The Pro Bono Debate and Suggestions for a Workable Program

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THE PRO BONO DEBATE AND SUGGESTIONS FOR A WORKABLE PROGRAM

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I. INTRODUCTION

Although the concept of pro bono publico, the rendering of an attorney's services without or with substantially reduced compensation, has been in existence for centuries, there has been an increasing interest in the question of whether this public service can be made a mandatory one. This new attention is due largely to the fact that while the right to adequate assistance of counsel has been expanding, neither the federal nor state governments have taken sufficient action to assure that counsel will be provided. Since government funding does not appear to be meeting the needs of the indigent in obtaining legal services, courts have increasingly relied upon lawyers to represent the indigent without compensation. Faced with the problem of limited governmental resources to meet a growing need, the question arises as to the extent to which the donated services of the bar can be relied upon to provide a solution. It is this contribution by attorneys which has spawned considerable debate and divided the bar into two opposing camps, those supporting and those opposing a mandatory pro bono service requirement.

This note will explore the development of a mandatory service requirement by reviewing the American treatment of such an obligation. Some
attention will be given to foreign approaches as well. In addition, the need for legal assistance will be analyzed. Finally, in view of the uncertain status of a mandatory pro bono system, suggestions for workable and substantially enlarged voluntary programs will be made. Given the important need to provide legal assistance for the poor, the best strategy may be to lay aside the constitutional and legal arguments both for and against a mandatory obligation. Since the definitive case has yet to be brought before the Supreme Court, more damage than good may be done by supporters of a mandatory requirement if the outcome of such a case would be to deny such an obligation. Rather than jeopardizing the real needs of the poor by such a strategy, it seems that concentrating on efforts to increase voluntary contributions, and promoting funding both on the government's part and on the part of private charity, may be a better way to assure that the guarantee of equal justice for all will become a reality.

II. HISTORICAL DEVELOPMENT OF A PRO BONO SERVICE REQUIREMENT

The historical development of a pro bono service requirement may be traced on many fronts. The English tradition of providing attorneys for the poor is often cited as a basis for a pro bono obligation in this country, as is United States case law. In addition to this country's case law, the practices of bar associations have reflected a varying commitment to pro bono services. Treatment of the problem of providing the poor with legal assistance and of pro bono services as a part of the solution in foreign countries, particularly in western Europe, may lend some insight into how the United States should proceed.

Both proponents and opponents of a mandatory pro bono service requirement claim to have historical precedent on their side. Those in favor of such a requirement trace their views to the early English practice of providing representation to the indigent, as well as to some recent American case law. Opponents, however, question the validity of the proponents' arguments which rest on those English traditions and also point to a line of American legal precedent which is to the contrary.

A. The English Tradition

Because the American legal system draws so heavily from English jurisprudence, many commentators on the subject of a mandatory public service obligation have traditionally turned to the English treatment of the subject in order to discern what the American bar's pro bono responsibilities should be.

One of the earliest records of English courts requiring a serjeant-at-law to represent an indigent with little or no pay occurred in the fifteenth
In addition, a statute first enacted in 1495 and continuing through 1883 specifically provided that counsel would be assigned to an indigent suing in *forma pauperis*, and that no compensation would be given to counsel. Court rules which continued to allow the indigent to sue in *forma pauperis* later replaced the statute in 1883.

Closer scrutiny of the English treatment of the poor and their access to counsel, however, suggests that counsel was made available only on a very limited basis. For example, although the statutes spoke of assigning counsel to a litigant, unless the litigant had been allowed to proceed in *forma pauperis*, the assignment did not require counsel to forego a fee. The establishment of *forma pauperis* status was itself fraught with formidable obstacles which the plaintiff was required to overcome. For example, the plaintiff was required to prove his poverty and to supply at least two counsel to the court who would certify to the court that the case had merit. Therefore, a reliance by proponents of a mandatory pro bono obligation in the United States on the English precedent seems unwarranted.

Another justification that proponents of a mandatory pro bono system proffer is also deeply rooted in the English court system. Proponents argue that the court’s traditional control over “officers of the court” in England is a factor upon which to base judicial regulation of attorneys in the United States. However, doubt has also been cast upon this theory by scholars who have analyzed the origins and development of the “officer of the court” title, and the corresponding duty to serve the court. Such scholars have found that there is no American counterpart to either the serjeant-at-law or the English barrister.
B. American Case Law

In the United States, the development of a pro bono service requirement by attorneys is closely linked to the right to be represented by counsel. American courts have interpreted the constitutional guarantees of equal justice, due process, and assistance of counsel, both in the federal and state constitutions, to mean not only access to a court but also access to an attorney. Yet neither courts nor any other institution of the government necessarily made a corresponding provision to furnish funds to pay for the attorneys needed to perform the task of representation. As such, it seems appropriate to consider this growing right to counsel before continuing to review the development of a pro bono requirement to meet the need for representation.

1. The Expanding Right To Legal Counsel

The growing right of litigants to counsel in American courts can be divided into two distinct lines of cases - criminal and civil. In criminal cases, the right of an accused to assistance of counsel seems to be fairly well established. In civil cases, however, that right is much less clear and subject to considerable debate.

The right of an accused to counsel in criminal cases is unequivocally stated in the sixth amendment of the Constitution and in provisions of state constitutions. In Powell v. Alabama, the United States Supreme Court dealt with the issue of the right to counsel in a case involving a state trial and conviction for the capital crime of rape. The Supreme Court expanded the federal constitutional right of an accused to counsel in state, as well as federal courts, by making the sixth amendment applicable to the states by way of the due process clause of the fourteenth amendment. In addition, the Court concluded that under certain cir-
cumstances, the right to counsel required the court to assign such counsel to indigent defendants to aid in the preparation and trial of the case. Otherwise, defendants would be denied due process. The circumstances requiring the court's assignment of counsel identified in Powell were the defendants' youth, ignorance, illiteracy, the surrounding public hostility, their imprisonment while in peril of their lives, and the fact that defendants were from out of state and unable to communicate with those who could have been of help to them in mounting their defense. 14

Several years later in Johnson v. Zerbst, 15 a case concerning a federal trial and conviction for counterfeiting, the United States Supreme Court broadened the circumstances under which courts were required to appoint counsel. The Court recognized that the average defendant, regardless of special circumstances such as youth or illiteracy (which characterized the defendants in Powell), lacked the legal skills necessary to protect himself. Accordingly, the Supreme Court held that a defendant's right to counsel in a federal trial required appointment of counsel unless that right had been knowingly and intelligently waived. 16

The right of an indigent accused of a crime to counsel at the state level was first squarely dealt with by the United States Supreme Court in Gideon v. Wainright. 17 In this case, the Court affirmed that "any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." 18 While Gideon extended assignment to ordinary felony cases, the Court later extended the right of assignment of counsel to those misdemeanor charges which threatened incarceration. 19

The right to counsel in civil cases, however, is less well defined and consequently still subject to considerable controversy. In Lassiter v. Department of Social Services, 20 a parental termination case, the United States Supreme Court held that the lack of appointed counsel did not deny the defendant due process. The Court decided that the need for appointment of counsel should be determined on a case by case basis. Taking account of Mrs. Lassiter's lack of interest in the proceedings as evidenced by her failure to appear at the custody hearings, or to speak to a lawyer, the Court held that due process did not require the assignment

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14 Id.
15 304 U.S. 458 (1938).
16 Id.
18 Id. at 344.
19 For example, in Douglas v. California, 372 U.S. 353 (1963), the right to appointment of counsel was extended to criminal appeals. Gilbert v. California, 388 U.S. 263 (1967), extended it to post-indictment lineups. In addition, Arger singer v. Hamlin, 407 U.S. 25 (1972), held that persons charged with misdemeanors who had a possibility of imprisonment were also entitled to appointment of counsel.
2. Compelled Uncompensated Legal Assistance

Absent government funding programs, the alternative of mandatory pro bono has been urged. It is these mandatory calls to assist civil litigants without compensation, that have spurred much recent debate. Proponents of a mandatory pro bono obligation argue that there are no constitutional claims for the defendant. Because the Court's decision rested entirely on the due process (i.e., fair trial) argument, there is still a question as to whether the Court would require counsel based on equal protection claims.

Several state and federal courts have interpreted the right to counsel to include assistance when the defendant is already incarcerated due to a previous proceeding and is then sued civilly in a subsequent proceeding. In *Payne v. Superior Court*, the California Supreme Court recognized that the defendant, who was serving time for a previous conviction, was physically unable, due to his imprisonment, to prepare for his defense in a second (this time civil) suit. In *Salas v. Cortez*, this same court refused to limit the right to counsel to those imprisoned. Here the indigent defendant was being sued by the state in a paternity action. It is important to note, however, that in this case as in the criminal cases in which access to counsel was deemed a right, the government, and not a private party, was taking action against the defendant.

Generally, it seems that though the courts are unwilling to recognize an absolute right to counsel in civil cases, they acknowledge such a right when the facts of the case merit. Defendant's physical inability due to incarceration to prepare for a defense or defendant's indigence in parental rights cases brought by the state are two instances where courts have determined that a right to appointed counsel exists. As a consequence, attorneys have been asked and often ordered by the courts to serve, frequently without compensation.

Even though the constitutional right to counsel in civil cases has been developing slowly, increasingly the right to counsel on the part of a civil litigant has been based on statute. However, most legislatures have not correspondingly expanded funding to provide for the counsel now mandated under statute.

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21 *Id.* at 33. In addition to the fact that Lassiter failed to attend the original hearing when her son was adjudged neglected and transferred into state custody, the Court also took into account the fact that she had not contacted or inquired about her son during the two years that he was in foster care. *Id.* at 21, 32-33.

22 For example, in *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976), the Supreme Court of California held that the defendant, who had been jailed after his conviction for receiving stolen property, was constitutionally entitled to appointment of an attorney when he was sued by the victim of the first suit for damages.

23 *Id.*

24 *Id.* at 923, 553 P.2d at 576, 132 Cal. Rptr. at 416.


26 *Id.*
impediments to requiring such service of the bar and that there are policy reasons and historical precedents on which to base the requirement. Opponents, of course, argue that constitutional barriers do exist, that statutory bases are questionable, that inherent judicial authority is unclear, and that policy arguments cut against any such requirement.

The notion that courts have the power to appoint counsel cannot be adequately relied upon to require that counsel be commanded to perform without adequate compensation, as both attorneys and courts question the extent of this statutory or "inherent" authority.

Several courts have repeatedly affirmed their own authority to appoint counsel in civil cases and expect that attorneys will render their services without compensation. Some federal courts have based their authority specifically on 28 U.S.C. § 1915(d) which governs proceedings in forma pauperis. Until recently, the question of whether § 1915(d) merely permits courts to "request" that attorneys represent indigent litigants or whether the statute permits courts to "require" that attorneys serve was answered differently by many courts. For example, the fourth and eighth circuit appellate courts held that § 1915(d) permitted mandatory assignments of counsel, while the seventh and ninth circuits rejected the notion that courts could compel attorneys to serve based on § 1915(d). The issue has finally been resolved by the Supreme Court in Mallard v. United States District Court for the Southern District of Iowa. In this case, Petitioner Mallard, an attorney, was asked under the Federal District Court of Iowa appointment system to litigate a case involving two current inmates and one former inmate who were suing prison officials. After reviewing the case, Mallard filed a motion to withdraw, claiming lack of familiarity with both the legal issues presented and with litigation, and offered to volunteer his services in his area of expertise.

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27 See generally Rosenfeld, supra note 6.
31 28 U.S.C. § 1915(d) (1982) states that "the court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." (emphasis added).
32 Id.
33 Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971); Whisenant v. Yuam, 739 F.2d 160, 163 n.3 (4th Cir. 1984) (mandatory assignment of counsel is permissible); Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982); United States v. 30.64 Acres of Land, 795 F.2d 796, 801-803 (9th Cir. 1986) (mandatory assignment of counsel is impermissible).
35 Id. at 299.
36 Id. Mallard offered his services in bankruptcy and securities law. Id.
tion, however, was denied.\textsuperscript{37} The Court held that 28 U.S.C. § 1915(d) does not authorize a federal court to require an unwilling attorney to represent an indigent litigant.\textsuperscript{38} However, the Court took care to emphasize it did not consider the question of whether the federal court possesses inherent authority to require lawyers to serve, since the U.S. District Court for the Southern District of Iowa never invoked this authority when demanding that Mallard serve.\textsuperscript{39}

Nor did the Supreme Court in \textit{Mallard} decide whether other federal statutes\textsuperscript{40} authorize compulsory assignment, or if they in fact did, whether such assignment would pass constitutional muster.\textsuperscript{41} However, at least one court has denied the authority expressly given it by statute to appoint an attorney. The U.S. District Court for the Northern District of Alabama in \textit{In re Nine Applications for Appointment of Counsel in Title VII Proceedings} \textsuperscript{42} rejected the authority vested in it by statute\textsuperscript{43} to appoint counsel. In this case, nine plaintiffs sought free legal representation in civil suits brought under Title VII of the Civil Rights Act of 1964.\textsuperscript{44} The court rejected the compelled service as void, basing its rejection on the notion that such assignment created an involuntary servitude in violation of the thirteenth amendment.\textsuperscript{45}

Looking beyond statutory power, some courts have held that judges have inherent power to assign counsel, whether such attorneys be compensated or not.\textsuperscript{46} In fact, the Court of Appeals of New York in \textit{In re

\textsuperscript{37} Id.
\textsuperscript{38} Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 298 (1989). The Court engaged in an analysis of the meaning of “request” and found that it was inconsistent with such verbs as “require” and “demand”. \textit{Id.} at 301-308. Its analysis also included a discussion of congressional intent in passing the statute. The Court concluded that due to Congress’ awareness of more stringent state practices which did allow compulsory assignment of attorneys, and due to the differences in the wording of 28 U.S.C. § 1915(c) which imposes mandatory duties on court officers and witnesses and was passed at the same time as 28 U.S.C. § 1915(d), that Congress intended only to ask for attorneys’ services rather than mandate them. \textit{Id.}
\textsuperscript{39} \textit{Id.} at 308 n.8, 310.
\textsuperscript{41} \textit{Id.} at 306 n.6.
\textsuperscript{42} 475 F. Supp. 87 (N.D. Ala. 1979).
\textsuperscript{44} \textit{In re Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87, 87-88 (N.D. Ala. 1979).}
\textsuperscript{45} \textit{Id.} at 88.
\textsuperscript{46} \textit{In re Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975); In re Farrell, 127 Misc. 2d 350, 486 N.Y.S.2d 130 (Sup. Ct. 1985).}
Smiley held that statutes merely "codify the inherent power of the courts." This case dealt with the issue of whether an indigent plaintiff or defendant wife in a divorce action was entitled to appointment of counsel; and if so whether the county was obliged to compensate counsel retained by the women. In addition, some courts, such as the Supreme Court of Tennessee and the Superior Court of New Jersey have not hesitated to find lawyers in contempt for refusing to obey their order to serve. Other courts, such as the Supreme Court of Missouri, find they have no such inherent power to compel service.

Aside from the issue of the court's authority to appoint counsel is the separate matter of a lawyer's ethical duty to accept such assignments absent compensation. Again, courts have been split on the issue as to whether there is an obligation of the profession to respond. United States v. Dillon is one of the most frequently cited cases in this regard. In Dillon an appointed attorney requested reimbursement for representing an indigent prisoner. The Ninth Circuit Court of Appeals held that an attorney has an obligation established by traditions of the profession which requires that s/he represent individuals on court order even without compensation. Dillon, as well as other cases, held that the duty to provide legal assistance to the indigent arises as a condition of occupational licensing.

Cases which oppose the notion that the bar has a duty to render legal service without compensation can also be found. One of the earliest cases which rejected the argument that attorneys should serve because of the special privileges they enjoyed is the case of Webb v. Baird decided in 1854. Webb rejected the notion that any special privileges existed.

47 Smiley, 36 N.Y.2d at 438, 330 N.E.2d at 55, 369 N.Y.S.2d at 91.
48 Id. at 437, 330 N.E.2d at 55, 369 N.Y.S.2d at 90.
50 State ex. rel. Scott v. Roper, 688 S.W.2d 757, 768 (Mo. 1985) (civil suit for alleged medical malpractice).
51 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).
52 Id.
53 Id. at 635. The court relied heavily on the appellant's brief which provided a historical summary of the traditions of the profession in representing the indigent. Portions of the brief, found in the appendix to the case, expounded on the English traditions of providing the indigent with representation. Id. at 636. See Shapiro, supra note 1 (calling into question reliance on this "tradition"). See also United States v. 30.64 Acres of Land, 795 F.2d 796, 800 (9th Cir. 1986).
54 346 F.2d 633, 635 (9th Cir. 1965).
55 State v. Rush, 46 N.J. 399, 410, 217 A.2d 441, 447 (1966) (duty is an incident of the license to practice law).
56 6 Ind. 13 (1854).
57 Id.

The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights. The legal profession having been thus properly stripped of all its odious distinctions . . . the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class.
Some courts, although presupposing that a duty for attorneys to serve exists, have relieved attorneys of their duty to represent the indigent and thus have refused to require lawyers to absorb the full cost of representation of the poor.\(^5\)

Even among courts that find the lawyer has a duty to represent the poor, there is confusion as to whom the attorney owes the obligation. Some courts hold that it is an obligation owed to the courts; others look to the Code of Professional Responsibility to justify a duty owed directly to the indigent; while still others have held that the duty is one owed to the state itself.\(^59\)

Compelling the legal profession to represent the indigent without compensation also raises constitutional questions, which to date have yet to be determined by the Supreme Court.\(^60\) The issues may be broken down into several different concerns. One of the primary objections to a mandatory pro bono service requirement is that it constitutes a "taking" of an attorney's services without just compensation and thus violates the fifth amendment.\(^61\) Another objection raised is that the requirement would violate the thirteenth amendment's prohibition against involuntary servitude.\(^62\) Yet another concern is that such a requirement would discriminate against attorneys as a class, and thus violate the equal protection clause of the fourteenth amendment.\(^63\)

With respect to the fifth amendment "taking" issue, the Dillon\(^64\) decision is once again illustrative of the arguments used to support a mandatory pro bono service requirement. The U.S. Court of Appeals for the Ninth Circuit found that the attorney had no right to compensation for his services because there has been no "taking" when an attorney is compelled to fulfill a preexisting obligation taken on by entering the

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\(^5\) State v. Rush, 46 N.J. 399, 412, 217 A.2d 441, 448 (1966) (court specifically found lawyer owed a duty to the court but refused to place entire burden of providing counsel on lawyer). See also Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972).

\(^59\) In re Smiley, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 58, 369 N.Y.S.2d 87, 94 (1975), and In re Farrell, 127 Misc. 2d 350, 486 N.Y.S.2d 130 (Sup. Ct. 1985) (obliged by Canons to perform duties to the indigent); State v. Rush, 46 N.J. 399, 410, 217 A.2d 441, 447 (1966) (duty is owed to the court in contrast to duty owed to the indigent); In re Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87, 89 (N.D. Ala. 1979) (duty is owed to the state).

\(^60\) It should be noted that one court has dealt squarely with the issue of whether a bar association may condition membership upon a certain amount of pro bono work being done by its members. The court held that it was both permissible and proper for a voluntary bar association to require this commitment of its members. It is unlikely, however, that it would extend this ruling to include all bar associations since this court in the same case also held that an attorney could not be compelled to represent an indigent client. State ex. rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (emphasis added).

\(^61\) U.S. Const. amend. V provides: "nor shall private property be taken for public use, without just compensation."

\(^62\) U.S. Const. amend. XIII, § 1.

\(^63\) U.S. Const. amend. XIV, § 1.

\(^64\) 346 F.2d 633 (9th Cir. 1965).
Finding no "taking", the court did not reach the question of whether the services rendered by the lawyer constituted "property" within the meaning of the term as used in the fifth amendment. Courts which followed the same analysis as the Dillon court include the Supreme Court of New Jersey in *State v. Rush*, and more recently the Ninth Circuit Court of Appeals in *United States v. 30.64 Acres of Land*.

On the other hand, many courts have found arguments for a pro bono requirement unpersuasive. For example, courts holding an unconstitutional "taking" have often based their decision in part on finding that a lawyer's services are a form of property. Those courts have found that the burden has reached the point of becoming a "substantial deprivation of property" and therefore constitutionally infirm.

There is also a line of thought which rejects the idea that the obligation is valid as a licensing requirement of attorneys or that attorneys have a duty to render the service because of the monopoly that such a license grants them. The Supreme Court of Missouri, when discussing the monopoly issue in *State ex. rel. Scott v. Roper*, systematically rejected it substantially on three grounds. First, the court questioned whether a

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66 Id. at 635.
67 Id. at 636.
69 795 F.2d 796 (9th Cir. 1986).
70 The Supreme Court of Utah in *Bedford v. Salt Lake County*, 22 Utah 2d 12, 447 P.2d 193 (1968), stated:

[T]he legislature can no more require a lawyer to represent a client for free than it can compel a physician to treat a sick or injured indigent patient without pay. The legal assistance which an attorney renders to a client is his stock in trade; and in order for the attorney to make a living, he must sell his service.

71 *Knox County Council v. State ex. rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940). The court found that the mere power to license certain occupations does not justify a taking of property.

The Legislature may in the future require the licensing of restaurant operators and grocers, ... If a law should be enacted requiring every person licensed by the state to render services, or furnish the materials of their business, to paupers gratuitously, much difficulty would be found in justifying a decision holding the law unconstitutional as depriving the green grocer or the restaurant operator of his goods, or as depriving the physician, or the barber, or the electrician, or the mechanical engineer of his services, without compensation, while adhering to a rule that licensed attorneys' services may be taken without compensation.

72 688 S.W.2d 757 (Mo. 1985).
73 Id.
monopoly in fact existed since no individual was restrained from arguing his own case.\(^7\) Second, the licensing requirements were for the purpose of protecting the public and assuring minimum standards of competence, not for the purpose of limiting competition and assuring advantage for attorneys.\(^7\) Lastly, the court found that the monopoly argument used to compel service of attorneys must "rest upon some unstated assumption, otherwise members of all occupations licensed by the state could be compelled to render gratuitous service."\(^7\)

In marshalling support for their position, opponents of a mandatory pro bono service requirement frequently point to the thirteenth amendment's prohibition against involuntary servitude. Although this theory has attracted a few followers,\(^7\) the stronger argument is that the thirteenth amendment was designed to abolish slavery and does not contemplate prohibition of the type of mandatory service which is at issue here.\(^7\)

Lastly, the argument is made that compelled service denies attorneys their right to equal protection and discriminates against them as a class by requiring them to pay for the cost of providing legal representation to those who cannot otherwise afford it. Again, cases which have dealt with this issue have resulted in mixed decisions.\(^7\) In *State v. Rush*,\(^7\) the Supreme Court of New Jersey found no constitutional obstacle, equal protection or otherwise, to compelled uncompensated assistance of counsel. But the court did concede that "the burden upon the bar could reach such proportions as to give the due process argument a force it does not

\(^7\) Id. at 765.
\(^7\) Id.
\(^7\) Id.
\(^7\) For example, Rosenfeld points to several decisions which, although they do not deal with the issue of attorney's services, can be analogized to the mandatory pro bono situation. Rosenfeld, *supra* note 6, at 290-94.
\(^7\) In Cunningham v. Superior Court, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (1986), the court stated:

It is a legitimate state function to assist the poor, but under the Constitution, this goal cannot be accomplished at the expense of one particular group of people. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons.

177 Cal. App. 3d at 348, 222 Cal. Rptr. at 861-62 (citation omitted). *But see State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (denying that there is a violation of equal protection when attorneys are asked to represent the poor without compensation).

\(^7\) 46 N.J. 399, 217 A.2d 441 (1966).
now have." Thus, there may be a limit beyond which the courts will not allow the practice to go unchecked.

C. Group Efforts to Develop a Pro Bono Service Requirement

Notwithstanding the confusion surrounding the correctness and appropriateness of a pro bono service requirement, bar association efforts to involve attorneys with pro bono activities have occurred on both a national and local level. Here again, because of the lack of consensus and the absence of a strong unified policy, the efforts have sent a mixed message and thus have met with varying degrees of success.

1. American Bar Association Efforts

Efforts to involve the private bar on a nationwide basis with public service work can be traced to the Canons of Professional Ethics which were adopted by the American Bar Association in 1908. The Canons articulated that every lawyer had an ethical duty to accept assignment as counsel for an indigent prisoner and to forego a fee where appropriate; however, they made no reference to the frequency with which such assignments should be accepted. These Canons were expanded with the adoption of the Code of Professional Responsibility in August, 1969. The Code, eventually adopted by forty-eight states, included the Canons,

81 Id. at 408, 217 A.2d at 446.
82 See also Partain v. Oakley, 159 W.Va. 805, 227 S.E.2d 314 (1976), which held that
where the caseload of appointments is so large as to occupy a substantial amount of the attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law, or where the attorney's costs and out-of-pocket expenses attributable to representing indigent persons charged with crime reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirements must be considered confiscatory and unconstitutional.
Id. at 814, 227 S.E.2d 319. The court further stated that the "present system of appointment is rapidly approaching an unacceptable and potentially unconstitutional state." It therefore ordered that lawyers "may no longer be required to accept appointments as in the past" and gave the Legislature one year in which to define the specifics of a delivery system for legal defense counsel. Id. at 822, 227 S.E.2d at 323.
83 ABA CANONS OF PROFESSIONAL ETHICS (1908).
84 "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf." Id. Canon 4. Canon 12 states in pertinent part that "[a] to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all." Id. Canon 12.
85 G. HAZARD, JR. & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 100 (2d ed. 1988). Two states, California and Illinois, did not adopt the Code of Professional Responsibility; however, they did pass similar rules or a modified version, respectively. Id.
representing the general standards of professional conduct, Ethical Considerations, which are aspirational in nature, and Disciplinary Rules, which are mandatory and which, once adopted by a state legislature or court, subjected an attorney to disciplinary sanctions for infraction.86 The 1969 Code asked attorneys to go beyond representing only the indigent prisoner. It broadened the lawyer's responsibilities by requesting that he assist the legal profession generally in fulfilling its duty to make legal counsel available regardless of the client's ability to pay.87

The ABA continued its activities to promote a pro bono service requirement and in 1975 the ABA House of Delegates approved a resolution which affirmed each attorney's responsibility to provide public interest legal services, defined those services broadly to include poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice, and placed responsibility with the organized bar to assist each lawyer in fulfilling that responsibility.88 This latter requirement gave impetus to the bar's further involvement in defining the lawyers' *pro bono publico* commitment.

It was with these attempts to further define the pro bono responsibility that dissent in the bar first became apparent. In 1979, the American Bar Association Commission on Evaluation of Professional Standards released the first draft of its proposed revisions of the Code of Professional Responsibility.

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87 **Model Code of Professional Responsibility** (1969). It states: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." *Id.* Canon 2. Ethical Consideration (EC) 2-16 states that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." *Id.* EC 2-16. "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer." *Id.* EC 2-25. "The fair administration of justice requires the availability of competent lawyers . . . . Those persons unable to pay for legal services should be provided needed services." *Id.* EC 8-3.

88 The text of the full resolution adopted by the House of Delegates in Montreal in August 1975:

RESOLVED, That it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services;

FURTHER RESOLVED, That public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. Poverty Law: Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
2. Civil Rights Law: Legal representation involving a right of an individual which society has a special interest in protecting.
3. Public Rights Law: Legal representation involving an important right belonging to a significant segment of the public.
4. Charitable Organization Representation: Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.
Responsibility. Unlike the Code, which consisted of Canons, Ethical Considerations and Disciplinary Rules, the revisions consisted solely of Rules of Professional Conduct to be enforced through disciplinary proceedings. This early draft, which was given limited circulation, proposed a pro bono service requirement of forty hours per year or the financial equivalent. Disagreement as to the requirement caused the Commission to issue a revised draft in 1980 which eliminated both the specification of hours and the financial alternative, made the requirement one of service only, and required attorneys to report their compliance on an annual basis.

As a result of the inability to reach a consensus, the Commission in late 1980 returned to the 1969 Code approach making the service requirement purely aspirational in character. Both the mandatory nature of the requirement and the suggestion for annual reporting were omitted. In fact, opposition to a mandatory pro bono standard was so strong that the adoption of the entire set of rules proposed by the Kutak Commission was threatened. The ABA's Model Rules of Professional Conduct are:

5. Administration of Justice: Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

FURTHER RESOLVED, That public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct;

FURTHER RESOLVED, That so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

FURTHER RESOLVED, That the appropriate officials, committees or sections of the American Bar Association are instructed to proceed with the development of proposals to carry out the interest and purpose of the foregoing resolutions.

ABA House of Delegates Res. on Public Interest Legal Services (Aug. 1975) reprinted in Rosenfeld, supra note 6, at 260 n.29.


duct, promulgated in 1983 without any mandatory pro bono, are now in effect in about half of the states.94

More recent efforts by the American Bar Association, however, have at least resulted in the endorsement by the House of Delegates of a recommended pro bono service commitment that each attorney should strive to give annually. Specifically, the ABA House of Delegates, in August, 1988, passed a resolution, without opposition,95 calling for all attorneys to devote fifty hours per year to pro bono and other public service activities that serve those in need, improve the law, the legal system or the legal profession.96 Furthermore, the resolution provided that law firms and corporate employers should credit attorneys with time they spend on pro bono work toward their billable hours requirements, and that law schools should require firms recruiting on campus to provide a copy of their pro bono policy.97

2. Efforts of State and Local Bar Associations and Courts

The inability of the national bar to show a unified front in supporting a pro bono standard inevitably transferred the problem of providing counsel for the poor to the state and local bar associations and courts. Controversy at this level has continued and thus has hindered the establishment of efficient systems to involve individual attorneys in pro bono work. Nevertheless, a few local bar associations and courts have been able to implement pro bono standards.

For example, there are several voluntary bar associations which have made pro bono mandatory with membership. The Orange County Bar Association of Florida, a voluntary bar association, requires all members to become involved with public service activity.98 Attorneys either take two pro bono referrals each year or make an annual financial contribution of $250.99 However, although the pro bono requirement is mandatory, there is no enforcement mechanism; therefore, some attorneys, albeit a small percentage (approximately 3%), refuse to take case referrals or to pay dues.100 Other bar associations with a mandatory pro bono require-

94 G. HAZARD, JR. & D. RHODE, supra note 85, at 100.
96 Id. See also, J. TYRRELL, THE LAW FIRM PRO BONO MANUAL i (1989).
97 Marcotte, supra note 95, at 140.
99 Id.
100 As of October, 1987 the Orange County Bar Association reports that of the 1600 members of the bar, 50 refuse to take case referrals or pay dues as required. Reported by the American Bar Association Private Bar Involvement Project (PBIP) as an addendum to the article referenced in note 98. The PBIP has compiled an information packet on civil mandatory pro bono which may be requested by contacting the PBIP at 750 North Lake Shore Drive, Chicago, Illinois 60611 or at (312) 988-5770.
Court-ordered appointments without compensation, for example, have been challenged across the country. In 1983, when the Fresno, California County Superior Court took steps to compel pro bono representation of indigents in paternity and child support cases, critics of the plan stood ready to take their challenge to the Supreme Court, if necessary. The California court eventually withdrew from its position and abandoned its plans for compelling pro bono representation. Similar challenges to court appointed pro bono representation have occurred in Arkansas, New York, and most recently in Iowa.

101 Graham, Mandatory Pro Bono - The Shape of Things To Come?, A.B.A. J., Dec. 1, 1987, at 62. However, not all associations allow a financial alternative. For example, in contrast to the Orange County Bar in Florida, the Tallahassee Bar Association has rejected a financial alternative and requires attorneys' services alone. Smith, supra note 93, at 731.

102 Id. at 62.

103 Id. at 64.

104 Id.

105 In Arkansas, Joseph M. Erwin, a sole practitioner, requested that he be excused from his assigned case and charged that the court order violated federal rules of civil procedure requiring notice and comment as well as equal protection guarantees. Miskiewicz, Volunteerism Alone Not Enough - Mandatory Pro Bono Won't Disappear, Nat'l L. J., Mar. 23, 1987, at 1, col. 1. No further action was taken by Erwin after the court remedied the procedural defects and rescinded the order affecting him, but he is quoted as saying that other attorneys are ready to pick up where he left off. Graham, supra note 101, at 64. See In re Farrell, 127 Misc. 2d 350, 486 N.Y.S.2d 130 (Sup. Ct. 1985) (holding that attorneys could be compelled to represent indigent clients). See also Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915(d) permits district courts to request attorneys to represent indigent litigants in civil cases but does not permit courts to require such representation).
Debates in bar associations abound. For example, after lengthy debate, the Dade County Bar Association of Florida eventually rejected a proposal for a mandatory pro bono service requirement in 1987.106 Recently the issue has been hotly debated in New York. Since early 1988, when New York State Chief Judge Sol Wachtler first appointed the Committee to Improve the Availability of Legal Services (the Marrero Committee), critics and proponents of mandatory pro bono have wrestled with issues of the indigent's need for counsel, the constitutionality of compelling attorneys to represent the poor without compensation, and appropriate delivery systems.107 The initial review by the Marrero Committee alone lasted an entire year and ended with the submission of preliminary proposals in the spring of 1989.108 The period of comment which followed lasted yet another year with a final decision not expected until the first quarter of 1990, fully two years after the initial inquiry was made.109 Other states which have considered, or are currently considering, a mandatory pro bono service requirement include Hawaii, North Dakota, Maryland, and Arizona.110

It is important to note that bar associations and the courts are not the only groups involved in the pro bono debate. Both the Oregon and Washington state legislatures have considered, but failed to pass, proposals which would have made service to the poor by attorneys a requirement to practice in the state.111

D. International Developments

American treatment of the problem of providing legal representation for the indigent, and its corresponding dependence on pro bono activity, is in distinct contrast to the development of solutions to the problem in the remainder of most of the western world. Although many western European nations have in the past relied on charitable work by attorneys to represent poor clients, the concept of charity has slowly been abandoned in favor of comprehensive, government-financed programs to meet the need.112

For example, although proponents of a mandatory pro bono system point to the English tradition, which as mentioned previously is in itself somewhat questionable,113 they fail to recognize that England abandoned

106 Graham, supra note 101, at 62.
107 COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, 1 (July 18, 1989).
108 Id.
110 PBIP Fact Sheet Summary, Mandatory Pro Bono. See supra note 100.
111 Graham, supra note 101, at 62. The Oregon proposal would have required both attorneys and physicians with at least five years experience to provide 200 hours of professional services in criminal cases every six years at no cost to indigent persons in need. H.R., 2005, 64th Leg., 1987 Or.
113 See supra notes 1-7 and corresponding text.
the practice of compelling attorneys to take on pro bono work without fee in the middle of the twentieth century. In 1949, England passed the Legal Aid and Advice Act, which provided full compensation from government funds for lawyers' services provided to a qualifying poor client. In France, as in the United States, the right to counsel has been recognized for some time. Although until 1972 there was no provision for remuneration of attorneys who took on indigent cases, legislation passed in that year provided for such compensation to attorneys. By contrast, Germany, although it was later than either England or France in recognizing the poor's right to counsel in civil cases, was the first to give meaning to that right by enacting legislation, in 1923, which provided for compensation of attorneys.

Northern European countries which assured a right to counsel by promulgating laws to compensate their lawyers included Norway in 1915, Sweden in 1919, Denmark in 1969, and Belgium and the Netherlands in 1957. Government supported programs also exist in countries in southern and central Europe. Spain has guaranteed a right to counsel since 1855, and since 1975 has provided compensation for lawyers representing the indigent. Although Austria does not provide direct compensation to lawyers for representing poor clients, the government does make payments to a bar association pension fund to compensate for the services. Only Italy and Portugal continue a system of requiring charitable services of attorneys to meet the needs of the indigent for counsel. Indeed, a substantial number of other nations in the western world have

115 Johnson, The Right to Counsel in Civil Cases: An International Perspective, 19 Loy. L.A.L. Rev. 341, 343 (1985). In 1851 the French legislature enacted the Law on Legal Aid, which established that free lawyers should be provided for civil litigants with insufficient resources. Id.  
116 Id. The Law of Jan. 3, 1972, No.72-11, J.O. (Jan. 5, 1972) provided for government payment of lawyers representing the indigent. Id. at 343 n.10.  
117 The right to counsel in civil cases in Germany was created in 1877. In 1919 an amendment to the law first provided that attorneys be compensated for their actual disbursements, while later amendments in 1923 provided that they be compensated for their fees as well. M. CAPELLETTI, J. GORDLEY & E. JOHNSON, supra note 112, at 48 n.148.  
118 Johnson, supra note 115, at 344.  
119 Id.  
120 Id. at 344-45. In Denmark, the right to counsel compensated by the state is made available to the middle class as well as the poor. Id. at 345 n.15.  
121 Id. at 345.  
123 Id. at 346 & n.20.  
124 Id. at 346 & n.19.  
125 Id. at 346 nn.21, 23.
followed suit and not only guarantee the indigent a right to counsel, but also make provision for that right by guaranteeing that counsel be compensated by the government for services rendered. 126

III. THE PROBLEM OF UNMET CIVIL LEGAL NEEDS

Although there is disagreement as to the gravity and scope of the unmet legal needs of the poor, 127 no one denies that the needs of the indigent are not being fully satisfied by the current legal system.

A. The Legal Needs of the Indigent

Several recent studies have detailed both quantitatively and qualitatively the specific legal needs of the poor. On a national basis, it is estimated that the poor have approximately twenty million legal problems, 93.2% of which go unserved. 128 Although this is in itself a staggering figure, several studies have gone further in defining the need by individual household, thus making the figures even more meaningful. Nine surveys done by various groups throughout the nation estimated that a poor household is faced with at least one to as many as six legal problems annually. 129 On an even more personal level, this suggests that individuals encounter, on average, from one to two legal problems each year, and, as indicated above, most are not satisfied. 130

Legal needs in the civil area which go unmet range in variety from

126 During the 1960's and 1970's New Zealand, most of the Australian states, and most Canadian provinces enacted legislation to assure that the poor were provided with compensated attorneys. Id. at 347-348.
127 See COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, supra note 107, at 69 (statement by Sol Neil Corbin disagreeing with the Committee that empirical evidence supported their conclusion that a "crisis" exists).
128 Born, Serving the Poor, A.B.A. J., Mar. 1, 1988, at 144. Specifically, the study identified 19,792,000 legal problems.
130 Id. Specifically, the studies found that individuals encounter between .49 to 2.35 legal problems annually. Conversion from incidence of civil legal problems per household to incidence of civil legal problems per poor person is accomplished using 2.34 persons per household. Id. Following is only a summary of the survey results. More specific detail as to survey population and method of survey is available in the cited appendix.
housing to immigration problems. 131 Although securing and maintaining decent housing is generally the most common and most serious of the problems faced by the indigent, this is followed closely by problems the poor have in securing public benefits, consumer problems (such as consumer fraud and debt collection problems), health problems, problems encountered with utilities, family disputes, and discrimination. 132 Unless legal counsel is made available, the indigent will be ill-equipped to face such complex and devastating problems as wrongful eviction, arbitrary and inadequate benefits distribution, and denial of health care.

<table>
<thead>
<tr>
<th>Study</th>
<th>Date</th>
<th>Location</th>
<th>Sample Size</th>
<th>Per Household</th>
<th>Per Person</th>
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<td>Boston Bar Association</td>
<td>1975</td>
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<td>1979</td>
<td>Jacksonville, Florida</td>
<td>151</td>
<td>2.87</td>
<td>1.20</td>
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<td>North Carolina Legal Services</td>
<td>1979</td>
<td>N.C.</td>
<td>434</td>
<td>1.80</td>
<td>.77</td>
</tr>
<tr>
<td>Virginia Legal Aid Society</td>
<td>1979</td>
<td>South Central Virginia</td>
<td>687</td>
<td>2.50</td>
<td>1.07</td>
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<tr>
<td>Western Kentucky Legal</td>
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<td>24 Kentucky Counties</td>
<td>295</td>
<td>1.30</td>
<td>.56</td>
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<tr>
<td>Nat'l Soc. Science &amp; Law</td>
<td>1980</td>
<td>Providence, Rhode Island</td>
<td>150</td>
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<td>North. Va. Legal Services</td>
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<td>1,353</td>
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<td>North Central Texas Legal</td>
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<td>5 North Central Texas counties</td>
<td>149</td>
<td>3.05</td>
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<tr>
<td>Legal Aid Foundation of Colorado</td>
<td>1986</td>
<td>Colorado</td>
<td>500</td>
<td>3.72</td>
<td>1.70</td>
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131 The draft of The New York Legal Needs Study, reprinted in Appendix 4 of the New York State Bar Association, Report of the Special Committee to Review the Proposed Plan for Mandatory Pro Bono Service (Oct. 16, 1989). (The draft was being finalized while the Bar Association Report was being written).

132 Id. Specifics of the study include the following data:

Housing - over 34% of those surveyed reported having at least one such legal problem and nearly 36% of those who had a housing problem labelled it as their most serious legal problem.

Public benefits - 22% of the respondents reported having at least one such problem. 13.7% of the respondents identified it as their most serious.

Consumer problems - 15.4% of those surveyed indicated at least one unmet legal need in this area, and 7% of these respondents said it was their most serious problem.

Health - 15% had at least one unmet health related legal need, while 11.8% said it was their most serious problem.
B. Methods for Meeting the Need

Although various methods of meeting the poor's need for legal representation have been advanced, they have failed to adequately satisfy the growing need. Current forms of providing counsel for the indigent include both private and government funding of legal aid, storefront law offices or legal clinics, prepaid legal insurance, contingent or reduced fee legal services and, of course, pro bono activities on the part of the organized bar and individual attorneys. One trend is evident. While attorney and bar association involvement in the pro bono solution seems to be garnering more attention, government support is definitely on the decline. For example, beginning in 1984 the Reagan administration proposed that the Legal Services Corporation, a primary source of funding for state and local agencies providing legal representation to the poor, not be reauthorized and that no funding be provided to it.

As the discussion in the above section indicates, pro bono activities are currently receiving much publicity as a means of providing the poor with needed legal services. The attention pro bono has been receiving has no doubt increased awareness and prompted some lawyers to donate their time. But the response is still inadequate to meet the need.

United States government involvement in finding a solution to the poor's need for counsel has a long and controversial history. The Economic Opportunity Act of 1964, which created the Office of Economic Opportunity (OEO), and within it the Community Action Program (CAP), provided the first move toward federal funding of legal services for the indigent. In the following year, the Legal Services Program (LSP) was

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133 Of the nearly 20 million legal problems the poor encounter annually, 6.1% are dealt with by Legal Services Corporation attorneys, while only 0.7% are met by private bar response. Born, supra note 128, at 144.
134 Between 1981 and 1987 the number of pro bono programs throughout the country rose from 50 to 450. They operate in all 50 states as well as Washington, D.C. and Puerto Rico. Miskiewicz, supra note 105, at 1, col. 1.
136 The ABA Private Bar Involvement Project estimates approximately 88,000 attorneys were involved in rendering legal aid to the poor in 1986, while by 1988 the number had reached 100,000. Miskiewicz, supra note 105, at 1, col. 1; Mandatory Pro Bono, A.B.A. J., May 1, 1988, at 46. Also, fully 95% of today's pro bono programs did not exist before 1982. Id. at 47.
137 In 1985 the ABA estimated that 10.7% of licensed attorneys in the United States participated in formal pro bono programs. However, by 1987 the figure had increased to 13.8%. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC THROUGH THE PRIVATE BAR INVOLVEMENT PROJECT, DIRECTORY OF PRIVATE BAR INVOLVEMENT PROGRAMS, 199, 212 (1987).
established as a part of the CAP, which was made responsible for administering the program. By 1967, the LSP's budget was at $40 million.

From the beginning, however, the Legal Services Program was not without opposition. Federal, state and local government bodies, as well as some private interest groups felt threatened by the litigation that the LSP was pursuing. For example, the California Rural Legal Assistance (CRLA), an OEO organization, sponsored several politically volatile suits which aroused so much hostility and so galvanized critics that the existence of the entire LSP was actually threatened.

As political attacks against the LSP mounted, supporters of providing legal services for the poor urged that the LSP cut itself off from the OEO and organize as a separate corporation, but still remain dependent on federal funding. In 1974, the Legal Services Corporation (LSC) was established as a "private nonmembership nonprofit corporation . . . for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."

Even as a separate corporation, however, the LSC has been subject to the political and economic realities of government funding. Between 1975 and 1980, the LSC budget appropriation rose at first from $71 million to $300 million. Increases in funding allowed the LSC to reach its short term goal of providing the equivalent of two attorneys for every 10,000 poor people. However, in 1981, the Reagan administration announced that it proposed to eliminate the LSC and consequently made no allotment for funds in its proposed fiscal year budget for 1982. 

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141 For example, Morris v. Williams, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967), a CRLA sponsored case, forced California to restore $210 million in cutbacks made in the state's Medi-Cal Program. The litigation had important political consequences for both CRLA and the LSP, and possibly the later created Legal Services Corporation because it kept Governor Reagan from fulfilling a campaign promise to balance the state budget. George, supra note 139, at 683-87.
142 In 1973, Howard Phillips, appointed by President Nixon as acting OEO Director, began issuing directives which were aimed at disbanding the OEO anti-poverty programs, including the LSP. Because President Nixon never submitted his name to the Senate for confirmation, many of the actions Phillips took as acting director were deemed void. Special Project: The Legal Services Corporation: Past, Present, and Future?, supra note 138, at 593, 602 n.97.
143 42 U.S.C. § 2996b(a) (1982).
145 Id.
146 Id. at 610-11.
Since then, the LSC has been plagued by the inability to increase its funding. While the national expenditure on services for lawyers in civil cases is at approximately $60 billion annually,147 the LSC's budget remains frozen at approximately $300 million per year.148 In other words, less than one half of one percent of attorneys' fees is spent on representation for the indigent, who make up approximately ten percent of the population.149 The Gramm-Rudman-Hollings budget reduction act of 1986 caused a further reduction of $14.3 million in federal funding.150 By 1987 it was estimated that the lack of funding had caused further deterioration to the extent that there existed only 1.6 attorneys for every 10,000 persons below the poverty level.151 Correspondingly, the number of lawyers employed by the Legal Services Corporation fell from 6,500 in 1980 to 4,500 in 1987,152 while those in poverty rose from 6.2 to 7 million people.153

Even the government's actions with respect to their support of funding for indigent access to legal services send a confusing message to those who must eventually provide the service. The following comments from a brief written in support of increased funding imply that the evisceration of the LSC due to lack of funding could quite possibly have the effect of dampening the private bar's commitment to pro bono services. Such a step would be seen, and not incorrectly, as a national decision that legal services for the poor are not all that important, or merely reflect "liberal" political tenets no longer in vogue. If the taxpayers and their elected representatives belittle the importance of providing legal services for the poor, it would be difficult for lawyers to view themselves as duty bound to contribute their own time and services toward this goal.154

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149 Bureau of the Census, Department of Commerce, supra note 147, at 455 (Table No. 739). Families below poverty level between the years 1980 and 1987 are as follows: 1980 - 10.3%, 1981 - 11.2%, 1982 - 12.2%, 1983 - 12.4%, 1984 - 11.6%, 1985 - 11.4%, 1986 - 10.9%, 1987 - 10.8%. Id.

150 Miskiewicz, supra note 105, at 8, col. 3.

151 Id.

152 Poor Have a Right to Their Day in Court, USA Today, Jan. 14, 1988, at 8A, col. 1.

153 Bureau of the Census, Department of Commerce, supra note 147, at 455 (Table No. 739).

IV. SUGGESTIONS FOR A WORKABLE PROGRAM

Given the desperate need for legal representation, a solution must be found. The legal profession can be a part of that solution on many different fronts: by bringing about legislation to better fund legal aid programs, by encouraging private fund raising efforts to fill the need, and by encouraging pro bono work. What is needed is a comprehensive action plan which will integrate and effect continuous supervision and management of all possible facets of such a program. The following are the suggested components for achieving such an integrated plan.

A. Government Funding

Seeking increased government commitment to what is in effect a social welfare problem, is essential if the poor are to be assured of adequate legal assistance. Programs suggested by groups researching the problem often include increased government funding, but few offer a constructive plan to make that happen. One group which has gone beyond merely recognizing that government funding should be increased has suggested that the bar should take the responsibility of educating the media, the public, and government leaders about the extent and nature of unmet needs of the poor so that their support for increased funding may be elicited.

In addition to educating individuals about the needs of the poor, it will also be critical to dispel any skepticism that might surround a plan proposed by the bar to increase funding for legal services, i.e., to dispel the view that the proposal was just another means for lawyers to make more money. Therefore, the education should also emphasize lawyers’ contributions, such as their private fund-raising efforts and pro bono work.

The education of the public, media, and legislators will also be necessary to overcome doubts that a government program can efficiently achieve the goal of bringing legal services to the poor. Even proponents of a mandatory pro bono service requirement recognize that a “better solution would be a quick, large infusion of federal, state, and municipal funds to provide civil legal services equal to the demand.”

In order for the general public to recognize that government funding is the best answer to providing legal services to the poor, it will be important for those lobbying for increased funding to point to the positive

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155 For example, the Marrero Report merely “recommends increased public spending” at all levels of government but does not contemplate how this is to be achieved. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, supra note 107, at 9.

156 NEW YORK STATE BAR ASSOCIATION, supra note 131, at 14.

157 COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, supra note 107, at 20.
results of state and federally funded programs designed to bring services to the poor at a minimum of cost. For example, the Legal Services Corporation spends approximately ninety-five percent of its budgeted dollars directly on aiding the poor, while only five percent is spent for management and administration of the organization.\textsuperscript{158} Also, state support for legal aid can be shown to benefit not only the client, but also indirectly, the state treasury. Several programs in New York designed to fund attorney fees in child support, AIDS, and housing proceedings have actually succeeded in saving the state tax dollars by exacting payment for services from the responsible parties and thus relieving the government of providing support in the form of ADC, Medicaid, or state supported housing.\textsuperscript{159}

In addition to pointing out the reasonable cost involved in federal and state funding of legal services, the greater efficiency of government staff attorneys versus a pro bono system of attorneys should be emphasized. A government staff attorney concentrating exclusively on the problems of the poor will develop an effectiveness in dealing with cases which the private bar, even through additional training, is unlikely to achieve. Some areas of poverty law, such as needs-based government benefit programs, can involve complex statutes, regulations and administrative and bureaucratic processes. No doubt these could be deciphered by a volunteer attorney with time spent researching the problem, but often the time available is minimal since the needs of the poor often arise in emergency situations where time is of the essence.\textsuperscript{160} In addition, by immersing themselves in one area of law, staff attorneys will be better able than volunteers to recognize systemic and recurring problems and thus respond with appropriate solutions.\textsuperscript{161}

Of course, government funded legal services programs offer no panaceas. The government staff attorney is typically young and inexperienced and therefore less capable of protecting his/her clients against such bu-

\textsuperscript{158} In 1979, the LSC reported that it spent only 2.4\% of its total legal services budget for management and administration costs, while 94.3\% was spent on field programs to provide legal aid, with the remainder going to program support and field monitoring. \textit{Special Project: The Legal Services Corporation: Past, Present, and Future?}, supra note 138, at 615 (citing LSC ANN. REP. 28 (1979)).

\textsuperscript{159} The New York child support project pursues cases where the failure to receive child support has forced or may force the custodial parent to rely on government aid. Thus by exacting support from the responsible parent, the project saves government funds such as ADC from being used.

The New York State Department of Health AIDS project helps to transfer the cost of supporting AIDS patients from the state by enforcing private insurance contracts and thus delaying or avoiding reliance on the state's funds.

The homelessness prevention project funded by the State Department of Social Services aids clients in housing proceedings in order to check homelessness before it starts, and its consequential costs to the state. \textit{New York State Bar Association}, supra note 131, at 19.

\textsuperscript{160} \textit{Id.} at 15.

\textsuperscript{161} \textit{Id.} at 17.
reaucratic imperatives as the pressure to settle. In addition, heavy case loads and a high turnover rate among legal aid attorneys result in very little training or supervision to support and develop the inexperienced attorney. On balance, though, legal services attorneys provide a valuable service.

Finally, in order to place responsibility for providing legal services for the indigent firmly in the hands of the government, it will be necessary for the bar to rally support for the idea that lack of such legal services will have the ultimate effect of undermining the legal system. The public must be made to understand that

[r]espect for the legal system is a two-way street. A citizen’s respect for the system necessarily requires a perception that the system is fair, and essential to that perception is that the citizen enjoy effective access to it. If the public does not afford the poor such access, it can hardly expect the poor to respect the legal system . . . . Affording all persons, regardless of their means, access to legal services is an essential element of our social compact as a society of laws.

B. Contributions by Attorneys and Law Firms

Both financial and service contributions by individual attorneys and law firms should be encouraged by the bar as a factor in alleviating the poor’s need for legal services. In light of the uncertain legal status of mandatory pro bono plans, it seems that a better strategy would be for opponents and proponents of a mandatory plan to set aside their disagreements, and unite to produce a voluntary plan which would truly make a difference in making legal services accessible to the poor.

A recent example of such a strategy is the program initiated in Maryland in the fall of 1989. Although they came close to endorsing mandatory pro bono, the Standing Committee on Rules of Practice and Procedure instead recommended that the Maryland Court of Appeals

164 Id. at 431-32.
allow the Maryland State Bar Association to mount a statewide campaign to increase voluntary pro bono.\textsuperscript{166} The plan, which includes a mass mailing to all Maryland attorneys, glitzy celebrity advertising, and heavy media exposure, was expected to recruit about one half of the state's attorneys for pro bono work.\textsuperscript{167} The mailing, which corresponded with "People's Pro Bono Week" was so well received that, within two months, over fifty percent of attorneys had already responded to the survey and ninety percent of those responding had indicated a willingness to volunteer for pro bono service.\textsuperscript{168}

1. Pro Bono

Because attorneys and law firms are uniquely qualified to render legal assistance, their commitment to pro bono work is an essential ingredient in giving the poor better access to the legal system. In order to evoke the greatest response, the bar must take two basic steps. First, it must emphasize that pro bono work is an obligation to be taken seriously, and though not legally compelled, is to be expected of every attorney and thus supported by law firms. Second, the bar must assure that once an attorney has shown a willingness to take on the obligation, the ensuing process must be kept as simple as possible and facilitate that willingness to serve.

The ABA has already taken an important step by endorsing a fifty hour per year standard for broadly defined pro bono service.\textsuperscript{169} It seems that the broader the definition, the more likely it is that attorneys will be able to find themselves a niche in which to volunteer their services, but it is also less likely that their services will always or even primarily be aimed at delivering services to those in greatest need, the poor. Recognizing this fact, it seems that the standard endorsed by the bar should be twofold. Namely, one standard should be established for services donated exclusively to meeting the urgent needs of the indigent, while another standard should be set for volunteer services in other areas such as for nonprofit organizations, which also depend on donated time. For example, a lawyer could be said to have met the obligation of pro bono work, if s/he spent

\textsuperscript{166} Garten, Maryland People's Pro Bono Campaign Seeks to Establish Justice for All, PBI EXCHANGE, Winter 1990, at 10. The recommendation that pro bono become mandatory is thus deferred for another two years while the MSBA sponsors the campaign and evaluates the results. Id. at 10, 18.

\textsuperscript{167} Id. at 25. "L.A. Law's" Richard Dysart was featured in the 30-second public service ad designed to recruit attorneys for pro bono work. Id.

\textsuperscript{168} Surveys were mailed to the 19,000 attorneys authorized to practice in Maryland during the week of October 16-22, 1990. By December 19, 1990, surveys had already been received from 8186 lawyers. Id. at 18-20. Also, more than 5000 of those responding were willing to be trained in new areas in order to better accommodate the need of the indigent. Maryland Lawyers Provide Millions, PBI EXCHANGE, Winter 1990, at 20.

\textsuperscript{169} Marcotte, supra note 95, at 140, J. TYRRELL, supra note 96, at i. See supra notes 95-97 and corresponding text.
either fifteen to thirty hours of her or his time per year helping the indigent on cases or twenty-five to fifty hours per year donating legal expertise in other areas such as law reform efforts, the administration of justice, assisting charities such as United Way Services, or local cultural organizations.\textsuperscript{170}

Aside from supporting a standard for the pro bono obligation, the organized bar also needs to assure that volunteering services can be easily accomplished. The New York State Bar Association terms this "removal of barriers to volunteerism."\textsuperscript{171} Because poverty law requires a certain expertise, training needs to be made available to those attorneys wishing to donate their time. Another barrier which needs to be dealt with is that of malpractice insurance. The New York State Bar report has suggested providing for insurance with such mechanisms as an indemnification pool or blanket professional liability insurance to cover attorneys while working on pro bono matters.\textsuperscript{172} The third barrier to volunteerism that the New York report identifies and suggests be eliminated through special funding is the payment of out-of-pocket costs.\textsuperscript{173} One incentive that should be considered is to offer attorneys state tax credits for hours spent on pro bono cases.\textsuperscript{174}

In addition to eliminating these external "barriers to volunteerism", the bar needs to stress that barriers inherent in the law firm environment also be removed. For example, pro bono hours should be credited towards the billable hour mark which a firm requires that its attorneys meet.\textsuperscript{175} Also, reviewing pro bono work along with other billable work during annual evaluations of associates and rewarding pro bono work with bonuses would reinforce the message that pro bono is not only accepted, but expected.\textsuperscript{176} Firms can be supportive of pro bono in other ways as well. For example, they can involve attorneys by establishing separate departments for community service and facilitate associate rotation through those areas, or arrange for attorneys to work outside the firm with neigh-

\textsuperscript{170} Formulae for a combination of services donated strictly for the poor and services donated to other eligible causes could be developed. Because cases vary in the amount of legal assistance necessary for completion, it seems that a guideline setting forth hours may be more appropriate. Also, a standard using hours will recognize that consultation with a client, not just the handling of a case, is a valuable service.

\textsuperscript{171} \textit{NEW YORK STATE BAR ASSOCIATION, supra} note 131, at 27-29 (1989).

\textsuperscript{172} \textit{Id.} at 30.

\textsuperscript{173} \textit{Id.} at 28.

\textsuperscript{174} \textit{J. TYRRELL, supra} note 96, at 14. Virginia’s Neighborhood Assistance Act, effective in October, 1988, provides a tax credit of up to $175,000 annually for legal services contributions by attorneys to the identified community programs. Attorneys may take a tax credit for 50% of their total contribution. \textit{Id.} at 14, 95.

\textsuperscript{175} \textit{Id.} at 13.

\textsuperscript{176} \textit{Id.} One firm, Jones, Waldo, Holbrook & McDonough sets aside a portion of the aggregate amount of yearly bonuses for those who perform pro bono services. \textit{Id.}
The latter can, in turn, benefit the law firm, by providing the young lawyers with training not readily available in his/her ordinary practice. Also, pro bono by attorneys can generate pro bono by others. For example, Operation Uplift, a program being adopted by law firms around the country, asks clients who have been represented by an attorney, pro bono, to volunteer the same amount of hours to some type of community service as repayment for the legal services rendered.

2. Monetary and Fund-Raising Contributions

Just because attorneys are uniquely qualified to fill the void of legal services for the poor does not mean that their contribution to solving the problem need be limited to performing those services themselves. In fact, as the above discussion regarding government funding and the efficiency of the LSC indicates, an attorney may prefer to contribute funds, and the indigent may thus be better served if a specialist in poverty law is assigned to the case, rather than a lawyer ill-equipped to take on the case. Promoting efficiency in the system seems to be one of the best reasons to support a monetary alternative to the pro bono obligation.

Firms can take the lead in fund-raising and in making monetary contributions to aid in expanding legal services to the poor. One example, currently being used by the New York law firm of White and Case, is to offer a bonus to new hires if they, in return, agree to work for a public service agency for at least one year.

Encouraging either pro bono work or the payment of a monetary alternative, however, should not be the end of the bar's involvement. Both on a national and local level, funds can be raised to provide legal aid by soliciting donations from individuals and corporations. This solicitation should not be confined to attorneys or law firms, since as mentioned earlier, the problem is, or at least should be, one for which all members of society have a responsibility. Attorneys and law firms, however, should play the major role in implementing any fund-raising drives, whether they take the form of mail or phone campaigns. Fund-raisers should not overlook bequests or “memberships” as a source. And of course, there

\[\text{Huizinga, Private Attorneys, Public Commitments: The State of Law Firm Pro Bono, PBI EXCHANGE, Fall 1989, at 4, 5.}\]
\[\text{See infra note 180.}\]
\[\text{Money for Public Service Work: New York Firm Offers Bonus, PBI EXCHANGE, Fall 1999, at 25. (The bonus of $10,000 will be given in installments while the graduate is employed by the public agency).}\]
\[\text{The fund-raising suggestions which follow in the text were garnered from an interview with John Szucs, President of the Kidney Foundation of Ohio, in Cleveland, Ohio (Jan. 8, 1990).}\]
\[\text{Id. For example, the Kidney Foundation allows for a continuum of donations. Special labels denoting various levels of giving such as “life member” or “sustaining member” are valuable devices to spur donations.}\]
are special events which, if handled properly, can not only serve to increase revenues but also, by increasing publicity, gather the support of a wider audience.\textsuperscript{183}

\subsection*{C. Law School and Student Involvement}

Another way in which legal services for the poor can be increased is through law school and student involvement in pro bono, clinical programs, and fund-raising. While as many as forty percent\textsuperscript{184} of incoming students are interested in public service legal careers, only three percent\textsuperscript{185} pursue those careers upon graduation.\textsuperscript{186} Obviously, law schools need to take a more active part in fostering ideas and attitudes of professional and societal responsibility in their students.\textsuperscript{187}

Some universities are doing just that. Tulane University, Florida State University, the University of Pennsylvania, and Valparaiso University have adopted mandatory pro bono plans which require that students provide free legal services as a condition of graduation.\textsuperscript{188} The number of hours required range from twenty hours (nine semester hours) at Tulane University to seventy hours at the University of Pennsylvania.\textsuperscript{189} Also serving to "raise the profile of pro bono" is the "Just Ask" program.\textsuperscript{190} Originating in California, the program systematically, by letter-writing campaigns and information sharing, encourages both students and law firms to discuss pro bono opportunities during the interview process.\textsuperscript{191}

\textsuperscript{183} \textit{Id}. The Kidney Foundation has successfully held black-tie galas and annual golf outings, and has become known in Cleveland for its "Chili Cook-off," all as part of its fund-raising mission.

\textsuperscript{184} Anderson, \textit{Whittling Away at Debts While Helping the Poor}, PBI EXCHANGE, Summer 1989, at 3.

\textsuperscript{185} \textit{Id}.

\textsuperscript{186} The National Association for Law Placement and Salary Survey reports the following for types of employment for the class of 1987: 63.5\% - Private Practice, 12.5\% - Judicial Clerkship, 12.1\% - Government, 7.9\% - Business and Industry, 3\% - Public Interest, 1\% - Academic. Huizinga, \textit{Where Have All the Students Gone?}, PBI EXCHANGE, Summer 1989, at 2, 10.


\textsuperscript{188} Harold, \textit{Shouldn't there be a response to mandatory law school pro bono other than "Do I have to?"}, 18 \textit{STUDENT LAWYER}, Jan. 9, 1990, at 11.

\textsuperscript{189} Huizinga, \textit{Law Students Learn from Hands-on Pro Bono Experiences}, PBI EXCHANGE, Summer 1989, at 14. At Tulane, which was the first university to adopt a mandatory pro bono plan in September 1987, every student must complete a total of 20 hours of pro bono work in either their second or third year. At Florida State University, the policy, which goes into effect in September 1990, mirrors that of Tulane's except that students will certify themselves through an honor system. The University of Pennsylvania requires that students donate 35 hours of pro bono work during each of their second and third years of law school. Students were first affected here in the fall of 1989. \textit{Id}. (emphasis added).

\textsuperscript{190} Huizinga, \textit{supra} note 186, at 10.

\textsuperscript{191} \textit{Id}. Universities which have followed California's lead and initiated "Just Ask" programs are: the University of Chicago, the University of Michigan, Harvard, Yale, Columbia, and the University of Maryland.
Clinical programs which expose students to clients and issues they would not otherwise likely encounter should also be expanded as should education in poverty law issues. Law schools must "make clear that all lawyers, whether they work for the Legal Aid Society or a major corporate law firm have the opportunities and responsibilities to do more than represent clients."  

In addition, the academic community can help make public interest work more financially feasible for those interested. For example, university sponsored Loan Repayment Assistance Programs (LRAPs) allow graduates to defer or eliminate a portion of educational loans while working in qualifying employment. In addition, students can become involved in fund-raising for grants which are awarded to those interested in pursuing public interest work. Annually, $600,000 is raised for 350 such grants, which provide the funding for law students to work in over 100 legal services offices or to pursue public interest research.

V. CONCLUSION

It is beyond question that the vast majority of legal needs of the indigent continue to go unmet. Although judicial recognition of the right to assistance of counsel has been expanding, increased funding by federal and state governments to meet the increasing need for legal service has not been forthcoming. Consequently, the legal community will increasingly be called upon to fill the void left by inadequate government response. This is evident in the compelling of uncompensated legal assistance by some courts, as well as in the efforts on the part of bar associations and courts to develop a standard pro bono service requirement.

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192 New York State Bar Association, supra note 131, at 36.
193 Redlich, supra note 187, at S-18, col. 1.
194 Anderson, supra note 184, at 15. Twenty-two law schools (see article for a complete listing) offer some form of LRAP. Qualifying employment is usually defined as work for the government, legal services or a nonprofit organization. Also, some programs phase in total loan forgiveness after a certain number of years spent in public interest employment. Id.
195 Caudell-Feagan, Students Work Toward Granting Public Service Needs, PBI Exchange, Summer 1989, at 11. In 1989, 20 law firms throughout the country participated in the National Association of Public Interest Law's "Public Service Challenge". The 'Challenge' succeeded in raising funds to supplement the student-generated grants to the extent that an additional 40 grants will be made available. Id.
Although the legal profession can be a great catalyst in seeking solutions to the problem, imposing a mandatory pro bono service requirement on all members of the profession seems to be an extreme and perhaps imprudent choice as a solution. Relying solely on the establishment of mandatory pro bono plans, in the face of resistance within the legal community as well as the constitutional uncertainty of such plans, would be akin to putting all our eggs in one basket. A better solution to the problem would be to address the problem on multiple fronts and develop those sources of legal aid as yet untapped or not fully developed. As suggested, the legal community needs to take a more active part in mobilizing itself, the legislatures and the public in order to garner the monetary and pro bono support necessary to bring effective legal services to the indigent.

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