restrict services to advice only rather than assisting in any way in the preparation of documents.

If so the proposed rule would be inconsistent with the long stated aims of access to justice and is likely to result in fewer people being given pro bono assistance in relation to the preparation of court documents. It is respectfully submitted that bipartisan government policy over several decades has been to support increased access to justice. To date the Court has acted in support of that policy as reflected in Order 80 of the Federal Court's rules concerning Court appointed referral for legal assistance.

Possible Problems Arising as a Result of the Proposed Rule

We turn now to the particular issues raised in our consultations in relation to the proposed rule.

1. Drafting ambiguity may deter the provision of assistance

The proposed rule raises quite complex questions over which there are some differences of opinion. There is a lack of clarity in relation to several aspects of the proposed rule. For example, what is meant by 'prepared a document'? How much involvement need there be by a practitioner for the rule to operate? Several people queried with us, and indeed disagreed, on whether it would catch a practitioner giving a precedent application, for example, to a person. Would it apply to oral advice given to a client as to points that should be made in, for example, an application or written submissions? Would it make a difference if the lawyer jotted these points down on a piece of paper – a practice that might be particularly useful for clients from non-English speaking backgrounds. One suggestion that has been made is to specify that 'prepared a document' does not include advising a litigant on the preparation of a document. Additionally it has been suggested that 'a document which is filed' would be clearer and more limited than 'in connection with'. However, whilst a narrowly operating rule would be preferable to one of broad scope, such a limitation might produce the artificial and unhelpful result that lawyers providing limited assistance will stop short of taking the final practical step of actually producing and printing out a document for a person.

The rule also refers to 'intended' which begs the question, intended by whom? For example, a lawyer could have a conversation with a person who makes notes that they intend to use in a document to be filed in court. Would they be required to put the lawyer's name on the document, notwithstanding there was no such intention on the part of the lawyer?

¹ Some evidence that these standards are largely met may be indicated by the very good insurance claims experience of community legal centres.

2. Potential time/cost may deter provision of assistance

Many lawyers and legal services agencies will be deterred from providing the limited assistance now available if a consequence of providing that assistance is to open a lawyer to a *potentially time consuming or costly* form of public scrutiny and inquiry about the subject matter of the advice. It appears a clear intention of the proposed rule that costs orders may be made against a practitioner personally, or, more likely, a lawyer may incur time and expense in dealing with inquiries from the court in relation to his or her involvement in the matter. In such circumstances it is submitted that it is obvious that many lawyers currently providing a limited form of assistance to disadvantaged people about current or proposed litigation will cease to provide assistance altogether. That will not deter or diminish the number of unrepresented litigants before the court but will ensure that those people will not have available even the limited assistance now available on a non-fee basis.

3. Particular difficulties for volunteer legal advisers

As noted above, much of the assistance provided at advice clinics is undertaken by volunteer lawyers who are employed by private firms, government agencies and corporations. It is suggested that a solicitor employee of a major corporation, law firm or government department, is in no position to identify himself or herself as the solicitor who prepared the document as to do so potentially would open the solicitor to professional inquiry and perhaps embarrassment which would potentially affect their employment. It is respectfully submitted that the proposed rule is naive in assuming that persons who provide pro bono assistance to disadvantaged people would be permitted to continue to do so if their involvement became the subject of lost time or public scrutiny in relation to their employment.

It is submitted that it is insufficient answer to the above to suggest that the legal centre involved place its name on such a document. In common with legal advice and assistance bodies, community legal centres have guidelines for cases they can and cannot take on. If a legal centre's name was placed on all documents that volunteers provided assistance in creating or settling, the practical impact on the legal centre is that its guidelines for legal assistance must be abandoned (which is impractical) or volunteer lawyers directed not to provide assistance of that kind. If a legal centre put its name on the document, the legal centre would have to have much greater involvement than at present in relation to the litigation, for example, ensuring that a document that a volunteer has given advice on, drafted, settled, or assisted in drafting, is filed in that form without amendment, or at least presented in accordance with the advice given. This would lead to the situation where the centre would either have to do the whole of the work in-house, which often is impossible, or refuse to offer advice and assistance to unrepresented litigants. Neither would be a good outcome. In addition, there would be administrative and management burdens for CLCs if their name were to go on the documents. In addition to the need to create and maintain files, the decision to have the Centre or a Centre's solicitor named on court documents would at least have to be made by the Principal Solicitor at the Centre, who may well not be present at the advice session where the client is assisted.

4. Lack of control over document

Legal centres, legal aid commissions and other pro bono lawyers not infrequently need to limit their involvement to providing initial advice and assistance to clients as opposed to acting for them in an ongoing way. This may take a variety of forms, including giving oral advice, writing down 'key points', or drafting or settling applications or other documents to be filed and/or used in relation to court and tribunal proceedings. Most legal centre and pro bono clients have little or no familiarity with court processes or documents, may have literacy problems and have little chance of completing the necessary documents without assistance. Given that a lawyer providing this kind of

assistance does not have ongoing involvement, the lawyer will not know how and in what form the person ultimately presents the information to the court. If the lawyer's name were to appear on the document, the lawyer would need to have that control, which would effectively mean having to act for the client in an ongoing way, when they have already made a decision that they are not in a position to do so.

5. Unrealistic expectations of lawyer's involvement in a matter

A number of people with whom we consulted expressed the concern that the proposed rule would have a 'chilling effect' on pro bono assistance because of a concern by the lawyer that including their name on the document would increase their likely involvement in the matter beyond that which they can or are willing to have. Inclusion of the lawyer's name could raise unrealistic expectations on the part of the client, the Court and possibly also respondents, as to the lawyer's role and ongoing involvement. One practitioner told us that in his experience, once his name got on a court or tribunal's file in a matter, he would be called by the court or tribunal for a variety of reasons – including to inquire about the person's whereabouts, willingness to attend a conference and other like matters. A practitioner might anticipate that the court would call upon him or her to attend and explain matters which would involve committing further time to the case. Again, the necessary consequence of these concerns is to deter practitioners from offering pro bono assistance.

6. Commercial sensitivities

A lawyer providing assistance pro bono may be in a position where they are entitled to act or advise in the matter in that there is no legal conflict of interest however they may for other reasons think it prudent that their name not appear on a document prepared in the particular proceedings. This is most likely to occur where the lawyer's employer has some commercial relationship with the respondent, for example that it proposes to tender for the respondents' legal work in the future, or acts for the respondent in a different class of matter. In these circumstances the proposed rule would mean the lawyer would decline to provide assistance.

7. Potential for incorrect assumptions to be made about the context of assistance provided

The proposed rule may also deter practitioners from providing pro bono legal assistance because of a concern that the Court may make erroneous assumptions about the content and context of the advice and assistance given. For example, the assistance in preparing the document may have been given in a short advice session by a lawyer who has not had the opportunity to read the person's whole file, or listen to tapes of Refugee Review Tribunal hearings and who may even have advised the person that their appeal lacks merit. It may be that the assistance in preparing the documents is given in the pressured circumstances of having to act quickly, and with incomplete information, in order to preserve appeal rights. It may be that the lawyer does not have particular expertise in the area but nevertheless gives the person assistance on the contents of documents on the basis that it is better that the person have that assistance than none at all. The inclusion of the lawyer's name on the document tells the court nothing of these circumstances yet might imply, or lead to the assumption, that the lawyer has advised the person to take the action and done so on the basis of full instructions. Practitioners may fear costs orders being made on the basis of false assumptions, or at the very least, would not want to be put in the position of having to explain to the court these matters. Moreover, obligations of privilege may also prevent the lawyer from explaining his or her reasoning or conduct.

8. Further explanation of the lawyer's involvement will often be desirable

One person commented that merely having the practitioner's name recorded in the document would be confusing. If their name were to go on the document, many would want to explain further their involvement, by for example stating 'I have no ongoing involvement in the matter'. For staff of the legal aid commission it might be, 'I have assisted in the preparation of this document but will not have further involvement unless the client's application for aid is successful'. This desire would not by itself decrease access to justice except to the extent it places an additional burden on the volunteer lawyers or legal aid service.

9. The potential benefits of the rule may be able to be met in other ways or may be illusory

A number of people have questioned the need for and/or the utility of the proposed rule. Inclusion of the practitioner's name will tell the court nothing about the circumstances in which the name came to be present including how much assistance the person had.

As one commentator experienced in providing pro bono services in the Federal Court noted " .. in the pro bono area a lot of lawyers (some admitted as practitioners, some academics, some law students) do their best to help unrepresented people. They cannot do so by representing them. They often do so by helping with preparation of documents. As the example cited by Branson J [in *NADG of 2002 v MIMA* [2002] FCA 893] shows, they might reflect a degree of legal learning not matched by practical experience. In those circumstances, I do not see the utility in requiring the lawyer to be identified. It cannot have anything to do with trust between bar and bench. It cannot be assisted by the ethical duty owed by practitioners, because the lawyer might not be a practitioner.,

We are aware of the practice that sometimes occurs of people in prison and detention sharing their documents, however this practice will not be addressed by the proposed rule.

Several people have made the point that where a person has received limited assistance in the preparation of court documentation, they are still unrepresented and ought properly be treated by the court as unrepresented persons to whom the court has an obligation to provide assistance. If the court wishes to know whether a person has ongoing legal assistance the court can always inquire of the litigant without needing the proposed rule to do so.

10. Potential for mis-use of the proposed rule

If there are to be consequences attaching to a breach of the proposed rule, then the existence of the rule may create opportunities for powerful government and corporate respondent interests to take technical unmeritorious points.

Conclusion

We respectfully suggest that the Court should not proceed with the rule as drafted as there is a real danger that it would deter pro bono lawyers and legal service agencies from providing certain kinds of assistance to litigants. While the work undertaken by legal aid agencies and pro bono lawyers should be of high quality, there are other means by which this quality should be guaranteed.

It might be possible to redraft the rule to ensure that it operates only where the legal practitioner has fully taken on the task of, and has, drafted a document that is filed in court in that form. Some have supported the idea of a rule operating in these circumstances on the basis that if a legal

practitioner drafts such a document, whether pro bono or for a fee, they should be willing to put their name to it and be held accountable for it. Others, however, point to the deterrent effect this would have on pro bono work, not because a practitioner is doing sub-standard work, but because it raises the prospect of some ongoing involvement in the matter, including the possible need to account for their due diligence, and the practitioner does not want to have ongoing involvement.

We recommend that if, after considering the matters raised herein, the Court is minded nevertheless to proceed with a rule of this sort, the Court consider undertaking formal consultations through its User Groups and with others who are likely to be affected including community legal centres, legal aid commissions, law firm pro bono lawyers and some barristers who do pro bono work particularly in the migration area to the extent that they are not represented on those groups. In our submission the objective should be to address the concern that has led to the drafting of the rule in a way that does not threaten the provision of pro bono or publicly funded legal services to disadvantaged litigants or potential litigants.

Thank you again for the opportunity to comment on the proposed rule. Please contact Jill Anderson, Policy and Research Officer or myself if you would like to discuss any of the above matters.

Yours sincerely,

Gordon Renouf
Director
National Pro Bono Resource Centre
(sent by email)