"No case has been more revealing of the opportunities for evil by lawyers than that of the Bishop Estate." –Lizabeth Moody, Dean Emeritus, Stetson University College of Law

A Modest Proposal

The Proposal: That every lawyer be required to report to an appropriate outside agency any serious, uncorrected breach of trust by anyone serving at the highest level of a charity's governance structure (e.g., trustee of a trust; director of a corporation).

An Exception: This rule would not apply to lawyers who are exclusively engaged to represent an individual's personal interests. Such status could be established only by production of a written engagement letter that had been signed by the client and lawyer at the inception of the engagement, stating unequivocally that charitable funds could not be used to pay the lawyer's fees nor to provide reimbursement for any such payment.

Appropriate Outside Agency: This would include the state attorney general's office, the local court that has primary jurisdiction over the charity, and the Internal Revenue Service.

Brief Background: When one hears of sustained misconduct at the highest levels of any organization, such as occurred at Bishop Estate, the public naturally wonders: "Where were the lawyers?" This same question arguably led to passage of the Sarbanes-Oxley Act and changes to Rules 1.6 and 1.13 of the lawyers' Model Rules of Professional Conduct. This "modest proposal" builds on such changes, but applies only to lawyers who have been or could be paid, directly or indirectly, with charitable funds.

To appreciate the need for this change, imagine yourself as legal counsel for a charity where an insider at the highest level has seriously breached a fiduciary duty. You explain that the law requires corrective action, but the insider, who under local law may be your "client," declines to take such action. Under these circumstances, what are you likely to do? Rule 1.6(a) requires client confidentiality. There are exceptions, but they may apply only if the insider's activities are criminal or fraudulent and the lawyer's services were used to further the misconduct. Even if these elements are present and an exception to rule 1.6(a) applies, that only *permits* the lawyer to report the misconduct outside the charity according to the model rule. Rule 1.13 might also allow disclosure, but it—like the current exceptions at Rule 1.6(b)—only *permits* disclosure to an appropriate outside agency; it does not *require* it. The difference is critically important because whistleblowing appears to be the "road less traveled." Anecdotal evidence suggests that few lawyers would "blow the whistle" on a former client. Of course there are some lawyers who would report serious misconduct, but from a policy standpoint the outcome should not depend on the individual lawyer's values and gumption.

Bottom Line: Lawyers who are paid with charitable funds should watch out first and foremost for the public's interests when an insider abuses a charity. Requiring such lawyers to do so would enhance existing enforcement efforts and reduce—perhaps even eliminate—the need for new laws that would burden all charities.