

## FOUNDATION LUNCHEON SPEECH

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By Whitney Cunningham

### I. Introduction

I want to thank the Foundation's President, Todd Lang, and the Foundation's Executive Director, Dr. Kevin Ruegg, for the privilege of speaking to you today on behalf of the State Bar of Arizona. I would also like to acknowledge and thank our chief justice, Rebecca White Berch, and our vice chief justice, Scott Bales for their presence and participation at this awards luncheon. They are joined by our other justices, John Pelander, Robert Brutinel and Ann Scott Timmer. This underscores the importance of the work of the Foundation, not only to the State Bar, but to the Supreme Court of Arizona as well.

On behalf of the State Bar, I congratulate the honorees recognized today for your outstanding contributions to legal services and education.

### II. Obligations

The theme for this year's convention is Serving Justice. And my question is who serves justice to the neediest among us? Who represents low-income Arizona residents - those women who are victims of domestic violence, seeking to move their children to safety away from abusive spouses? - families who are facing unfair eviction from their homes? - those forced to pay unreasonable interest on consumer debts? - immigrants seeking to establish legal residence under our laws? Who represents all those who cannot afford to hire a lawyer to guide them, advocate for them, and give them a voice in our courts?

I like to spend the next few minutes talking to you about that part of the Foundation's mission and the State Bar's mission for which there is a perfect overlap, promoting access to justice. If you will indulge me, to get this conversation off on the right footing, please stand if you are able and join me in reciting our nation's pledge of allegiance.

[Pledge of Allegiance]

Thank you, please be seated. Now, you have just done it again. You made a pledge. Most of us have been reciting this pledge all our lives, hundreds of times, maybe more. And each time, how do we conclude our pledge? With a promise contained in three critical words: "justice for all." Any lawyer or judge ought reasonably to be able to claim he or she pursues justice, so I want to draw attention to just the last two words of the pledge: "for all."

I practice civil law, with a heavy emphasis on civil litigation. Real estate disputes, business disputes, construction disputes. I enjoy what I do. I also have kids and a mortgage, so I enjoy it when clients pay my invoices. I have not dedicated my career to serving the poor in need of legal representation. Even in this room populated by lawyers and non-lawyers who support the work of the Foundation, very few of us have dedicated our careers to meeting the legal needs of the poor. You too have kids; you too have mortgages.

And yet, we recite the pledge. When I say the pledge today, it's the same pledge I recited when I was in the third grade, but of course, I am no longer in the third grade. I have been trained with special skills, licensed by august regulatory bodies, and now entrusted to carry out the pledge in deed, not just in word.

Our obligation as lawyers and judges to ensure justice for each person irrespective of socio-economic status is an ancient one.

In the Book of Deuteronomy, chapter 16, verse 19 speaks specifically to judges but it applies equally well to lawyers: "you shall not be partial." That's from the New International Version, and I like the King James Version even better, which says that in making judgments, "thou shalt not respect persons." In other words, justice is not defined by a party's status or stature. In the American tradition, we like to say no one is above the law.

Our obligation as lawyers and judges to ensure justice for each person irrespective of socio-economic status is also a thoroughly modern one.

Twenty three years ago, in 1990, our Supreme Court amended our Rules of Professional Conduct, adopting Ethics Rule 6.1, which sets out a lawyer's obligation: "A lawyer should voluntarily render public interest legal service." The first method identified by the rule calls for lawyers to provide "professional services at no fee or at a substantially reduced fee to the poor or near poor or to organizations that have as a principal purpose promoting the interests of the poor..."

I suppose there would be no strong objection in this room to the notion of pro bono service to which Rule 6.1 calls us. The rule states we should strive to provide at least 50 pro bono hours each year. And as all of you know, the rule is a voluntary one; there is no mandate that individual lawyers give away their time.

The need for legal services for the poor is immense. Congress created the Legal Services Corporation in 1974 as an independent 501(c)(3) charitable organization. The Legal Services Corporation is funded annually by Congress, and distributes more than ninety percent of its total funding to 134 nonprofit legal aid programs across the country. Three of these legal aid organizations serve the poor in our state, Community Legal Services, Southern Arizona Legal Aid, and in my hometown of Flagstaff, DNA People's Legal Services.

In 2010, congressional funding for the Legal Services Corporation was 420 million dollars. Its budget has been cut in each of the past three years, so that today it operates with only 80% of its funding from 2010, which is a total reduction of about 80 million dollars. In April, I was able to travel to Washington, D.C. together with other leaders of our Bar, where we joined with bar leaders from across the country, to meet with our legislators and seek their support for the president's proposed budget, which would restore legal services funding. We'll have to wait to see if our efforts bear fruit. To put the call of Ethics Rule 6.1 in context, though, consider this. If the 18,000 active lawyers and judges in Arizona provided just half of the rule's prescription for 50 hours of pro bono, and we ascribed a value to those services equal to Arizona's median

hourly billing rate for private attorneys, then the value of that pro bono work would be greater than the 80 million dollars Congress has cut from the Legal Services Corporation budget over the past three years.

What this means is that each of us, as individual lawyers, can and must contribute to the legal needs of the poor, and if we do so, collectively we will make a big impact.

Here are 5 specific ways in which you can help, some of which are brand new this year.

### III. Opportunities

Opportunity Number 1: Take on pro bono cases through the volunteer lawyers program of one of our legal aid organizations.

I would be a hypocrite if I didn't admit that plenty of times over the past decade I have reflected on my service on the Board of Governors and various related committees and felt like I was making a fair pro bono contribution. I also do not wish in any respect to diminish the substantial and vital contributions made by those who work to strengthen the State Bar and the Foundation. But consider it this way, the person making bullets in the munitions factory plays a vital role in a war effort, but we don't hand out the Bronze Star to those folks. That honor is reserved for the men and women who risk taking a bullet made in the other team's munitions' factory. In other words, there is a good argument to be made for each of us to do our pro bono service on the front lines, as it were. We should be ready to help in difficult circumstances, brave enough to fight potentially unwinnable causes, and willing to lose if necessary.

Late last year I met a client. I'll call her Sandy. She had young kids, and she and her husband had worked 15 years in a family automotive business. Earlier in the summer, her husband had petitioned for divorce and was capably represented. The immediately interesting twist in this case was that the husband obtained an injunction against Sandy ordering her to stay away from the family residence, where she lived, and from the family business, where she worked. At the same time, it made no provision for her to receive income of any kind.

Next, her husband had the family business, a ma and pop corporation, bring a separate lawsuit against Sandy claiming all the money she had taken from the family business over the preceding years was unauthorized and should be repaid. She was served this new complaint while in court attending a divorce proceeding. She didn't realize she needed to file a formal answer; she didn't even appreciate that this was an altogether separate lawsuit. A few weeks later, default was entered. Ten more days passed. A short time after that, a hearing on damages was scheduled.

And then, ten days or so before the hearing, with no home, no income, and no realistic defense against a default in the civil case, Sandy and I met for the first time when she came into my office. Nothing like a good challenge to get you out of bed in the morning. I'll spare the details of the representation, except to say this: Winning a pro bono case feels just as satisfying as winning for a paying client.

I share this story because this is what goes on. Real people, real cases. And we need your help.

The State Bar is working to expand opportunities to do just this.

Currently pending before the Supreme Court is a petition to amend our rule governing mandatory continuing legal education, which would allow up to five hours per year of MCLE to be earned by providing legal services to the poor through one of our approved legal services providers.

In addition, this is an opportunity for lawyers who are not regularly licensed to practice, such as registered in house counsel. Last year the State Bar petitioned, and the Supreme Court adopted on an accelerated basis, an important change to the licensing rules to allow registered in-house counsel to provide pro bono legal services through one of the legal aid organizations. This rule became effective January 1 of this year. (And by the way, credit for these rule changes largely goes to the State Bar's Legal Services Committee and the leadership of Gary Restaino).

You can sign up for the Volunteer Lawyers Program with any of our legal aid organizations by going to their websites.

Opportunity Number 2: Provided limited scope representation.

If taking on whole cases is problematic for you, then take on a piece of a case.

Also effective January 1 the Supreme Court adopted the State Bar's petition to modify the civil rules so that attorneys may now enter notices of limited scope representation. An attorney and client can agree on matters, or hearings, or issues for which the attorney will make an appearance.

This opportunity is well suited for my work with Sandy. Divorce law is not in my wheel house. I suggested to her that she talk to DNA People's Legal Services. It turns out she had, and she produced a letter in which DNA explained that while it was prepared to help with the divorce, it lacked the expertise needed to handle the business dispute. So I called my friends at DNA and suggested a team approach. I would take on the business litigation and they would handle the divorce. Since the business issues were likely to come up in the divorce as well, I would consult as to those issues. DNA accepted my offer, so now Sandy had a full legal team who could address her needs. Under the new rule, I can appear on her behalf and limit the scope of my responsibility to the matters I know about and agreed to take on.

Opportunity Number 3: Ghost write legal papers when you can't commit to in-court legal representation.

If taking on a whole case, or even part of a case, is unworkable, you can still make a significant contribution. One of the comments to Ethics Rule 6.1 drives home this point: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of

the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.”

Last year the State Bar petitioned, and the Supreme Court adopted on an accelerated basis an important change to Rule 11 in the civil procedure rules. Beginning January 1 of this year, and I quote, “An attorney may help to draft a pleading, motion or document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or document.” Many cases confronting the poor play out in our justice courts, where structure and procedure are easier for self-represented parties. This change in Rule 11 allows lawyers to help litigants represent themselves. This behind-the-scenes help, which may take little of our time, could prove invaluable in cases involving landlord-tenant issues, consumer debt collection and similar disputes.

#### Opportunity Number 4: Sign up for the Foundation’s modest means program.

The modest means program connects individuals who don’t qualify for free legal services with an attorney, who provides a one-hour consultation for \$75. If the lawyer and client agree, the representation may continue beyond the initial consultation at the reduced \$75 rate. Ethics Rule 6.1 advocates providing professional services at “a substantially reduced fee” to the “near poor.” The modest means program is a great way to fulfill this call, and you are not committing to anything more than a one hour meeting.

In case you haven’t noticed, your opportunities are getting easier and easier. Just keep listening until you hear one that fits.

I signed up for the modest means program. I was able to limit my prospective representation to areas in which I have competence. The Foundation’s website identifies 15 different practice areas. If you Google Arizona bar foundation, you will go right to the site.

#### Opportunity Number 5: Become a Fellow of the Arizona Foundation for Legal Services and Education

Ethics Rule 6.1 states – and this is in the rule itself, not in the comments – “The efforts of individual lawyers are not enough to meet the needs of the poor. ... a lawyer is encouraged to provide financial support for organizations that provide legal services to persons of limited means or to the Arizona Foundation for Legal Services & Education for the direct delivery of legal services to the poor.”

Becoming a fellow of the Foundation means donating the sum of \$16.67 per month. Or to put that in terms we lawyers can understand, that’s one double shot soy latte per week. Since I became a fellow, I’ve lost twenty pounds. And I get to put it on my resume. [Since Patricia Refo is in the room, I’ll also note that I now pay twenty dollars per month to list being a fellow of the American Bar Foundation on my resume. I’m looking forward to losing a few more pounds.]

And by the way, for any non-lawyers in the room, this is the one call for action I am making for which no law license is required. Anyone can be a fellow of the Foundation.

I can't overstate the importance of financially supporting the Foundation and our legal aid organizations. I already told you about cuts to the Legal Services Corporation. The fact is that my case for Sandy did not initially come through a legal aid organization. She found me through a mutual friend. As I indicated, DNA had told her it lacked some of the resources needed for her case. When I called my friends at DNA about this, they told me that even with the volunteer lawyers program, they were struggling to find resources needed to match private attorneys with legal aid cases. In other words, the budget cuts are creating a downward spiral.

I got Sandy's case worked out with DNA, so that we could collaborate. One side benefit to this arrangement is that I now speak regularly with one DNA lawyer in particular who has my number on speed dial. He knows he can call me anytime he has a question that might be in my area of practice, and I can mentor him, help identify issues, and sometimes take on a new case.

Lesson for any legal aid attorneys in the room – you should have at least ten lawyers on your speed dial who practice in different areas and who you can call for help and advice.

Lesson for lawyers who want to sign up through the volunteer lawyers program – be persistent. If you don't get an immediately satisfying response, please understand it is not because your help is unneeded or unwanted. It may be because the need is so great and the resources so few.

Thank you for giving me this time to highlight some of the new and not so new ways we can contribute to meeting the legal needs of the poor. Let's all do our part to serve justice, for all.