

In Honor of Pro Bono Service

Lawyers are by nature problem solvers. One of the most intractable problems that the legal profession has addressed over the past quarter century is the "justice gap" that affects the nearly 50 million Americans who live at or below the federal poverty level. Despite the growing efforts of bar associations across the country, the one statistical constant has been this: 80 percent of the legal needs of Americans of limited means remain unmet.

In order to enforce our most basic rights, legal help is often a necessity. Legislation that builds a social safety net beneath our most vulnerable populations is often meaningless without legal help to enforce those rights. An unrepresented parent seeking to maintain child custody stands almost no chance against an opponent who brings a lawyer to court. Without legal help, battered spouses generally find no sanctuary. Families fighting foreclosure on their own stand little chance of saving their homes. Rights to food, housing and other basic necessities are illusory when they cannot be enforced in the legal system.



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The American Bar Association, the State Bar of California, the Bar Association of San Francisco and law firms, big and small, have each amplified their efforts to attack this problem; but the growing ranks of the poor - and the growth in their legal problems - keep outstripping those efforts.

As its newest effort to recognize *pro bono* volunteers, to recruit new *pro bono* lawyers and to highlight the critical problem of the unmet legal needs of the poor, lawyers across America will observe the first National Pro Bono Celebration Week, Oct. 25-31. The Bay Area legal community will be at the forefront of that Celebration, as it has always been in the battle for the rights of the poor, marking the week with clinics, workshops, receptions and fairs.

At "Project Homeless Connect" at the Bill Graham Civic Auditorium, more than 2,000 homeless San Franciscans not only will receive legal advice, but also will have access to assistance ranging from job counsel-

ing to medical information, in short, holistic services to address all the needs of this client population. The Alameda County Bar Association's Justice for All Symposium will offer information sessions along with clinics in family law, consumer debt, foreclosure and bankruptcy. Law school activities will range from panels on *pro bono* at Boalt Hall School of Law, to a movie night and discussion at Stanford and a Pro Bono Open House at Golden Gate University. Pro bono agencies will open the week with a Pro Bono Summit to brainstorm 21st century solutions to the *pro bono* crisis, and end it with a Pro Bono Reception and Fair that recognizes and honors those who volunteer.

The volunteer lawyers who provide this help are part of the legal profession's long tradition of *pro bono* service. Although members of any profession can and should make free service for the poor a part of their standard practice, it is the legal profession that includes *pro bono* service as a core value. The American Bar Association and the State Bar of California each has an aspirational goal that calls for lawyers to spend 50 hours a year in *pro bono* service. And lawyers are responding in numbers, with nearly three-quarters of us reporting that we do an annual average of more than 40 hours of *pro bono* work, according to research by the ABA Standing Committee on Pro Bono and Public Service. That figure amounts to more than 30 million hours a year of free legal assistance to the poor, but it is not nearly enough.

Volunteerism is not a partisan issue. It is a central part of the call for action made by presidents from Kennedy to Reagan to Obama. The legal community asks everyone to join with us in volunteering to help the growing number of our neighbors who have fallen on hard times. Volunteer help is a renewable resource, which is not dependent upon fossil fuels or the stock market. And it becomes stronger and more abundant with use.

If you feel bold enough, give your lawyer a hug this week, since the odds are 3 to 1 that he or she devotes the equivalent of one week a year to aid the poor. Ask your neighbor, doctor and accountant what steps they are taking to help the poor of the Bay Area, and thank them for their efforts. We have a long way to go before Americans living below the poverty line truly have equal rights and services. Let's devote National Pro Bono Celebration Week toward bringing that day a little closer.

To learn more, visit www.celebrateprobono.net.



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The Missing Piece of Healthcare Reform

Last week, the *Daily Journal* published an article highlighting a pervasive problem of bad faith denials by disability insurers. This problem is largely absent from discussions of health care reform, despite being integrally linked to health care. If improving health care access and outcomes is our priority, then we can't ignore the need for disability insurance reform.

Understanding the relationship between disability insurance and health care access is important for two reasons. First, disability insurance is an important tool for accessing health care and improving health outcomes - key concerns underlying state and federal health reform efforts.

Bad faith denials can cause employees to lose access to employee benefits before they are able to qualify for health care through other public benefit programs, like the federal Social Security program. This can mean a dramatic reduction in income, which often results in people having no money to pay for health care - medical treatment and supplies necessary to prevent deterioration, achieve maximum independence, and maintain a good quality of life.

In many cases, the financial effects are also devastating - causing bankruptcy or homelessness. A Harvard study found that about half of

families filing for bankruptcy cited medical causes, and of those 75.7 percent had insurance at the onset of illness. Access to stable housing and support is important for everyone - but for persons with disabilities, it is essential to the ability to function independently and maintain physical and mental health.

Second, there are strong parallels between the disability and health insurance markets concerning how and why bad faith denials occur. This means that reforms enacted to address this problem in health care provide useful lessons for reforming disability insurance.

Disability insurance, like health insurance, has grown into a lucrative industry, and insurers always have a financial incentive to deny claims. They have an inherent conflict of interest because of their dual role in determining benefit eligibility and paying these benefits. Consequently, disability insurers employ many tactics to encourage or justify claim denials - many of which have been criticized or even prohibited in health care.

Some of these are overtly unscrupulous: imposing denial quotas on insurance administrators; tying bonuses to company earnings; pressuring medical consultants to deny claims; and making claims determinations before requesting medical documentation. Others are harder to identify, and thus more insidious: failing to give medical consultants necessary medical evidence; using the wrong standard for determining disability; and giving unreasonably greater weight to opinions of physician consultants who have not physically examined the patient than to more detailed, consistent reports by treating physicians.

The *Daily Journal* highlighted another tactic: using medical reviews that are not really independent because the medical consultants are chosen by the insurer, rely on the insurer for repeat business, and have a disturbingly high rate of siding with insurers.

While profit motivates these practices, ineffective legal oversight is the reason they are so pervasive. Indeed, another unfortunate parallel between disability and health insurance denials is the lack of meaningful judicial recourse as a check on insurers' bad faith.

State tort law requires insurers to act in good faith in making benefit determinations, and allows them to be sued for large punitive damages to deter future bad faith denials. Punitive damages are important because of the power imbalance favoring insurers, the huge financial incentive to deny claims, and the devastating consequences that can result from wrongful denials.

Unfortunately, many insurance plans are employment-based and thus regulated under a federal law called ERISA, which preempts state tort law and prohibits punitive damages. ERISA limits the amount of damages an insured can seek to the amount of benefits due. This means plans have nothing to lose in denying claims wrongfully and making people sue.

ERISA provides some protection - it requires insurers to provide a full and fair review of claim requests. And federal courts have overturned benefit denials in many cases because certain plan practices violated this requirement. The problem is that these individual successes are too little, too late. The slow judicial process means the employee has probably suffered serious consequences as a result of the denial - harms that courts have decided cannot be remedied under ERISA.

Consider the story Curtis Walker, profiled in the *Daily Journal*: A senior IT project manager for Kaiser Permanente, he became disabled in 2004 after suffering a stroke. His Kaiser doctors found him disabled, and the federal Social Security Administration agreed. But MetLife, his employment-based disability insurer, denied his claim for benefits. MetLife is one of the disability insurers that has been sued and had denials overturned by courts numerous times because of unfair practices. Mr. Walker filed a lawsuit against MetLife, but is still waiting for trial. In the meantime, he has lost his job, house, family's medical coverage, and savings.

The inability of courts to prevent bad faith denials and to fully compensate those harmed makes the role of government regulators critical.

Regulators have many more tools at their disposal: they can investigate and fine insurance companies for violations, require reporting that uncovers bias in the review processes, and proscribe (or require) practices that

create (or prevent) bias. Regulators may also be authorized to administer a binding independent review process that provides a speedier resolution, minimizing the financial and health consequences from a wrongful denial.

In fact, we rely heavily on government regulators to utilize these tools in regulating health insurance companies. Managed care horror stories led many states, including California, to improve regulatory oversight by broadening regulators' powers, enhancing staff expertise and capacity, and creating an independent medical review process that is binding on plans.

And ERISA allows this. Although it preempts state tort law, the Supreme Court has made it clear that ERISA does not preempt state regulation specifically directed at insurance companies, even if purchased through employers. The only exception is for employers who self-insure.

Unfortunately, regulatory oversight for disability insurance is not nearly as robust or proactive. The California Dept. of Insurance has been surprisingly passive in light of the magnitude of the problem revealed through numerous lawsuits, media stories, and a prior multi-state investigation in 2004.

Although the Department has authority to investigate disability insurers, sustained oversight is lacking and the occasional fines are not severe enough to deter a practice that saves plans so much money. One problem is that the Department does not appear to have enough staff with the requisite expertise. For example, the *Daily Journal* reported disturbingly inconsistent statements between current and former Department officials about the scope of their regulatory authority.

Another problem is the lack of a formal independent medical review process for benefit denials. Although consumers can file complaints with the Department, they seem to get very little, if any, information about how or when investigations will be conducted. In Mr. Walker's case, he said he contacted the Dept. of Insurance in April 2005, and has yet to receive help.

Robust regulatory oversight and a binding independent medical review process are as necessary to protect consumers against wrongful denials of disability benefits as they are for health care benefits. Without meaningful reform, people already struggling to cope with disabling medical conditions will continue to suffer preventable and potentially irreparable financial and health consequences.



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