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Mandatory Pro Bono: The Path to Equal Justice

I. INTRODUCTION

If ever a time shall come when . . . only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow.¹

"If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."² Throughout history, many attempts have been made to satisfy the legal needs of the poor. In 1495, England enacted a law during the reign of King Henry VII that provided for counsel to be given to poor litigants at no cost.³ Since this early beginning, no less than fifteen western, industrialized nations have provided such a right to counsel to indigents.⁴ The experience of the United States, however, is significantly different. Although indigent defendants in criminal cases have a constitutional right to counsel,⁵ this right has not been equally extended to indigent civil litigants.⁶ Additionally, although federal law provides for the waiver of fees, costs, and security deposits in criminal and civil cases for persons financially unable to pay,⁷ legal opinion is less than unan-

1. E. BROWNELL, *LEGAL AID IN THE UNITED STATES* xiii (1951) (quoting Lyman Abbot, New York Legal Aid Society 25th Anniversary Dinner (1901)).

2. BROWNELL, *supra* note 1, at xviii (quoting the Honorable Judge Learned Hand, New York Legal Aid Society 75th Anniversary Dinner (1951)).

3. Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 *LOY. L.A.L. REV.* 341, 342 (1985) (citing Statute of Henry VII, 1495, 11 Hen. 7, ch. 7 (repealed 1883, 46 & 47 Vict. ch. 49), *reprinted in* S. POLLOCK, *LEGAL AID—THE FIRST 25 YEARS* 10 (1975)).

And after the said writ or writs be returned, . . . the justices . . . shall assign to the same poor person or persons counsel learned by their discretions which shall give their counsels nothing taking for the same, and in likewise the same justices shall appoint an attorney and attorneys for the same poor person and persons . . . which shall do their duties without any rewards.

Id. (translated from the King's English into modern language).

4. These nations include the following: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden and Switzerland. Johnson, *supra* note 3, at 343-48 nn.8-32.

5. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (indigent criminal defendants have a constitutional right to appointed counsel for all felonies, all misdemeanors for which imprisonment is actually imposed, and all appeals of right).

6. See, e.g., *United States ex. rel. Sholter v. Claudy*, 203 F.2d 805 (3d Cir. 1953) (constitutional guarantee of the right to counsel applies only in criminal proceedings).

7. 28 U.S.C. § 1915(a) (1982). "Any court of the United States may authorize the

imous as to whether federal judges may compel or merely request attorneys to volunteer their services to the indigent.⁸

The result of these attempts to provide legal services to the poor in the United States has been a kaleidoscope, with contributions being made by legal aid societies,⁹ federal¹⁰ and state¹¹ governmental programs, and individual and collective efforts of the private bar.¹² Few dispute, however, that despite these efforts, this country's poor are under-represented.¹³

The purpose of this comment is to delineate the role that attorneys can and should take and the impact they would have on the problem of inadequate legal representation of the poor. Initially, this comment will quantify the unfulfilled need for civil counsel that exists for indigents in this country. The next part will describe the present state of legal assistance to the poor, focusing on the pro bono efforts being made by the bar. Also provided will be an analysis of the arguments concerning the constitutional and practical problems com-

commencement . . . of any . . . action . . . civil or criminal . . . without prepayment of fees and costs or security . . . by a person . . . unable to pay such costs or give security therefor." *Id.*

8. *Id.* § 1915(d). "The court may request an attorney to represent any such person unable to employ counsel . . ." *Id.* Some federal district courts have compelled such service from attorneys. See *infra* notes 43-52 and accompanying text.

9. The first legal aid society in the United States began in 1876. The *Deutscher Rechts-Schutz Verein* was incorporated to give free legal aid and assistance to poor German immigrants. BROWNELL, *supra* note 1, at 7. By 1916, organized legal aid operated in 37 cities, and the programs handled 117,201 cases. *Id.* at 8. For further history of legal aid in the United States, see generally J. BRADWAY & R. SMITH, GROWTH OF LEGAL AID WORK IN THE UNITED STATES (U.S. Department of Labor Bulletin No. 607 (1936); R. SMITH, JUSTICE AND THE POOR, (1919); Special Project, *The Legal Services Corporation: Past, Present, and Future?* 28 N.Y.L. SCH. L. REV. 593 (1983) [hereinafter Special Project].

10. On the federal level, the Federal Legal Services Program was established in 1965 under the Office of Economic Opportunity. Special Project, *supra* note 9, at 598. The Legal Services Program was replaced with an independent corporation, the Legal Services Corporation, "in order to protect the effectiveness, independence, and integrity of federally funded legal services for the poor." *Id.* at 603. Among the congressional findings in establishing the Legal Services Corporation were: (1) the "need to provide equal access to the system of justice"; (2) the "need to provide high quality legal assistance to those" unable to afford it and; (3) the goodwill generated in society to respect the government and its laws by making legal services available. 42 U.S.C. § 2996 (1982). The purpose of the Legal Service Corporation was to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *Id.* § 2996b(a).

11. Several states have also created publicly-funded legal service programs. See generally MD. ANN. CODE art. 10, § 45A (1987). Maryland created the Maryland Legal Services Corporation in 1982 to supplement legal services for the poor. *Id.*

12. See *infra* notes 38-43 and accompanying text.

13. See, e.g., Spencer, *Mandatory Public Service for Attorneys: A Proposal for the Future*, 12 Sw. U.L. REV. 493 (1981) (asserting that a mandatory service requirement of attorneys is constitutionally and ethically proper and represents progress toward a just distribution of legal services). "[T]he present need for legal services among un-represented and under-represented individuals and groups is enormous." *Id.* at 495.

monly associated with mandatory pro bono. In response to arguments of impracticability, this comment will suggest proposals that would make a compulsory pro bono program more palatable to attorneys and more beneficial to indigents. Finally, this comment concludes that although mandatory pro bono is a constitutionally valid approach to solving the serious problem of the poor's under-representation, alterations of past proposals are needed to marshal the support of the bar and to provide truly effective assistance to the poor.

II. THE NEED

Few people would question that the legal needs of this country's poor¹⁴ and near poor¹⁵ are substantial. A more difficult question, on which there is no consensus, is the extent of unfulfilled need.¹⁶ A recent estimate suggests that over eighteen million legal problems, or ninety-three percent of the annual legal needs of the poor, go unserved.¹⁷

The existence of this unmet need is verified by numerous studies conducted on the state level. In Maryland, a study conducted in July 1987 indicated that "the typical low-income household surveyed had 3.29 legal problems per year (excluding repeat occurrences of identical problems)"; two-thirds of the households questioned reported having at least one problem in the previous twelve months.¹⁸ Despite

14. The classification of the poor is determined by the government's poverty income level. In 1985, poverty level income was \$10,989 or less. DEP'T. OF COMMERCE 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 442, table no. 745 [hereinafter STATISTICAL ABSTRACT].

15. The near poor is commonly defined as persons whose income is not more than 125% of poverty level income (that is 1.25 times the current poverty income level). One hundred and twenty-five percent of the poverty level income in 1985 was \$13,736. *Id.* This latter category was composed of 44.2 million persons, 18.7% of the United States population. *Id.*

16. Miskiewicz, *Mandatory Pro Bono Won't Disappear*, Nat'l L.J., Mar. 23, 1987, at 8, col. 3 (statements by Mr. Gerry Singen, lecturer at Harvard Law School and former vice-president of the Legal Services Corporation) ("Nobody has a truly comprehensive picture of the legal needs of the poor.").

17. Born, *Serving the Poor*, 74 A.B.A. J. 144 (1988). Of the estimated 19,794,000 legal needs of the poor, 93.2% go unserved, while 6.1% or 1,197,668 are handled by Legal Service Corporation attorneys, and only 0.7%, or 141,667 are disposed of through private bar involvement. *Id.*

18. MARYLAND LEGAL SERVICES CORPORATION, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR 9 (1987). The low-income household survey was conducted by Mason-Dixon Opinion Research, Inc. which contacted 800 randomly selected households. *Id.* at 8. "[A] legal problem was defined as a situation which, if brought to the attention of an attorney experienced in providing legal assistance to low-income per-

the extent of the problems, only thirty-seven percent of the households had seen an attorney in the previous *five years*.¹⁹ Analysts estimate that only one out of every five poor persons with a legal problem in Maryland receives proper assistance.²⁰

In Washington State, a State Bar Association study initiated in 1985 concluded: "the volume of free legal services now available to low-income people who cannot otherwise afford a lawyer is grossly inadequate and . . . the situation is getting worse."²¹ The study found that legal services programs in the state were funded at rates less than one-half the amount necessary to provide the minimum access to legal services for the poor as determined by Congress.²²

In 1985, the Oregon State Bar Association similarly concluded, that a substantial unmet need existed.²³ This study indicated that, annually, between 89,000 and 106,000 "potential meritorious 'cases'" existed for the Oregon poor.²⁴ The legal services programs in Oregon could handle only one-third of these cases.²⁵ Only ten percent of the remaining 60,000 cases were accepted by voluntary pro bono programs.²⁶

Clearly the poor in this country are neither insulated nor immune from legal difficulties. Although the exact quantification of the legal needs of the poor is not clear, it is obvious that they are vast. Certainly, the unmet needs are substantial enough to warrant assistance in some form.

III. THE PRESENT STATE OF LEGAL ASSISTANCE TO THE POOR

Efforts to lessen the unmet legal needs of the poor by direct assistance of legal professionals are packaged in three modes. First, direct government programs established on the federal²⁷ and state²⁸ levels exist to bring legal aid to the indigent. But such programs are not necessarily assured of permanency. For instance, the vitality and effectiveness of the Legal Services Corporation, the mainstay in feder-

sons, would be recognized as constituting a problem within the provisions of the law." *Id.* at 8-9.

19. *Id.* (emphasis in original).

20. Wentzel, *Bringing Legal Aid to State's Poor*, *The Evening Sun* (Baltimore), Oct. 2, 1987, at 4, col. 2.

21. DRAFT REPORT OF THE WASHINGTON STATE BAR ASSOCIATION TASK FORCE ON PRO BONO SERVICES 9 (1987) [hereinafter WASHINGTON DRAFT REPORT].

22. *Id.* at 9-10. Congress mandated that legal services programs should be funded at a level of \$13.57 per poor person to provide minimum access to legal services. *Id.* at 9.

23. *Id.* at 10.

24. *Id.*

25. *Id.*

26. *Id.* at 10-11.

27. *See supra* note 10.

28. *See supra* note 11.

ally-funded legal aid to the poor, has been questioned due to actions and philosophies inside²⁹ and outside³⁰ the halls of government. Even assuming the continued existence of the Legal Services Corporation, its resource base is microscopic when compared to the amount spent on access to legal assistance by society as a whole.³¹ In 1985, \$47.5 billion was spent for legal services in the United States.³² The Legal Services Corporation budget for 1985 was only \$305 million.³³ Thus, the federal government's expenditure for legal aid to almost one-fifth of the population³⁴ was only two-thirds of one percent of the national expenditure on the services of lawyers in civil cases.

A second method of assistance to the poor are programs operated by legal aid societies. Although these efforts are often highly suc-

29. The Reagan Administration consistently sought to terminate the Legal Services Corporation (LSC). See Caplan, *Understanding the Controversy Over the Legal Services Corporation*, 28 N.Y.L. SCH. L. REV. 583 (1984). Despite annual budget requests that included no funds for the operation of LSC, Congress has continued to allocate money to the Corporation, albeit at amounts less than pre-1980 figures. *Id.* at 583-84. In 1980, the LSC budget was \$321 million. *Id.* at 584. In 1981, a 25% reduction shrank the LSC budget to \$241 million. *Id.* For the years 1984-1986, the LSC's budget was frozen at \$305.5 million. Miskiewicz, *supra* note 14. Additionally, an automatic cut of over \$14 million was made in the 1986 budget due to the Gramm-Rudman-Hollings Budget Reduction Act. *Id.*

See also Lauter, *LSC Head Suggests Abolishing Agency*, Nat'l L.J., Feb. 23, 1987, at 2, col. 1. The current director of the LSC is Mr. W. Clark Durant III, a Reagan appointee. Mr. Durant supported the Reagan Administration's desire to abolish the legal aid corporation. Mr. Durant advocates the opening up of the legal profession by repealing state laws prohibiting unauthorized legal practice and by eliminating bar exam passage requirements. He suggests that by allowing nonlawyers to provide legal services, new and more effective ways of serving the poor could be developed. *Id.*

30. See, e.g., Phillips, *Legal Services and the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 355 (1985) (address given by the President of the Conservative Caucus at the 1984 Federalist Society National meeting advocating the termination of the LSC charging that its attorneys have been free to "lobby, litigate, organize, propagandize, patronize, and proselytize for their preferred causes" in violation of Congress's intent and directions). *Id.* at 355; see also Comment, *Pulling the Reins on Legal Services Lobbying*, 9 HARV. J.L. & PUB. POL'Y 203 (1986) (criticizing the LSC's lobbying activities and suggesting Congress should tighten restrictions on the LSC to prevent abuse and to provide control by the low-income legal services client in the attorney-client relationship).

31. Johnson, *supra* note 3, at 357. Johnson concludes that government funding of legal services for the poor is less than one percent of that spent by society for lawyers in civil cases. *Id.*

32. STATISTICAL ABSTRACT, *supra* note 14, at 754, table no. 1757.

33. Johnson, *supra* note 3, at 357 n.68.

34. Assistance from the Legal Services Corporation is available only to people financially unable to obtain legal assistance on their own. 42 U.S.C. § 2996b(a) (1982). In 1985, 44.2 million persons, or 18.7% of the United States' population, had incomes at the poor or near poor level. STATISTICAL ABSTRACT, *supra* note 14, at 442, table no. 745.

cessful,³⁵ they are overwhelmed by the vast needs of the underprivileged, which exist despite government action.³⁶

The third type of legal aid to the indigent, pro bono activities conducted by individual attorneys and bar associations, have yet to garner more than token participation.³⁷ However, pro bono activity is the area where the greatest potential lies to make significant inroads in meeting the needs of the poor.³⁸

Nationwide, the collective effort to mobilize the private bar to provide pro bono legal aid to the poor, although growing, is dismal.³⁹ Less than one in seven attorneys participate in a formal pro bono program.⁴⁰ Despite these low figures, or maybe because of them, interest is accelerating nationwide to require mandatory participation by licensed attorneys in programs for the public service.⁴¹ This interest has been manifested in judicial, legislative, and state and local bar association initiatives.⁴²

35. E.g., Krause, *President's Page: The Legal Aid Foundation—Making the Rule of Law a Reality for Low-Income People*, 9 L.A. LAW. 6 (1986). The Legal Aid Foundation of Los Angeles has a staff of 160 including 55 attorneys. Each year, the Foundation assists 24,000 clients, out of a pool of 800,000 potential clients, on a budget of \$6.4 million. The Foundation's effectiveness is exemplified by its 82% success rate in eviction cases that go to trial. *Id.* at 7.

36. See Dale, *Reagan Campaign Has Cut Legal Aid to Nation's Poor*, Nat'l Cath. Rep., May 15, 1987, at 8. Nationwide, there are 22 attorneys per 10,000 people in the general population. Among the poor, the figure is 1.4 attorneys per 10,000. *Id.* In 1987, the San Francisco Neighborhood Legal Assistance Program fulfilled less than 10% of San Francisco's poor's legal needs, down from approximately 25% in 1981. Kenkelen, *Bay Area Public-lawyer Role is Down: Caseload is Not*, Nat'l Cath. Rep., May 15, 1987, at 8.

37. See *infra* notes 39 and 40 and accompanying text.

38. Palmer & Aaronson, *Placing Pro Bono Publico in the National Legal Services Strategy*, 66 A.B.A. J. 851 (1980).

Pro bono service is the most crucial untapped resource realistically available to the national legal services effort. If operated in close conjunction with full-time, staffed programs and with an explicit set of priorities, organized *pro bono* programs can substantially supplement both policy impact and individual service work on behalf of the poor.

Id. at 854.

39. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC THROUGH THE PRIVATE BAR INVOLVEMENT PROJECT, DIRECTORY OF PRIVATE BAR INVOLVEMENT PROGRAMS 212, table no. 5 (1987) [hereinafter 1987 ABA DIRECTORY]. Only 13.8% of the licensed attorneys in the United States participate in formal pro bono programs. This, however, is up from 10.7% in 1985. *Id.* at 199, table no. 7. *But see*, Harkness, *Executive Directions—Pro Bono in Florida: Contributions from Private Practitioners*, 59 FLA. B.J. 7 (1985). In 1984, a random sampling of 5000 attorneys practicing in Florida indicated that 72.1% of the in-state and almost 60% of the out-of-state bar members donated time to pro bono. *Id.*

40. 1987 ABA DIRECTORY, *supra* note 39, at 213, table no. 5.

41. See Graham, *Mandatory Pro Bono—The Shape of Things to Come?*, 73 A.B.A. J. 62 (1987); see also *Pro Bono Makes the Grade at Tulane*, 16 STUDENT LAW. 7 (1988). Beginning with the 1987-1988 first-year class, Tulane Law School requires students to complete 20 hours of legal service for indigents through the New Orleans Pro Bono Project in order to graduate.

42. Graham, *supra* note 41, at 62.

A. Court Ordered Pro Bono

Recently, eight federal district courts have adopted local rules or general orders that provide for the mandatory appointment of free counsel to indigents in civil cases.⁴³ On May 5, 1987, the district courts sitting in Arkansas adopted Local Rule 34 which empowers them to appoint legal counsel for indigents.⁴⁴ The Arkansas plan provides that, in civil cases in which a party is proceeding *in forma pauperis*,⁴⁵ the court may make a mandatory appointment of a practicing private attorney chosen at random from within the district in which the case is pending.⁴⁶ Safeguards are provided to ensure that public service efforts will be spread evenly among the lawyer population⁴⁷ and that the cases referred are meritorious.⁴⁸

A pro bono organization, the Volunteer Lawyers Project, coordinates court appointments of attorneys to indigent clients made by the United States Southern and Northern District Courts in Iowa.⁴⁹ This arrangement, initiated in 1986, locates attorneys to provide free representation to indigent civil litigants.⁵⁰ Recent federal court experience (excluding bankruptcy proceedings) is required of the attorneys.⁵¹ In this program, like Arkansas', the attorney's burden in serving is minimal.⁵²

Other state courts have implemented programs by which private

43. *Id.* The eight federal courts are: "the Eastern and Western Districts of Arkansas, Northern and Central Districts of Illinois, Northern and Southern Districts of Iowa, the District of Connecticut, and the San Antonio division of Texas' Western District." *Id.*

44. ARK. FED. DIST. CT. R. 34 (1987).

45. 29 U.S.C. § 1915 (1982); see also *supra* note 7 and accompanying text.

46. ARK. FED. DIST. CT. R. 34 (1987).

47. Upon written application filed within fifteen (15) days of the original appointment order, an attorney may request leave of the court to withdraw if he/she represents (1) that he/she has actively participated in furnishing *pro bono* legal services (e.g., membership in a *pro bono* legal organization); and (2) that he/she has, in the last twelve (12) months, actually represented a *pro bono* client(s) in either (a) litigation, or (b) a non-litigation matter which the attorney can certify required the expenditure of a minimum of twenty (20) hours of time.

Id. (emphasis in original).

48. *Id.* "If after interviewing the client, investigating the facts, and researching the applicable law, an appointed attorney is convinced that the party's legal position is non-meritorious, the appointed attorney may petition the Court for leave to withdraw." *Id.*

49. St. Clair, *Iowa VLP Coordinates Court Appointments and Pro Bono*, P.B.I. ACTIVATION EXCHANGE, Fall-Winter 1986, at 14.

50. *Id.*

51. *Id.*

52. *Id.* The selection process involves a rotation of last names in three alphabeti-

attorneys are required to supply indigents with free legal assistance. In Westchester County, New York, "Westchester Legal Services, Inc., in cooperation with the office of the Administrative Judge of the Ninth Judicial District," assigns attorneys to represent civil litigants in matrimonial actions.⁵³ The assigned counsel program is premised on a statute which allows judges to assign attorneys to poor persons in civil cases.⁵⁴

In 1982, the ten district court judges of El Paso County, Texas, entered an order requiring every active attorney in the county, who was in good standing with the bar, to take no more than two domestic relations cases annually.⁵⁵ The program quickly established itself as a success. During its first full year of operation, El Paso attorneys accounted for almost thirty percent of all pro bono cases completed in Texas.⁵⁶ However, the status of this program is in doubt due to an opinion issued by the Texas Attorney General which interpreted the statute, on which the program was established, as not authorizing the district judges to delegate to the local bar association the power to operate a program that matched indigents with counsel in civil cases.⁵⁷

B. Legislative Consideration of Pro Bono Requirements

In 1987, two state legislatures studied the issue of requiring public service of attorneys.⁵⁸ In Oregon, the Speaker of the State House, Vera Katz, authored a bill which would have required attorneys (and doctors) with five or more years of experience to provide 200 hours of professional services to indigents.⁵⁹ This bill was submitted to the

cal groups. Assignments are made from only one group a year; thus, attorneys are assigned once every third year. *Id.*

53. Fink, *Why We Don't Have a Waiting List For Divorces*, PRIVATE BAR ACTIVITIES REP., Dec. 1986 (bi-monthly publication of Committee on Legal Aid of the New York State Bar Association). In the five-year period between January 1982 and December 1986, over 700 indigents were represented in matrimonial actions by pro bono attorneys. *Id.*

54. N.Y. CIV. PRAC. L. & R. 1102(a) (McKinney 1976). "The court in its order permitting a person to proceed as a poor person may assign an attorney." *Id.* Section 1102, in general, governs *in forma pauperis* rights and procedures in New York state courts. *Id.*

55. Letter from W. Frank Newton to Royal Ferguson (Feb. 24, 1984) (enclosing amicus brief submitted in support of the El Paso county pro bono program, at 8).

56. *Id.* (amicus brief, at 8, 9 n.14). Of the approximately 1,300 pro bono cases closed in Texas in fiscal year 1983, 382 were completed by El Paso attorneys. *Id.*

57. See JM-161 Op. Att'y Gen. 707 (1984). The opinion found that Texas Civil Statute Annotated, article 1917, did "authorize a district court judge to appoint counsel in a particular case when the party makes the required showing." *Id.* at 709. But this discretionary power rests with the court and could not be delegated in its administrative operation, as here, to the local bar association. *Id.* at 710.

58. Graham, *supra* note 41, at 62.

59. H.B. 2005, 64th Oregon Leg., Reg. Sess. (1987). The bill required that attorneys in Oregon serve 200 hours every six years in criminal defense, not civil cases. *Id.* § 2(2). To enforce this requirement, the bill gave the Oregon Supreme Court the

Consumer and Business Affairs Committee,⁶⁰ but failed to receive the support necessary to go to the full house for consideration.⁶¹

During the summer of 1987, the Washington Senate Judiciary Committee held public hearings on mandatory pro bono.⁶² Although a specific proposal was not developed, the committee chairman, Senator Philip Talmadge, said the legislature was "interested in the issue" and might reconsider mandatory pro bono if voluntary pro bono activities in the state did not increase.⁶³

C. Bar Association Consideration of Pro Bono Requirements

The American Bar Association (ABA) is a strong and active advocate of pro bono publico. It has assisted hundreds of local pro bono programs in a plethora of ways,⁶⁴ including providing on-site technical assistance,⁶⁵ creating and disseminating aids to assist in program development,⁶⁶ awarding grants for pro bono projects,⁶⁷ and recognizing success and achievement in individual and group public service

power to disbar, suspend, or reprimand any attorney not providing the requisite legal services. *Id.* § 4.

60. Moss, *Mandatory Pro Bono?*, 73 A.B.A. J. 26 (1987).

61. Graham, *supra* note 41, at 62.

62. *Id.*

63. *Id.*

64. Born, *supra* note 17, at 144. In 1981, the A.B.A.'s Private Bar Involvement Project (PBIP) was established by the Consortium on Legal Services and the Public with the purpose of promoting involvement by private attorneys in assisting the poor with their legal needs. *Id.* The PBIP has supported almost 600 local pro bono programs. *Id.* In addition, the PBIP keeps the legal profession abreast of current pro bono developments by both periodicals (a monthly newsletter, the *Bulletin*; a quarterly journal, the *PBI Exchange*) and the annual *Directory of Private Bar Involvement Programs*, and by co-hosting an annual Pro Bono Conference with the standing committee on Lawyer's Public Service Responsibility. *Id.*

65. *Id.* The PBIP will arrange a free on-site visit to offer technical assistance to any requesting pro bono program. Two hundred such visits have occurred, with twenty-eight programs being serviced in 1986-1987. *Id.*

66. In 1983, the ABA's Special Committee on Lawyers' Public Service Responsibility, in cooperation with the Private Bar Involvement Project, published "The Resource: A Pro Bono Manual." The manual was "designed to provide a comprehensive introduction to . . . the creation and implementation of organized *pro bono publico* legal services programs." ABA'S SPECIAL COMM. ON LAWYER'S PUB. SERV. RESP., THE RESOURCE: A PRO BONO MANUAL xi (E.F. Lardent ed. 1983). In addition, an information packet on civil mandatory pro bono has been compiled by the PBIP and can be requested by writing the PBIP at: American Bar Association, Private Bar Involvement Project, 750 N. Lake Shore Drive, Chicago, IL 60611.

67. See, e.g., *What's Happening, ABA Awards Grants for Pro Bono Projects*, 8 BAR LEADER 10 (1983). In 1983, the PBIP awarded \$88,000 to six local bar groups to help fund pro bono efforts. *Id.*

efforts.⁶⁸ The ABA has even considered the issue of making pro bono mandatory.

In 1980, the ABA Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission, after Commission Chairman Robert Kutak) presented a draft Model Rules of Professional Conduct to replace the Code of Professional Responsibility.⁶⁹ Model Rule 8-1 initially required each attorney to render free public service annually.⁷⁰ The outcry of opposition was swift, intense, and ultimately successful.⁷¹ As adopted in 1983, the Model Rules merely state that attorneys should render pro bono service.⁷²

Recently, state and local bar associations have gone on record in official support of pro bono efforts.⁷³ While emphasizing the obligation attorneys have in supporting the poor, some quantify the commit-

68. See, e.g., *News Update, ABA Honors Pro Bono Lawyers*, 71 A.B.A. J. 129 (1985). The pro bono public awards were created in 1984 to recognize individual lawyers for noteworthy contributions to the delivery of legal services to the poor. *Id.*

69. The Commission on Evaluation of Professional Standards was created in 1977 to "thoroughly and systematically rethink not only the Code of Professional Responsibility but also the entire range of issues in ethical lawyering." Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A. J. 47 (1980).

70. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (First Discussion Draft 1980) [hereinafter MODEL RULES DRAFT], reprinted in Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 261 (1981).

A lawyer shall render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations. A lawyer shall make an annual report concerning such service to appropriate regulatory authority.

Id.

71. In June 1980, the ABA Commission on Evaluation of Professional Standards deleted the reporting requirement of Rule 8.1. Slonim, *Commission Votes Down Pro Bono Reporting*, 66 A.B.A. J. 951 (1980). In December 1980, the ABA Commission on Evaluation of Professional Standards terminated the proposal requiring mandatory public service of all bar members. *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A. J. 33 (1981).

72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) [hereinafter MODEL RULES]. Rule 6.1 provides:

Pro Bono Publico Services: A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

73. In September 1987, the Boston Bar Association adopted a resolution which urged attorneys to make, as an important priority, public interest legal services in one of five areas. The five areas are: poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice and law reform. Boston Bar Ass'n Res. on Public Interest Legal Service (Sept. 1987) [hereinafter Boston Resolution].

On August 14, 1986, the Board of Managers of the Chicago Bar Association adopted a resolution that caused the Association to commit "to expanding civil legal services for low income persons in Chicago; . . . [to] adopt voluntary standards for its members to perform *pro bono* service; . . . [and] to employ a staff person to coordinate the [Associa-

ment reasonably necessary to fulfill that obligation.⁷⁴

Beyond mere aspirational policy statements, a few bar associations have made pro bono participation mandatory. All members of the Orange County, Florida, Bar Association are required annually to take two pro bono referral cases or contribute \$250 to the association's Legal Aid Society.⁷⁵ The option to "buy-out" of representation is exercised by 450 attorneys (twenty-eight percent of the association's membership), while 800 attorneys (fifty percent of the association's membership) take cases.⁷⁶ Pro bono service is also a requirement of membership in the Tallahassee, Florida, Bar Association.⁷⁷ In Tallahassee's program, an attorney can expect to be assigned an indigent civil case once every sixteen months.⁷⁸ The Dupage, Illinois, County Bar Association is a third local bar that requires its members to provide legal services for the poor.⁷⁹

IV. THE LEGITIMACY OF MANDATORY PRO BONO

Despite the growing nationwide interest in requiring attorneys to serve the poor, opponents argue that mandatory pro bono is ill-con-

tion's] *pro bono* activities." Board of Mgrs. of Chicago Bar Ass'n Res. (Aug. 14, 1986) [hereinafter Chicago Resolution].

On January 20, 1987, the Connecticut Bar Association resolved to "expand civil legal services for low income persons; . . . encourage its members to perform pro bono services; . . . establish as its goal for 1987 a 33 percent participation . . . in . . . [formal] pro bono activities; . . . [and] assign a staff person to coordinate the . . . pro bono activities . . ." Connecticut Bar Ass'n Res. (Jan. 20, 1987) [hereinafter Connecticut Resolution].

74. See, e.g., Boston Resolution, *supra* note 73 ("a reasonable level of commitment to [public interest legal service] is 35 hours per year at a minimum"); Chicago Resolution, *supra* note 73 (members' obligations satisfied by annual donation of 25 hours, \$365, or the amount equivalent to net income realized from 25 billable hours of legal work); Connecticut Resolution, *supra* note 73 (members should do annual service totaling at least 25 hours).

75. Marin-Rosa & Stepter, *Orange County—Mandatory Pro Bono in a Voluntary Bar Association*, 59 FLA. B.J. 21 (1985). Although members of the Orange County Bar Association are required to participate or contribute to the Legal Aid Society, membership in the association is voluntary. *Id.* The services provided by the Society include assistance with the common legal problems the poor experience such as those involving "consumer, landlord/tenant, administrative, family, juvenile and senior citizen situations." *Id.* at 22. Each year the Society makes 13,500 public contacts and represents approximately 1,500 in litigation. *Id.*

76. ABA's Pro Bono Involvement Project Office memorandum of telephone interview with Orange County Legal Aid Society Director, Catherine Tucker (Oct. 1987).

77. Memorandum regarding the Tallahassee, Florida Legal Aid Foundation, Inc., prepared by Director/Secretary, Jean H. Bittner (Apr. 30, 1986) [hereinafter Bittner Memorandum].

78. *Id.*

79. Graham, *supra* note 41, at 62.

ceived for two general reasons. First, requiring attorneys against their will to represent clients is unconstitutional. Second, even if it were constitutional, mandatory pro bono will not produce effective representation for the poor.

A. *The Constitutional Perspective*

The issue of the constitutionality of mandatory pro bono has been ably, and in the terms of one commentator "exhaustively,"⁸⁰ debated by legal writers.⁸¹ Thus, a brief summary of the issues and the opposing viewpoints will suffice. From the outset it is important to note that the constitutional validity of a pro bono requirement will be definitively decided only by courts examining actual controversies.⁸² To this point, no court has ruled favorably or unfavorably on an existing mandatory program of service employed and enforced by bar associations.⁸³

Opponents advance several theories on which mandatory pro bono could be found unconstitutional. First, a service requirement imposed on lawyers has been asserted to violate the fifth and fourteenth amendments'⁸⁴ prohibition of the taking of private property for public use without just compensation.⁸⁵ The gist of this argument is that the attorney's services in counseling and representing the indigent client are protected private property; the mandatory appointment of the attorney without his agreement is a taking for public use. If this argument were successful, the member of the bar required to serve

80. Torres & Stansky, *In Support of a Mandatory Public Service Obligation*, 29 EMORY L.J. 997, 1016 (1980) (asserting that the lack of access of the poor to the justice system is inimical to a rational system of law and that such a condition demands immediate response by the legal profession, namely by adopting a mandatory public service obligation).

81. See generally *id.*; Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981) (positing that mandatory pro bono is historically, traditionally, and constitutionally sound). But see Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980) (arguing that the history of public service requirements is ambiguous and concluding that due to constitutional, economic, and policy objections, no such obligation should be imposed on attorneys); Gilbert & Gorenfeld, *The Constitution Should Protect Everyone—Even Lawyers*, 12 PEPPERDINE L. REV. 75 (1984) (finding that a mandatory pro bono requirement violates attorneys' constitutional right to equal protection).

82. Torres & Stansky, *supra* note 80, at 1021.

83. But see *supra* note 57 and accompanying text. The Texas Attorney General's office issued a finding that the El Paso court-ordered service plan was not authorized by the statute on which it was premised. The Attorney General did not consider the constitutionality of the program. *Id.*

84. The fifth amendment provides: "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V This limitation has been extended to the states via the fourteenth amendment despite the absence of such explicit "no taking without compensation" language. See *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

85. Shapiro, *supra* note 81, at 771.

the indigent would be entitled to just compensation. This theory was relied on by the appellee in *United States v. Dillon*,⁸⁶ but was rejected by the Ninth Circuit Court of Appeals.⁸⁷ The greater weight of authority is that "enforcement of an obligation already owed to the public cannot constitute a taking for public use within the fifth amendment's strictures."⁸⁸ The courts have found that attorneys owe an obligation to the public to serve indigents on court order based on traditions of the legal profession in their capacity as "officers of the court."⁸⁹ Thus, as in *Dillon*, the majority of jurisdictions do not find the appointment of attorneys to represent indigent litigants to be a taking requiring compensation.⁹⁰

A second theory of unconstitutionality is that mandatory pro bono would discriminate against attorneys as a group in violation of equal protection.⁹¹ The basis of this argument is that equal protection requires that groups be treated similarly.⁹² Because mandatory pro bono singles out attorneys as a class to aid the indigent, attorneys are treated differently from other groups and thus equal protection is violated. However, this objection "is based largely on intuitive appeal; [and] it has never been upheld or even seriously considered in any re-

86. 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). In *Dillon*, the attorney petitioned for fees and expenses after court-appointed representation of an indigent defendant in a proceeding to vacate a judgment of conviction. The court of appeals reversed the district court's order directing payment, holding that the court appointment did not constitute a taking of the attorney's services.

87. The court concluded the appointment of appellee to serve as counsel for the indigent was not a "taking" and thus it found it unnecessary to decide whether the attorney's services constituted "property within the amendment's meaning." *Id.* at 636.

88. Rosenfeld, *supra* note 81, at 288; *see also* *Hurtado v. United States*, 410 U.S. 578, 588 (1978). "[T]he Fifth Amendment does not require that the government pay for the performance of a public duty it is already owed." *Id.*

89. *Dillon*, 346 F.2d at 634; *see also* Rosenfeld, *supra*, note 81, at 288; Comment, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981) (arguing that English common law shows a clear history of the tradition of members in the legal profession in their capacity as "officers of the court" to represent poor persons without compensation on court order). *But cf.* Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 S.C.L. REV. 541, 571 (1984) (asserting "that the assumed historical relationship between the 'officer of the court' title and judicial regulation of the bar" is inaccurate, and the use of the title merely provides a label that is substituted for analysis); Shapiro, *supra* note 81, at 753 (asserting that the "clear" history that mandatory pro bono proponents rely on to show a firm tradition of uncompensated legal services does not exist).

90. Torres & Stansky, *supra* note 80, at 1017 n.88.

91. Gilbert & Gorenfeld, *supra* note 81, at 84.

92. The fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

ported decision.”⁹³ The United States Supreme Court recognizes states’ rights to impose obligations and restrictions on professions subject only to the “rational relation” test.⁹⁴ The rational relation test requires that a regulation must rationally relate to a legitimate state end.⁹⁵ The purpose of giving indigents effective representation certainly is legitimate. Requiring attorneys to give the representation, as opposed to other groups, is certainly rational.⁹⁶ Therefore, as measured by the “‘rational relation’ test, the mandatory *pro bono* obligation would not deny equal protection of the laws to lawyers as a group.”⁹⁷

Some suggest that a service requirement of attorneys would violate the thirteenth amendment prohibition of involuntary servitude.⁹⁸ However, even opponents of mandatory *pro bono* admit that it is difficult to fashion a convincing argument using this constitutional basis.⁹⁹ However, in *In re Nine Applications*,¹⁰⁰ the court found the appointment of uncompensated counsel created an unconstitutional relationship of involuntary servitude between attorney and client.¹⁰¹ Nevertheless, this decision flies in the face of the vast number of courts holding that states may require uncompensated service to meet public needs regardless of the thirteenth amendment.¹⁰²

Several other points of unconstitutionality have been made with what seems to be a “grasping for straws” approach to add bulk to arguments. It has been suggested that “the burden of the requirement [to represent the indigent by order] . . . might be claimed to be so unfair as to amount to a denial of [the attorney’s] substantive due process.”¹⁰³ This may be true in the occasional situation where the amount of time and effort required by the attorney balloons beyond that reasonably contemplated. However, such a denial of due process

93. Rosenfeld, *supra* note 81, at 294.

94. *Id.* at 295.

95. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

96. Rosenfeld, *supra* note 81, at 296. According to Rosenfeld, “that lawyers can perform services to further [representation of the poor] ‘better and more quickly than others’ is beyond dispute.” *Id.*

97. *Id.*

98. The thirteenth amendment provides: “Neither slavery nor involuntary servitude . . . shall exist within the United States.” U.S. CONST. amend. XIII, § 1.

99. Shapiro, *supra* note 81, at 770. “In the case of the lawyer, then, the imposition of professional discipline, even to the point of disbarment, for refusal to accept an assignment appears to pass muster under the thirteenth amendment.” *Id.*

100. 475 F. Supp. 87 (N.D. Ala. 1979). Nine plaintiffs in Title VII civil rights actions were denied appointment of uncompensated counsel under section 2000e-5(f)(1) of the Civil Rights Act of 1964 because the court found such appointments would violate the thirteenth amendment’s prohibition against involuntary servitude. *Id.*

101. *Id.* at 88. This case is considered “the only decision that attempts to marshal any analytical support for the involuntary servitude thesis.” Rosenfeld, *supra* note 81, at 291.

102. Torres & Stansky, *supra* note 80, at 1017 n.89.

103. Shapiro, *supra* note 81, at 770.

is unlikely if a mandatory service program has both a specific time or case number requirement, and proper safeguards are implemented to assure the requirement is not inflated by unforeseen circumstances. At the same time, one opponent of mandatory pro bono raises the question whether the substantive due process of the indigent may be violated by the appointment of counsel; he recognizes, however, the argument has little force.¹⁰⁴

Finally, the fear is expressed that an attorney's right of association¹⁰⁵ may be violated by mandatory pro bono.¹⁰⁶ The response to this fear is the makeup of the mandatory pro bono program. Individual attorney's interests can be accommodated, while simultaneously reducing the existing need of indigents to counsel, by giving the attorneys some say and involvement in the case(s) assigned them. Proper procedures can see that this occurs.¹⁰⁷

In spite of the clearly drawn battle lines over claims of constitutionality versus unconstitutionality, perspective must be kept in focus. None of these arguments will ever be decided in a court of law unless mandatory pro bono is adopted, implemented, and challenged. Thus, the decision confronting bar associations whether or not to pursue a mandatory service requirement should be decided on the basis of what needs exist, what practical impact the bar can have on these needs, and whether the potential result justifies the effort. Consideration of the constitutional issues is helpful to compose a program that avoids arguments of invalidity; but, to refuse to implement a mandatory service requirement because of potential constitutional problems is inexcusable paralysis.¹⁰⁸

B. The Practical Perspective

In addition to the constitutional arguments against mandatory pro bono, opponents advance policy considerations that they say undermine the viability of a service requirement on attorneys.¹⁰⁹ Several

104. *Id.* at 771 n.176. "There is not . . . an adequate empirical basis for concluding that the practice in some jurisdictions of assigning inadequately compensated counsel so systematically violates the rights of criminal defendants to effective representation under the sixth and fourteenth amendments as to be constitutionally defective on that ground alone." *Id.*

105. The first amendment protects both the freedom to associate and privacy in one's associations. *NAACP v. Alabama*, 357 U.S. 449 (1958).

106. Shapiro, *supra* note 81, at 763-67.

107. See *infra* notes 158-175 and accompanying text.

108. Torres & Stansky, *supra* note 80, at 1022.

109. Gilbert & Gorenfeld, *supra* note 81, at 86-90; Shapiro, *supra* note 81, at 777-84.

of the arguments merit discussion as all of the potential problems give rise to legitimate concerns; but a well-conceived service program that is consistently applied can overcome these concerns.

The first argument is that the quality of services provided by attorneys in a mandatory service program would be low.¹¹⁰ One critic has said that requiring attorneys to provide free service to indigents would "unwittingly be creating a form of second-class representation."¹¹¹ Lawyers, it is said, lack the experience and training necessary to help the poor in their legal needs.¹¹² No one could realistically argue that an attorney specializing in international business transactions or ERISA law (Employee Retirement Income Security Act) could comfortably aid an indigent in a housing eviction suit without some form of training. However, experience in legal aid offices suggests this objection is overstated.¹¹³ Certainly, training and supervision would be necessary in any type of mandatory service program. But the training component of the program could be reduced in several ways.

First, by providing a "buy-out" provision which would enable an attorney to forego donating his service by making a financial contribution, as some mandatory pro bono programs do¹¹⁴ and proposals suggest,¹¹⁵ attorneys most lacking the skills would likely "buy-out."¹¹⁶ The "buy-out" effect would reduce the number of lawyers to be trained while increasing the funds available.¹¹⁷ Second, by limit-

See also Uelmen, *Simmering on the "Backburner": The Challenge of Yarbrough*, 19 LOY. L.A.L. REV. 285, 308-17 (1985) (arguing that requiring attorneys to represent indigent clients without compensation deprives the indigent of effective and conflict-free representation).

110. Gilbert & Gorenfeld, *supra* note 81, at 89.

111. *Id.*

112. *Id.* at 87.

113. [M]any legal aid programs have found that, with relatively modest amounts of training, even bond indenture lawyers can re-emerge from their specialist shells. Much of the work done in legal services offices requires substantial experience as well as skill—just as in private lawyers' offices. But private lawyers from a wide range of specialty backgrounds can be of immense help in serving poor people.

Spencer, *supra* note 13, at 510 n.77 (citing Erlich, *Rationing Justice*, 34 REC. 729, 744 (1979)).

114. Marin-Rosa & Stepter, *supra* note 75, at 22. Attorneys may satisfy their annual service requirement by contributing \$250 to the Orange County Legal Foundation in Florida. *Id.*

115. See Chicago Resolution, *supra* note 73. Private attorneys in Chicago may satisfy the voluntary pro bono service standards by contributing \$365 or the net income of 25 hours of legal work to an organization promoting the legal interests of low income persons. *Id.*; see also CIVIL LEGAL SERVICES COMMITTEE OF THE NORTH DAKOTA SUPREME COURT, DRAFT: A WORKABLE PLAN FOR CIVIL LEGAL SERVICES TO THE POOR AND NEAR POOR IN NORTH DAKOTA 56 (Nov. 1987) [hereinafter NORTH DAKOTA DRAFT]. "A covered attorney may 'buy out' any shortfall of hours of service at an hourly rate set by the Commission to meet the requirement." *Id.*

116. Spencer, *supra* note 13, at 510.

117. *Id.*

ing the subject-matter of the law that compelled attorneys could face to finite areas that hopefully are less complicated and time-consuming, several benefits would result. The training program could become more efficient as trainers with fewer, less complicated topics, could specialize. Attorneys doing pro bono work in the same areas would, over time, accumulate expertise requiring less training.¹¹⁸ Also, with the entire population of attorneys facing only certain areas of law, assistance could be provided between attorneys independent of the coordinating program, resulting in further resource savings. This limiting of the law that pro bono attorneys would be responsible for, would free full-time legal aid attorneys to concentrate on the more complicated, time consuming areas.

Another argument is that even if attorneys have the skills needed to represent the poor, they may intentionally lessen the quality of services provided.¹¹⁹ One commentator has stated: "[T]here is a direct relationship between level of compensation provided and quality of services rendered to indigents."¹²⁰ Three responses neutralize this objection. First, even though the representation is involuntary, the relationship between attorney and client will still be governed by principles such as those expressed in the Model Rules of Professional Conduct.¹²¹ Thus, the lawyer owes the indigent client the same competence¹²² and diligence¹²³ that would exist for a paying client. Also, those involved with legal aid firmly believe that attorneys' attitudes may quickly change from resentment to compassion once they have seen the needs of the poor.¹²⁴ Finally, a requirement of a specific

118. *Id.* at 511.

119. Gilbert & Gorenfeld, *supra* note 81, at 88.

120. Uelmen, *supra* note 109, at 310.

121. Rules governing attorneys' efforts on behalf of a client make no distinction between high-paying, low-paying, or even non-paying clients. Rules of conduct refer only to clients. *See infra* notes 122 and 123 and accompanying text.

122. MODEL RULES, *supra* note 71, Rule 1.1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

123. *Id.* Rule 1.3. "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.*

124. Eisenberg & Lardent, *Pro Bono That Works*, 37 NLADA BRIEFCASE 54 (1980).

There's nothing, I think, that can change private attorneys' attitudes . . . more quickly than representing a client who's living in substandard housing. They go out and take a look so they can represent the client in an eviction matter, for example, and they see what it's like to live in a housing project or to spend eighty percent of your disposable income . . . for an apartment that is vermin-infested, roach-ridden, hot in the summer, and cold in the winter.

Id.

amount of time¹²⁵ instead of the completion of a certain number of cases, could eliminate any shortcut incentive. If an attorney is required to complete two referral cases a year, a quick resolution is in his best financial interest. Saving time, and thus money, might induce him to take inappropriate shortcuts, such as settlements that might not be in the client's best interests.¹²⁶ However, with a requirement stated in terms of twenty hours, an attorney has no incentive to cut short particular cases. His requirement remains twenty hours whether he assists two indigent clients or ten.

A second argument against mandatory pro bono is that, regardless of the effort expended, the needs of the poor will not be met. Some object that it would be "inefficient and paternalistic"¹²⁷ to offer legal services which, given their monetary value, the poor would prefer be spent on other things.¹²⁸ Granted, it is unlikely that the legal needs of the poor would be fully satisfied by a nationwide requirement that attorneys provide free assistance. However, "[t]he appropriate question is whether mandatory public service will improve the situation."¹²⁹ Nationwide in 1986, 580,480 active attorneys were not involved in a pro bono program.¹³⁰ If a mandatory pro bono requirement of only twenty hours per year was enacted and complied with, almost 13.5 million attorney hours would be generated for the poor.¹³¹ Using 2000 "billable" hours as an attorney-year, the equivalent of more than 6700 attorneys would be put to work aiding the indigent.¹³² This is a significant step in the right direction.

A third problem opponents point to is the adverse economic effects attorneys and their indigent clients might suffer.¹³³ It is contended that small firms and sole practitioners will suffer more extensively than will large firms from a pro bono duty.¹³⁴ The argument is that the income to attorneys with small firms or in solo practice comes

125. The Boston, Chicago, and Connecticut resolutions regarding pro bono programs state the obligations owed in terms of hours, not cases. See *supra* note 74 and accompanying text.

126. See Gilbert & Gorenfeld, *supra* note 81, at 88, 89.

127. Shapiro, *supra* note 81, at 779.

128. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 566 (1979) ("Merely to increase substantially the quantity of free legal services is largely to waste our time, if even the poor, given the value, would likely think it more worthwhile to spend it on something else.").

129. Spencer, *supra* note 13, at 509.

130. 1987 ABA DIRECTORY, *supra* note 39, at 213, table no. 5.

131. The ABA estimated that there were 673,745 actively practicing attorneys in December 1985. *Id.*

132. This estimate is on the conservative side, especially for services provided in the future. Not only do several pro bono programs propose in excess of 20 hours per year but the number of attorneys in the United States is projected to grow about 38% by 1994. STATISTICAL ABSTRACT, *supra* note 14, at 384, table no. 656.

133. Humbach, *supra* note 128, at 566.

134. *Id.*

from selling time. Thus, these attorneys could fulfill their duty only by neglecting paying clients or by neglecting personal leisure time.¹³⁵ In response, one commentator notes that lawyers in large, urban firms contribute less time totally and proportionally than attorneys in solo practice, and thus they will be the ones required to significantly increase their pro bono involvement.¹³⁶ Additionally, a requirement of twenty hours a year is not so burdensome so as to make the financial survival of an individual or small firm precarious.¹³⁷

Two suggestions for a mandatory pro bono program would eliminate whatever rational fear of insolvency might exist. First, there should be a "hard-luck" exception, by which only in a very limited number of circumstances attorneys could be relieved of *that year's* time requirement.¹³⁸ Although financial inconvenience would not suffice, extreme financial difficulty should allow relief.¹³⁹ Second, to alleviate what could be a greater burden on new attorneys who are attempting to build a client-base, lawyers new to a community should be relieved of the service requirements for two or three years.¹⁴⁰ Some practitioners believe, however, that taking advantage of exemptions like the hard-luck or new attorney exceptions might actually be financially counter-productive to an attorney.¹⁴¹

It is argued that the poor themselves may indirectly suffer economically due to an increase in pro bono work.¹⁴² This view, termed "speculative" by one commentator,¹⁴³ develops out of the notion that the civil suits of the poor are likely to be directed at persons or entities who provide them with services.¹⁴⁴ Housing is a prime example; since the landlord has experienced increased costs to his operation

135. *Id.*

136. Spencer, *supra* note 13, at 511.

137. Twenty hours would represent only one percent of the hours many large firms require associates to bill annually. (This is based on the assumption that the average attorney gives 2000 hours annually).

138. Luban, *A Workable Plan for Mandatory Pro Bono*, REPORT FROM THE CENTER FOR PHILOSOPHY AND PUBLIC POLICY, UNIVERSITY OF MARYLAND 11 (Winter 1985) (suggesting a mandatory pro bono program is workable and outlining certain features to ensure its success).

139. *Id.*

140. *Id.*

141. Markham, *The Pros of Pro Bono*, 2 THE COMPLEAT LAWYER No. 1, 23, 24 (1985) (asserting that the benefits of doing pro bono work go beyond ethics and can improve the financial bottom line by: 1) making contacts with court and law enforcement officials; 2) providing a network for referrals; and 3) broadening an attorneys legal education and knowledge).

142. Humbach, *supra* note 128, at 566.

143. Spencer, *supra* note 13, at 511.

144. Humbach, *supra* note 128, at 566.

(in legal fees), he will likely raise rents to the detriment of the poor.¹⁴⁵

A fourth drawback of a mandatory pro bono program critics posit is that it will increase the congestion of an already overburdened court system.¹⁴⁶ In addition to the obvious unfairness of placing the onus of court overcrowding on a category of people who historically have not been a factor in causing that problem, the argument overlooks the fact that much of the public service work would occur in non-court settings.¹⁴⁷

A fifth objection to a required service program is that of vagueness. How will attorneys know what types of service will be allowed and how much time will be required of them?¹⁴⁸ These questions appear more significant than they actually are, especially when asked in the absence of any program guidelines. Vagueness can be overcome by clear, well-reasoned guidelines.¹⁴⁹

Sixth, those disfavoring a required service program point to the administrative problems such a plan would create. It is contended that unacceptably high administrative costs would follow from the required training and coordinating efforts.¹⁵⁰ Undoubtedly, increased costs would be incurred. But according to one proponent, existing projects have experienced successful coordination at reasonable cost, and this particular criticism merely points out the benefit of a "buy-out" option.¹⁵¹

The final administrative problem deals with enforcement. Critics contend that enforcement is impossible and would result in increasing the public's disregard of the legal profession.¹⁵² Involving almost 700,000 attorneys¹⁵³ in required service would certainly prove to entail a large enforcement effort. But allowing the "buy-out" option, requiring the work to be channeled through staffed coordinating organizations,¹⁵⁴ and reviewing annual reports submitted by attorneys

145. *Id.*

146. Shapiro, *supra* note 81, at 779.

147. Spencer, *supra* note 13, at 511.

148. *Id.* at 504-08.

149. For suggested guidelines that limit the range of types of service and quantify the requirement due, see *infra* notes 173-188 and accompanying text.

150. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, RECOMMENDATIONS AND REPORT OF THE SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE BY EVERY LAWYER 62, 63 (1980) [hereinafter NEW YORK REPORT]. This report recognizes the vast legal needs of the poor and recommends a 30-50 hour per year mandatory obligation by all practicing attorneys to engage in public service practice. It is appended with minority dissenting views of individual committee members.

151. Spencer, *supra* note 13, at 512.

152. NEW YORK REPORT, *supra* note 150, at 62-63.

153. 1987 A.B.A. DIRECTORY, *supra* note 39, at 199, table no. 7.

154. See Marin-Rosa & Stepter, *supra* note 75, at 21. The Legal Aid Society of the Orange County Bar Association acts as a referral mechanism to link indigent clients

showing fulfillment of duties,¹⁵⁵ would minimize violations.¹⁵⁶ Despite the probable existence of enforcement shortcomings, the impact of a mandatory pro bono program would far exceed the value of individual, voluntary action.¹⁵⁷

In sum, many objections exist to the creation and enforcement of a mandatory public service program for attorneys. However, none of these criticisms, individually or collectively, overcomes the vast benefit that such a program would produce.

V. MANDATORY PRO BONO: PROPOSALS FOR SUCCESS

The previous section discussed seven arguments against the practicability of mandatory pro bono. As pointed out, those criticisms can be neutralized by reasoning, past experience, and most importantly, by the specific nature of the program adopted. This section suggests the elements that will ensure the success of a required service program for attorneys.

The model mandatory pro bono guidelines should contain four provisions to overcome attorney opposition and to ensure that valuable aid will be provided to the indigent. First, it must define what services the program would require attorneys to provide. Second, the program must specify the amount of commitment demanded of the attorney. Third, the guidelines must delineate the exceptions that would exempt an attorney from service. Fourth, a sunset provision should be employed whereby the program would cease to exist after a certain length of time unless readopted by a majority of the affected attorneys.

A. Qualifying Service by Attorneys

The qualifying services under existing programs and proposals span the gamut of possibilities. The proposal with the broadest view

with members of the Orange County Bar Association. *Id.*; see also Chicago Resolution, *supra* note 73, § 3. The resolution calls on the Chicago Bar Association to "make available or seek funding to employ a staff person to coordinate the [associations'] pro bono activities." *Id.*

155. Most proponents agree that a reporting requirement is necessary. Spencer, *supra* note 13, at 512-13. The Kutak Commission originally proposed a reporting requirement, which was deleted in response to pressure from members of the bar. Slo-nim, *supra* note 71, at 951.

156. Spencer, *supra* note 13, at 513.

157. *Id.* "To blithely attribute overwhelming significance to problems of enforcement is more to demonstrate cynicism and distrust of one's professional peers than to demonstrate administrative infeasibility." *Id.*

of attorney efforts that would fulfill its mandatory requirements was the Draft Rules promulgated by the Kutak Commission in 1980.¹⁵⁸ Although this mandatory requirement was not adopted,¹⁵⁹ the current voluntary pro bono service standard enacted by the ABA continues to give great leeway to attorneys in deciding what activities can be considered pro bono.¹⁶⁰ An attorney may fulfill public interest service by "providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, [or] by service in activities for improving the law, the legal system or the legal profession."¹⁶¹ The advantage of such a broad guideline is that of providing discretion and creativity to the individual attorney to decide how he might best serve the public. Nonetheless, this definition of qualifying service may be too broad. One organization fears that wording this broad might reasonably include: supporting judicial candidates, holding public office, representing any "political, religious or lobbying group[s]" or even creating social groups "ostensibly to 'improve the law.'"¹⁶²

Another mandatory pro bono proposal was made in January 1980, by the Association of the Bar of the City of New York.¹⁶³ This proposal, compared to the ABA formulation, was slightly more restrictive in terms of what constituted public service work under the plan's guidelines.¹⁶⁴ First, to qualify efforts under the heading of the administration of justice, an attorney would need to specifically direct his work "towards improving and simplifying the legal process and increasing the availability and quality of legal services."¹⁶⁵ Second, legal services donated to institutions (charitable, religious, civic, governmental, and educational) would qualify only "where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate."¹⁶⁶ Unfortunately, the New York proposal allows certain nonlegal efforts to fulfill the attorney work requirement,¹⁶⁷ and criminal as well as civil

158. DRAFT MODEL RULES, *supra* note 70, Rule 8.1.

159. See *supra* notes 69-72 and accompanying text.

160. MODEL RULES, *supra* note 72, Rule 6.1.

161. *Id.*

162. Eisenberg, *NLADA on the ABA Model Rules*, 37 NLADA BRIEFCASE 49 (1980) (comments made to the ABA Commission on Evaluation of Professional Standards).

163. NEW YORK REPORT, *supra* note 150.

164. Spencer, *supra* note 13, at 517.

165. NEW YORK REPORT, *supra* note 150, at 27.

166. *Id.*

167. *Id.* at 12-13. As a general rule, nonlegal functions are excluded in satisfying the requirements, but two exceptions were provided: Nonlegal work designed to carry-out or improve the administration of justice, and any services provided to an organization whose purpose is to provide pro bono legal services. Such a pro bono requirement for attorneys should only be allowed to be fulfilled by work unique to attorneys. In this way, the talents and abilities that attorneys possess, due to their profession, are best utilized for the poor. *Id.*

casework is acceptable.¹⁶⁸

The National Legal Aid and Defense Association (NLADA) forwarded a mandatory pro bono proposal in response to the Kutak Commission's draft.¹⁶⁹ This proposal is more narrow in scope, in terms of service work allowed, than the Kutak Commission or New York proposals. The NLADA plan allows an attorney to discharge his public interest legal service duty in three ways:¹⁷⁰

A lawyer shall render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the availability of legal services to persons or groups which have traditionally been denied such services; or by providing professional services in civil cases to persons or organizations which lack sufficient funds to retain counsel; or by making a cash contribution to an organization which engages in such activities. A lawyer shall make an annual report concerning such service or payment to appropriate regulatory authority.¹⁷¹

Unlike the three proposals just discussed, the mandatory pro bono programs that currently exist¹⁷² have simple guidelines by which attorneys can judge their activities to determine whether requirements have been satisfied. To fulfill his annual responsibility in the local programs, the attorney typically must take one or two pro bono referrals.¹⁷³ Obviously, the beauty of these programs lies in their simplicity. Attorneys know exactly where they stand in relation to what is required of them. The drawback is that such a limitation may dampen the creativity of attorneys to assist the legal needs of the poor in ways other than casework. Another possible drawback of the currently existing programs is that they allow a wide range of legal problems of the poor to be referred to attorneys.¹⁷⁴ If the number of

168. *Id.* at 27. Criminal defense work should not be a part of a mandatory pro bono program as a constitutional duty exists for the government to provide counsel for the accused. *See supra* note 5 and accompanying text. Thus, the need of criminal litigants to legal assistance has a solution provided. The need of civil litigants can begin to be solved by mandatory pro bono limited to their assistance. *See also* Eisenberg, *supra* note 162, at 49.

169. Eisenberg, *supra* note 162, at 49.

170. *Id.* at 51.

171. *Id.* (emphasis in original); *see supra* notes 75-79 and accompanying text.

172. *See supra* notes 75-79.

173. Marin-Rosa & Stepter, *supra* note 75, at 22. The services provided by the Legal Aid Society of the Orange County Bar Association "include all legal problems commonly experienced by poor persons, such as, consumer, landlord/tenant, administrative, family, juvenile and senior citizen situations." (emphasis added). *See also* Bittner Memorandum, *supra* note 77 (service statistics). The types of cases the Tallahassee Legal Foundation take include: family law (divorce, separation, restraining orders, child support, alimony, custody, visitation, adoption, guardianship, paternity), employment problems, small claims defense, consumer complaints, property disputes (including landlord/tenant), and social service administrative law.

174. The discretion of what types of cases are to be included in the mandatory ser-

legal subjects available for referral were reduced, a program could experience several benefits.¹⁷⁵

First, the resources expended in training would be reduced. Not only would fewer specialists be required to instruct the attorneys on the nuances of the various legal categories, but the instruction would become more standardized. Common problems experienced by the pro bono attorneys could quickly be incorporated into the instruction syllabi. Attorneys would accumulate expertise in each year of service, thus requiring little more in future training than information pertaining to legal or procedural changes. Second, with more attorneys being instructed in fewer fields of indigent law, information and assistance passing directly between attorneys would become practical, and such bypassing of the coordinating office would conserve its resources. Finally, the full-time legal aid attorneys would be freed to concentrate on critical areas of the law that would be too complicated to efficiently utilize the part-time resources generated by mandatory pro bono.¹⁷⁶

B. The Quantity of Service by Attorneys

The quantification requirement is framed by two basic approaches. One, the existing local programs posit the quantification requirement in terms of number of cases to be accepted and completed.¹⁷⁷ This approach has several advantages, one of which is continuity. The client is benefited by having one counselor attending him throughout his problem. This is also of benefit to the attorney if he is able to quickly dispose of his client's legal need. Unfortunately, this ap-

vice program should be at the local administrative level. Those close to the situation can make the most appropriate decisions of what cases to qualify based on the needs of the poor in the community and the skills of the local attorneys. As a general rule, however, family law matters primarily should be eligible for referral to the pro bono attorneys. The first reason behind this rule is that a substantial percentage of the legal problems of indigents are family law related. See Bittner Memorandum, *supra* note 77 (service statistics). According to the Tallahassee Legal Foundation, 73% of the cases brought by indigents fall within the family law category. Second, unlike certain other areas of the law where there exists a vested interest that is likely not indigent, landlord/tenant problems for instance, the parties do not have the desire to stretch out resolution of the determination of the legal claim. Third, in certain circumstances, the law may be less complicated in family law matters.

175. Few law firms, and virtually no sole practitioners have the resources available to solve some of the more complicated and intractable problems that face the poor. However, for two inspiring examples of Los Angeles law firms willing to help the poor despite enormous cost, see Krause, *supra* note 35, at 7. The law firm of Gibson, Dunn & Crutcher donated more than \$500,000 in attorney time in a successful challenge to horrendous living conditions in a slum apartment building. *Id.* The law firm of Irell and Manella has contributed over 5000 hours to challenge health and safety conditions of skid row motels where many homeless are housed. *Id.*

176. Marin-Rosa & Stepter, *supra* note 75, at 21. All members of the Orange County Florida bar are required to accept two pro bono referrals annually. *Id.*

177. See *supra* notes 124-125 and accompanying text.

proach may encourage attorneys to take shortcuts to reduce their obligations.¹⁷⁸ Such shortcuts might include efforts to settle a case quickly, without proper discovery and investigation with which to bolster an indigent client's bargaining position.¹⁷⁹ This may result in representation without justice for the client.

The second approach to the amount of service required is to measure it in hours expended. Most proposals and bar association aspirational resolutions took this view.¹⁸⁰ This is probably the best approach because the requirement is easy to quantify. Attorneys know what is expected of them and are able to fit their obligation more conveniently into their schedules. Where the legal needs of indigents are composed simply of questions or requests for advice, far more indigents could be served in the hours approach.

In choosing the hours approach, the next question to confront is how many hours should be required. Obviously, the more hours demanded, the more service provided for the indigents. However, the fewer hours required, the less attorneys will object. The proposals discussed have ranged from twenty-five to fifty hours per annum.¹⁸¹ A twenty-hour yearly requirement may be far more practical. As pointed out earlier, the impact of service provided in a twenty-hour annual commitment by all attorneys would be substantial.¹⁸² Equally as important is the need to gain the attorneys' support, or at least to decrease their wrath. An initial twenty-hour commitment is more likely to be viewed as reasonable by the legal profession, especially in light of past proposals.

A feature that would be valuable in a required service program would be a "carry-over" provision.¹⁸³ This provision would allow an attorney who has invested more of his time in pro bono than is re-

178. *Id.*

179. NEW YORK REPORT, *supra* note 150, at 17-18. The New York proposal suggested a required standard of 30-50 hours per year, rising to 50-70 hours as the program acquired experience. *Id.* The Boston Bar Association suggested that a reasonable level of commitment to pro bono is 35 hours per year at a minimum. Boston Resolution, *supra* note 73. The Chicago Bar Association adopted a 25-hour per year standard. Chicago Resolution, *supra* note 73. The Connecticut Bar Association set a standard of 25 hours per year in at least two civil referrals per year. Connecticut Resolution, *supra* note 73.

180. *Id.*

181. See *supra* notes 129-132 and accompanying text.

182. NEW YORK REPORT, *supra* note 150, at 20, 21. The New York proposal would allow "carry forward" but only for a limited period into the future, not to exceed four years.

183. Shapiro, *supra* note 81, at 782.

quired in year one to reduce his year two duty commensurately. For example, if a mandatory pro bono system required twenty hours annually and the attorney worked thirty hours in year one, he would only be held to ten hours in year two. The advantage of this provision is that it enables an attorney to remain with a client longer than the annual requirement demands, without penalty, as the need arises.

The final feature in the time requirement should be a "buy-out" provision. This gives attorneys an alternative to the service work required. For whatever reason, they may make a financial contribution in lieu of donating their time. Theoretically, there would be no loss to the indigents, as the financial equivalent of the services would be given to the pro bono program.¹⁸⁴ The additional funds generated could certainly be put to use in providing the organizational framework (training and referral coordination) for the pro bono program. Better representation of the indigents may result because those who would exercise the "buy-out" option would seem less likely to perform diligently.¹⁸⁵ Also, the number of attorneys to be trained would decrease, saving both time and money.¹⁸⁶

The chief question here is how much should it cost to exercise this "buy-out" option? The amounts contemplated by both existing and proposed programs range from certain set amounts (\$250)¹⁸⁷ to the equivalent of net income per billable hour in that locale multiplied by the hours owed.¹⁸⁸ Although administrative problems exist with a "buy-out" provision measured in terms of the net income of billable hours,¹⁸⁹ economically such a provision would ensure that the equivalent of the obligation due would be donated, whether in service or money.

C. *Recognized Exceptions*

Flexibility is the hallmark of any successful program. Situations will exist where to hold an attorney to the duty imposed on him by the mandatory pro bono program would be unjust. In these narrow categories of exceptions, attorneys should be made partly or wholly exempt from the requirements. If an attorney is experiencing severe personal problems, be they financial, physical, or emotional, the program and the indigents, as well as the attorney would be best served

184. *Id.*

185. Spencer, *supra* note 13, at 510.

186. Marin-Rosa & Stepter, *supra* note 75, at 21.

187. Chicago Resolution, *supra* note 73.

188. A "buy-out" provision measured in terms of the monetary value of local billable hours would be more difficult to quantify and more difficult to administer than would a set certain sum.

189. Luban, *supra* note 138, at 11 (suggesting exemption due to severe financial or health problems).

by an exemption.¹⁹⁰ Another potential category consists of attorneys just going into practice or new to the community. Because of the difficulties involved in "getting on your feet," such attorneys should be given a two- or three-year grace period before the mandatory pro bono duties inure to them.¹⁹¹

For practical matters, certain classes of members of the bar should be exempted from mandatory pro bono service. Judges and legal aid workers would fit into this category—the former to eliminate potential charges of conflict of interest, and the latter since they will be an integral part of the coordination and distribution of the pro bono services. To insure effectiveness, increase the beneficial impact, and prevent charges of special treatment, the categories of exceptions to mandatory pro bono must be narrowly drawn.

D. Sunset Provision

A serious criticism generally leveled at government programs, but possibly appropriate to mandatory pro bono programs, is that once created they tend to become self-perpetuating, even to the point that regardless of whether the need or rationale that called for their establishment has ceased, the program continues. Although it is inconceivable that the need of the indigents that calls out so demandingly for mandatory pro bono will cease to exist in the foreseeable future, the use of a sunset provision that would call for the modification or termination of the program after a set period of time would lay to rest attorneys' fears that once established it could not be terminated even if ineffective or damaging. The use of sunset provisions with mandatory pro bono programs is not an original concept. A provision requiring that mandatory pro bono be terminated unless readopted by a majority of practicing attorneys after five years would provide safeguards for attorneys opposing mandatory pro bono, while at the same time assuring a significant trial period by which to fully measure and test its efficacy.

VI. CONCLUSION

The legal system in the United States is fast approaching a critical juncture. While access to the resources of the legal system in this country is becoming more and more a necessity to protect fundamen-

190. *Id.* (suggesting five-year exemption for new attorneys).

191. NORTH DAKOTA DRAFT, *supra* note 115, at 60.

tal rights, the cost of that access is increasing. The result is that "justice for all" is a concept virtually devoid of reality for the indigent.

The legal profession, while not responsible for the plight of the poor, has the opportunity to enhance the indigents' access to justice. The most effective method available would be the adoption of a public service requirement for all attorneys. Not only would significant amounts of direct legal assistance to the poor be generated, but the burden on the bar would be evenly spread among its members.

To embark on the path of mandatory pro bono will not be easy. History has shown opposition will be fierce. But by properly educating attorneys to the needs of the poor, the commitment required of the individual attorney, and the potential benefit of such service, the necessary support for required public service may continue to grow.

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