

THE PRODUCTION OF PRO BONO

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INTRODUCTION

Professor Susan Carle's contribution to this symposium, if I understand it correctly, first reviews her published research on the ethical behavior of the early NAACP leaders.¹ The paper then reassesses that research from the perspective of the several schools of thought on the relationship between "class" interest and professional regulation. The problem that animates Carle's paper is whether the elite lawyers who populated the NAACP's board during its earliest decade used their positions to promote personal or class interests, instead of the interests of the clients the NAACP served. That the lawyers were elites is evidenced by their inclination to excuse themselves from adhering to certain ethical prescriptions they had a hand in promulgating. Did these lawyers use, albeit perhaps unconsciously, the NAACP, the guise of the public interest, and their willingness to exempt themselves from ethical restrictions to promote self-interested ends?

This question assumes that lawyers' self-interest and their inclination and ability to conduct "pro bono" public interest litigation are in tension. In my view, they are not. Self-interest can, and arguably has, produced pro bono activities that further the public interest. Instead of calling lawyers away from self-interest to perform pro bono work, academic commentators interested in promoting pro bono efforts instead should attempt to explain how the two can coexist.

I. PRO BONO AND SELF-INTEREST

The primary contribution of the economic analysis of law has been descriptive. It has attempted to explain much of the common law as a product of rational self-interest. This explanation of the law has com-

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¹ Susan Carle, *How Should We Theorize Class Interests in Thinking about Professional Regulation?: The Early NAACP as a Case Example*, 12 CORNELL J.L. & PUB. POL'Y 571 (2003) [hereinafter Carle, *Class Interests*].

monly caused confusion on the part of certain critics. Just because a particular area of common law doctrine is consistent with rational self-interest does not necessarily mean the relevant rule makers, such as common law judges, created that body of law in an explicit attempt to further any particular aim. The actual motivations of the rule makers are technically irrelevant. What matters is that the rule makers' activities collectively created a body of law that produced or promoted certain allocative efficiencies, and that the law can to a certain extent be rationalized along these lines, thus allowing for a more complete understanding of the rules and more plausible predictions of the law's evolution.

Surprisingly, pro bono activities can also be explained as a function of economic self-interest. One such pro bono story can be told with respect to the ethical rules themselves. The rules of professional regulation on the whole are clearly in the public interest. The rule against conflicts of interest² promotes unbiased, disinterested representation; the confidentiality rules³ protect client confidences and enhance the quality of legal representation; the trust accounting rules⁴ protect client assets; and advertising and solicitation limitations⁵ maintain client trust in the integrity of the profession and minimize client vulnerability by warding off overreaching by lawyers. Nevertheless, it is a fact that lawyers, who might prefer to further their self-interest, helped devise these rules. As a result, a self-interested interpretation of the rules is also plausible. The rule against conflicts of interests deters lawyers from discounting their services for antagonistic clients who wish to share a lawyer, and also ensures the multiplication of lawyers to resolve disputes; the confidentiality rules provide clients with a valuable place to hide their secrets and obtain sophisticated advice an asset lawyer can uniquely offer to clients for great remuneration; the trust accounting rules make clients pay full freight for their lawyers, discouraging lawyers who would cheat the going rate by using client trust accounts as a source of borrowed funds; and the advertising and solicitation limitations protect established client relationships, and provide a barrier to entry to new competitors. In short, the rules can plausibly be understood to promote the collective or "class interests" of lawyers by protecting fee levels against price cheaters and by generating clients to pay those fees.

Which of these explanations of the rules of professional regulation is the "correct" one? Why not both? Here's a better story: that lawyers, acting consistently with their personal and collective self-interest, have produced a body of rules that serve the public good. The rule against

² MODEL RULES OF PROF'L CONDUCT R. 1.7-1.9 (2002).

³ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

⁴ MODEL RULES OF PROF'L CONDUCT R. 1.15 (2002).

⁵ MODEL RULES OF PROF'L CONDUCT R. 7.1-7.5 (2002).

conflicted representations, for example, while promoting the multiplication of lawyers and discouraging price cheaters, also produces quality, unbiased representations. The public benefits of such a rule might outweigh its marginal anti-competitive effects. The fact that lawyers who justify this rule would point to its obvious public benefits does not automatically mean that the rule does not create benefits for its apologists as well. Most rules do create private rents and thus are sought by rent-seekers.⁶ To acknowledge this fact is not to argue that there should be no rules at all. That rent-seekers seek rules that favor them is a given. Whether or not rent-seekers can point to substantial public benefits or positive externalities from the rule, sufficient in size to outweigh the non-productive transfer payment of the rent, should operate as the litmus test for the desirability of the rule.

II. THE NAACP'S PUBLIC INTEREST WORK

The assumption behind much of the "pro bono encouragement" literature is to the contrary, arguing that lawyers' self-interest is in tension with public interest litigation and pro bono activities more generally. The claim is that lawyers, who spend a large portion of their time in profit-making activities, need to put aside crass, greedy self-interest and exercise altruistic motives to accomplish public good. The data on the NAACP's early years, however, suggests its lawyers acted in a manner consistent with the "self-interest" of the group, and that the self-interest of the NAACP produced desirable public goods. One way the NAACP furthered its own cause was by competing against other lawyers who were interested in remedying the plight of African-Americans.⁷ The NAACP also sought to maximize the value of its expenditures, preferring cases that raised litigable issues that, if resolved favorably, would have widespread impact.⁸ Many of these cases involved commercial rela-

⁶ See generally FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997).

⁷ The minutes of the NAACP National Legal Committee meeting in 1913 include discussion of an attempt to remove local representation from the case of *Alabama & V.R. Co. v. Morris*, 234 U.S. 766 (1914), to allow for NAACP representation. The NAACP's minutes from 1917 describe an accusation made against one Dr. Bundy to the effect that he was illegally soliciting funds for his defense, a practice at which the NAACP was experienced; see Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 *LAW & HIST. REV.* 97, 121-22 (2002) [hereinafter Carle, *Race, Class, and Legal Ethics*]. The NAACP's diligence in insinuating itself into controversies, even if limited to inexpensive letter-writing, along with its public campaign for clients, funds, and test cases, evidence the degree to which the organization struggled to become a significant voice for its cause. See generally Carle, *Class Interests*, *supra* note 1.

⁸ The NAACP's strategy of devising test cases is documented in Carle, *Race, Class, and Legal Ethics*, *supra* note 7, at 100-03.

tions.⁹ Indeed, because the group during this period was funded in part by members of the wealthy business class,¹⁰ the NAACP's willingness to litigate commercial cases had the effect of opening markets for business. Discrimination is costly along many dimensions, including its tendency to hinder business development.

Was the NAACP to be faulted if its first leaders were motivated by interests other than an altruistic love of the public good and were in part funded by businesses? In my view, the NAACP's competitiveness was instrumental to its eventual success. Racial discrimination was entrenched and pervasive. It required a unified, cohesive, well-funded and highly organized opposition to defeat it. The NAACP's empire building created this necessary structure; part of the story of the NAACP's emergence is that many competitor public interest groups and individual public service providers left in its wake.¹¹ Empire building may also have necessitated its leaders ignoring or excusing themselves from the ethical prohibitions that regulated the profession. The NAACP's competitiveness and willingness to engage in acts of solicitation brought it national prominence, procured for it fund-raising advantages, and certainly assured its members salaries, standing, and authority over the development of new law. In my view, whether or not the NAACP's founders acted out of self-interest is not an important question. What is important is to observe that their actions, even if out of self-interest, generated substantial public benefits that continue to accrue to this day. Even if the motives of the business class that funded part of the NAACP's litigations were purely financial, the point is that pursuit of financial self-interest helped produce substantial and overriding public benefits.

Pro bono can be a by-product of self-interest. At the time of the NAACP's founding and for much of the history of the American bar, pro

⁹ See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917) (local segregation ordinance prohibiting blacks from living on the same block as whites); *Jackson v. State*, 103 A. 910 (Md. 1918) (residential segregation ordinance); *State v. Jenkins*, 92 A. 773 (Md. 1914) (segregated seating on trains); *State v. Gurry*, 88 A. 546 (Md. 1913) (challenge to residential segregation ordinance); *Hull v. Eighty-Sixth Street Amusement Co.*, 144 N.Y.S. 318 (N.Y. App. Term 1913) (theatre tickets); *Gibbs v. Arras Bros.* 118 N.E. 857 (N.Y. 1918) (access to a liquor saloon). The other cases varied. See, e.g., *Guinn v. United States*, 238 U.S. 347 (1915) (right to vote); *Franklin v. South Carolina*, 218 U.S. 161 (1910) (murder defense); *Afro-American Order of Owls, Baltimore Nest No. 1 v. Talbot*, 91 A. 570 (Md. 1914) (trademark action involving name of the order); *Bainbridge v. City of Minneapolis*, 154 N.W. 964 (Minn. 1915) (showing the "Birth of a Nation" lead to the revocation of a local theater's license; the NAACP's involvement is not clear); *State v. Bonner* 168 S.W. 591 (Mo. 1914) (criminal appeal).

¹⁰ See Carle, *Race, Class, and Legal Ethics*, *supra* note 7, at 102–04 (noting the several industrialists and other wealthy patrons who financed the NAACP during these years).

¹¹ See generally *id.* (describing a number of other fledgling public interest groups around the birth of the NAACP); see also, e.g., *In re Neuman*, 155 N.Y.S. 428 (1915) (quoting the advertisement of a lawyer that read "a white lawyer, who is a colored man's friend").

bono was something done almost exclusively by elite lawyers.¹² Indeed, the binary definition of “public interest” adopted by the Supreme Court reflects this history, as public interest work is partially defined as that which is done without direct compensation.¹³ At the margin, elite lawyers are more able to afford time to work for free. A lawyer’s decision to engage in a pro bono representation communicated to other lawyers and clients his elite ranking. Today, most state bar rules strongly encourage lawyers, regardless of status or experience, to engage in pro bono.¹⁴ As a result, lawyers can no longer advertise their elite status by accepting unpaid, yet at times highly visible pro bono work. The overall decline in the number of hours lawyers spend working on pro bono cases might result from the democratization of pro bono practice. The problem with pro bono might be that the self-interest component has disappeared.

¹² See generally Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. ROUNDTABLE 381 (2001).

¹³ Compare *In Re Primus*, 436 U.S. 412 (1978) (holding that solicitation of clients is constitutionally protected for public interest legal practice not conducted for profit), and *NAACP v. Button*, 371 U.S. 415 (1963) (same), with *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (holding that solicitation of clients is not constitutionally protected for private, for-profit practices).

¹⁴ MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002). In early 1993, the ABA House of Delegates revised Rule of Professional Conduct 6.1 to call upon all lawyers to “aspire” to devoting 50 hours a year to pro bono public service of which a substantial majority shall go to the poor and to organizations that help the poor. This rule had no direct counterpart in the ABA Model Code of Professional Responsibility. EC 2–25 stated that the “basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer.” Florida nearly requires pro bono. Its rule is explicitly aspirational, but does mandate annual reporting on fulfillment of the aspirational criteria. RULES REGULATING THE FLA. BAR R. 4–6.1 (2002).

