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PRIVATE PRACTICE AND CAUSE LAWYERING: A PRACTICAL AND ETHICAL GUIDE

*Bettina E. Brownstein**

I. INTRODUCTION

This article is designed to provide both encouragement and guidance to those lawyers who are interested in combining a career in private practice with “cause lawyering.” First, it is important to define cause lawyering. I was approached to write this article because I was identified as someone who engages in cause lawyering. Prior to being approached, I had never heard the term before. Once I began researching the term, I found that there is a whole body of academic work on “cause lawyering” and “cause lawyers,” which was occupied with examining such questions as: What is the definition of ‘cause lawyers?’ What is the nature of their work? What distinguishes them from conventional lawyers? What motivates them as opposed to that which motivates conventional lawyers?¹ Although a discussion of the definition of cause lawyering and the nature of the work is useful, I will leave a meaningful examination of motivation to the scholars. Suffice it to say that it is my experience that cause lawyering is fun, intellectually stimulating, and can make one feel that he or she is doing something for the common good. This article will (1) identify defining characteristics of a cause lawyer, (2) distinguish cause lawyering from pro bono services, (3) examine obstacles that arise in the practice of cause lawyering, and (4) discuss how to balance the client’s interest with the cause. All of this will lead to a conclusion that although cause lawyering may be a new fangled term, its foundation is deeply rooted in many lawyers—both old and young—and provides an avenue for continuing legal education.

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1. See CARRIE MENKEL-MEADOW, *The Causes of Cause Lawyering, Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, 31, 33 (Austin Sarat & Stuart Scheingold eds., 1998); STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN, POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING, 7–11 (2004).

II. THE DEFINING CHARACTERISTICS

Cause lawyers used to be called “public interest lawyers.”² Other prominently used labels were civil rights lawyers, poverty lawyers, social justice lawyers, and activist lawyers.³ These labels seemed aimed at the full-time cause lawyer, or at least the lawyer who devoted most of his or her time to causes and not to those who had a mixed practice—one devoted primarily to representing clients for fees and only secondarily to advancing a cause.

There are also various descriptions of cause lawyers, all of which are in some way unsatisfying. Some examples include: lawyers who work to advance their moral or political values using their legal skills, lawyers who work to change the system, “lawyers who use law to change law or regulations to achieve greater social justice for people,” “lawyers who use law to achieve goals that transcend traditional client service,” and lawyers who assist individuals in achieving access to justice.⁴ Simply, cause lawyering can be defined as “any activity that seeks to use law-related means . . . to achieve greater social justice—both for particular individuals . . . and for disadvantaged groups.”⁵

Cause lawyers were once thought to be the exclusive province of the liberal or left wing of the political spectrum.⁶ Probably, most people thought of the American Civil Liberties Union (ACLU) or the National Association for the Advancement of Colored People when they thought about lawyers who used the courts to achieve social or political change. This situation began to change in the late 1970s and 1980s: Now, there are numerous socially and politically conservative organizations that use lawyers to further their agenda. Some examples are the American Center for Law and Justice, the Christian Legal Defense Organization, and the Washington Legal Foundation, which in particular has as its mission the defense of the “principles of free enterprise and individual liberties.”⁷

Here in Arkansas, the Family Council employs lawyers, most notably on such matters as same-sex marriage, abortion, fostering, and adopting children.⁸ On the other side of spectrum in Arkansas are the ACLU of Ar-

2. MENKEL-MEADOW, *supra* note 1, at p. 33.

3. See MENKEL-MEADOW, *supra* note 1, at p. 33 for a comprehensive list of labels and other citations.

4. See MENKEL-MEADOW, *supra* note 1, at p. 33.

5. MENKEL-MEADOW, *supra* note 1, at 37.

6. MENKEL-MEADOW, *supra* note 1, at 34.

7. Wash. Legal Found., WLF Mission, <http://www.wlf.org/Resources/WLFMission/> (last visited Apr. 14, 2009).

8. Family Council, <http://www.familycouncil.org/> (last visited Apr. 14, 2009). The Family Council intervened in the lawsuit brought by the ACLU of Arkansas to stop implementation of initiated Act 1, passed by the voters in 2008. *Judge Allows Family Council to*

kansas and Planned Parenthood of Arkansas and Eastern Oklahoma, which seek the aid of lawyers to advocate for a woman's right to choose.⁹ In both this state and nationally, lawyers are affiliated on both a full-time and part-time basis with organizations concerned with matters ranging from justice for potentially disadvantaged groups, disability rights, families and children, the environment, and First and Second Amendment rights.¹⁰ This is not an exhaustive list: A quick search on the internet will reveal many more such organizations.¹¹

A. Identifying the Characteristics in Law Students

Although I do not know what makes some lawyers want to work for causes and others not want to, it was not difficult to identify those students in law school who were most likely to become cause lawyers: They were the ones who sat attentively in the front rows of constitutional law class and raised their hands at every opportunity to answer the professor's questions. On the other hand, the students who were the least likely to become cause lawyers were those who placed themselves in the back of the constitutional law class and would mutter, "How is this going to help me learn how to draft a complaint?"

B. Cause Lawyers and the Constitution

Generally, cause lawyers are interested in constitutional law—not only because it is the basis of the rights of the people that by and large cause lawyers want to advance—but also because cause lawyers are genuinely

Intervene in Act 1 Lawsuit, ARK. BUSINESS, Mar. 6, 2009, available at <http://www.arkansasbusiness.com/article.aspx?aID=112994.54928.125135>.

9. See ACLU of Ark., Mission, http://www.acluarkansas.org/content/index.php?option=com_content&task=view&id=1&Itemid=2 (last visited Apr. 27, 2009); Planned Parenthood of Ark. and Eastern Okla., Abortion Issues, <http://www.plannedparenthood.org/issues-action/abortion-issues-5946.htm> (last visited Apr. 27, 2009).

10. The Arkansas Attorney Oath states that every attorney "will endeavor always to advance the cause of justice." Ark. Legal Servs. P'ship, Arkansas Pro Bono Partnership, <http://www.arlegalservices.org/home/publicweb/volunteer/> (last visited Apr. 17, 2009) (quoting Arkansas Attorney's Oath).

11. Nationally and internationally there are probably a thousand or more organizations utilizing services of cause lawyers. These include: the National Audubon Society, the Sierra Club, and other environmental groups, American Library Association (ALA), Innocence Project, Southern Poverty Law Center, Brady Center to Prevent Gun Violence, National Rifle Association, Lawyers Without Borders, and the American Bar Association Europe and Eurasia Program. The ALA has been at the forefront of advocating for the protection of our First Amendment right to read. See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003).

fascinated by the greatness of the Constitution, both when written and now. I also think that cause lawyers are invested in the Constitution—not just intellectually or as lawyers—but emotionally. They profoundly want it to work, to fulfill its promise, and to provide the tool to make government honor people’s rights.¹² My definition of cause lawyers would not necessarily be limited to lawyers who want to change the system, laws, or regulations, but would also include lawyers who want the system, laws, or regulations to work the way they are supposed to work—observing the rights reserved to the people in the Constitution.

III. CAUSE LAWYERS VERSUS PRO BONO LAWYERS

Cause lawyering is different from the usual pro bono lawyering, although there may be some overlap. Many lawyers accept pro bono cases through such programs as Central Arkansas Legal Services¹³ or represent prisoners in habeas corpus or 42 U.S.C. § 1983¹⁴ proceedings, by court appointment.¹⁵ Generally, these cases involve an individual who has a particular legal problem but lacks the financial means to employ an attorney; for instance, many pro bono cases concern domestic matters.¹⁶

Pro bono lawyering is very important, as the number of people who cannot afford an attorney to provide necessary legal services is substantial.¹⁷ Currently sixteen percent of Arkansans live below the federal poverty level.¹⁸ The Rules of Professional Conduct of many states recognize this need, including Arkansas.¹⁹ The ethical rule in Arkansas is aspirational rather than mandatory.²⁰ The Arkansas Rules of Professional Conduct, Rule 6.1, urges attorneys to devote fifty hours a year to pro bono work and accepts representing organizations seeking to advance or protect civil rights and liberties—in other words, cause lawyering—as one of the categories to which these fifty hours can be devoted.²¹

12. Our nation’s founding fathers established the Constitution “in [o]rder to form a more perfect [u]nion, [and to] establish [j]ustice . . . promote the general [w]elfare, and secure the [b]lessings of [l]iberty to [themselves] and [their] posterity. U.S. CONST. pmb1.

13. Ark. Legal Servs. P’ship, *supra* note 10.

14. 42 U.S.C. § 1983 (2006).

15. See ARK. RULES OF PROF’L CONDUCT R. 6.2 (2008).

16. Ark. Legal Servs. P’ship, *supra* note 10. During 2005, 10,570 cases were processed and closed by legal services. Ark. Legal Servs. P’ship, Fact Sheet – Legal Aid in Arkansas, <http://www.arlegalservices.org/Home/PublicWeb/Volunteer> (follow “stats and facts on the need for civil justice” hyperlink).

17. See Fact Sheet – Legal Aid in Arkansas, *supra* note 16.

18. See Fact Sheet – Legal Aid in Arkansas, *supra* note 16. (statistics & facts on the need for civil justice).

19. See ARK. RULES OF PROF’L CONDUCT R. 6.1 (2008).

20. *Id.*

21. *Id.*

In contrast, cause lawyering involves broader social or political principles which are advanced through litigation. Pro bono cases may evolve into public interest cases, if the client's legal problem implicates a broader societal or political problem. As an example of this, see *Department of Human Services v. Howard*.²²

IV. OBSTACLES

There are obstacles for those who want to do full-time cause lawyering. Although the number of opportunities has grown with the number of public interest organizations, there are still relatively few full-time cause lawyering jobs compared with the number of lawyers desiring such jobs, and they can be highly competitive. On the national level, cause lawyer jobs are concentrated in Washington D.C. and New York City. State and local organizations often do not have sufficient funds to hire a full-time lawyer and must depend on volunteer assistance. Finally, full-time cause lawyering generally does not pay as well as other types of jobs for lawyers. Therefore, if a full time job as a cause lawyer is not an option because of financial reasons or limited job opportunity, or if a position is not available, then part-time, and volunteer cause lawyering for a local or state organization for the private

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system or the legal profession.

Id. See MODEL RULES OF PROF'L CONDUCT R. 6.1 & cmts. (2008). There are no state ethical codes which require pro bono service.

22. 367 Ark. 55, 238 S.W.3d 1 (2006) (holding that prohibiting an adult from being a foster parent if an adult member of the person's household was a homosexual violated the separation of powers doctrine.) *Id.* at 66, 238 S.W.3d at 8.

practitioner presents an opportunity to do some extremely satisfying and valuable work. The need is great in Arkansas for this type of assistance.

A private practitioner must consider a few practical matters before he or she volunteers to handle a legal case for, or become affiliated with, a particular cause or organization. Practical considerations vary depending on whether the practitioner has a solo practice, is in a small firm, or is a member of a large firm. The practitioner must ask how devoting time and personal or firm resources to the cause may affect the practitioner and the firm. It is possible to earn a fee if the practitioner wins a lawsuit or obtains a favorable settlement, but such instances are rare and should not be expected.²³ Thus, cause lawyering can take time away from money-making opportunities.

In addition, taking on a cause may affect other non-monetary aspects of practice. If you are not a solo practitioner, you must ask how being affiliated with a particular organization, cause, or case may affect your relations with other firm members. You must also consider relations with other current or potential clients. There are times when representing a particular cause may run counter to the interests or beliefs of another, paying client. For instance, if a practitioner becomes involved with an environmental group, this can offend or be perceived as a conflict of interest by a lumber company client.²⁴ As another example, if a practitioner represents the Catholic Diocese, the advocacy of a pro-choice position on behalf of a client such as Planned Parenthood or the Center for Reproductive Policy may harm the relationship with the Diocese. Whether one is a solo practitioner or in a firm, he or she must not ignore the feelings of the staff. For instance, a secretary may have religious objections to same-sex marriages and may not want to assist in litigation to permit same-sex marriages.

Some causes are likely to be seen as less controversial than others. For instance, championing the rights of the mentally ill to treatment while incarcerated, or a case involving child custody in which the legal question was whether a court could consider the race of the mother's spouse in awarding custody—an issue that has constitutional implications.²⁵

One other thing to consider is that a cause lawyer is subject to the same ethical rules as every other lawyer. These rules are found in the Arkansas Rules of Professional Conduct, which are modeled on the ABA Model Rules.²⁶

In addition, private practitioners engaging in part-time cause lawyering may pick up a few bad practices. These should be avoided as well. A law-

23. *See, e.g.*, 42 U.S.C. § 1988 (2006).

24. *See* ARK. RULES OF PROF'L CONDUCT R. 1.7 (2008).

25. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004).

26. *See* ARK. RULES OF PROF'L CONDUCT (2008).

yer, no matter how passionate about a particular cause should always remember that in most cases he or she is representing individuals and not just the organization sponsoring the case. The issue of what is in the best interest of the client must be a lawyer's highest concern. Simply put, a cause should never be put above the interest of the client. For example, if a lawyer is representing students who have been expelled from school in a freedom of speech case for protesting on the school campus, she must always keep in mind what is best for them. In some instances this might involve compromise and settlement rather than taking the case to trial, especially if a trial might expose the students to unwanted publicity. Lawyers need to advise their clients that involvement in a cause lawsuit may expose them to media attention.

A cause lawyer should develop expertise in dealing with the media, because controversial cases will attract the attention of reporters. It is wise to develop a good relationship with reporters, which includes being candid when speaking with them. It does not take long for a novice cause lawyer to discover that he or she cannot control what is reported in the media. Usually, it seems as if only a few of the more inflammatory phrases uttered are quoted, while the lengthy contextual explanation is omitted. Lawyers should learn to be judicious and to the point in answering questions.

When a lawyer agrees to take a case for an organization,²⁷ the lawyer should, if at all possible, commit to handle the case until its conclusion and honor that commitment.²⁸ If an attorney has some hesitancy about taking a case for ideological or personal reasons or time constraints, he or she should not take the case. The attorney should not just abandon a case and assume that the organization can find another lawyer to handle it. Unfortunately, some lawyers do this very thing. In reality, it is not always possible for an organization to find a substitute lawyer. Even if a substitute can be found, delay are likely in the progress of litigation as the new lawyer familiarizes himself with the case. There is no difference from cause lawyering and other lawyering in this regard: An attorney should not withdraw from representation unless there would be no prejudice to the client or cause.²⁹

Lawyers must trust cause clients, i.e. individuals, who consent to be plaintiffs in lawsuits brought by organizations, with the same consideration as paying clients. This means that the lawyer must treat the individual client with respect and courtesy. There must be communication between the lawyer and client about the status and conduct of the case.³⁰ Ultimately, clients

27. See ARK RULES OF PROF'L CONDUCT R. 1.13 (2008).

28. See ARK. RULES OF PROF'L CONDUCT R. 1.16 (2008).

29. See *id.*

30. As an example, one of my colleagues, who represented a class of mentally ill criminal defendants detained in Arkansas jails, traveled out of his way for hours to see the mother

have the final say about the cause of the litigation, i.e., whether to settle or try their case. Referring organizations cannot interfere with what is in the best interest of the client.

V. CONCLUSION

Not everyone can or wants to do cause lawyering full time. For those who cannot, or choose not to, combining cause lawyering with private practice can be a good solution. Although private practice can sometimes seem routine, cause lawyering can be a rewarding, challenging, and stimulating experience and provide the occasion to be exposed to novel and difficult legal issues. It can become an opportunity to associate with lawyers who practice and think full-time about constitutional issues. It may provide the sole vehicle for a lawyer to grapple with constitutional law. Beyond the possibility of professional satisfaction, cause lawyering can also provide personal satisfaction in knowing that professional skills are being used for the common good. Thus, cause lawyering can be both professionally and personally satisfying.

of one of the members of the class to inform her about the condition of her son and the progress of the lawsuit. The mother did not have a telephone.