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Recommended Citation
Esther F. Lardent, Mandatory Pro Bono in Civil Cases: the Wrong Answer to the Right Question: Against, 49 Md. L. Rev. 78 (1990)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol49/iss1/6

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MANDATORY PRO BONO IN CIVIL CASES: THE WRONG ANSWER TO THE RIGHT QUESTION

ESTHER F. LARDENT*

"Those who cannot remember the past are condemned to repeat it."¹

George Santayana

"You have a pretty good case, Mr. Pitkin. How much justice can you afford?"²

Lawyer to Potential Client in New Yorker cartoon

INTRODUCTION

During the past decade, there has been a resurgence of interest in mandating public service on the part of attorneys.³ The debate around this issue has been vigorous and prolonged. Rarely, however, has that debate incorporated a clear understanding of the nature of and rationale for mandated attorney service, a realistic assessment of the impact and feasibility of such service, or an analysis of past efforts to impose such a service requirement. A comprehensive review of mandatory pro bono proposals introduced during the 1970s and 1980s, including the most recent proposal in Maryland, reveals the ultimate futility of this approach. This article will not address the constitutional issues often raised in discussions of mandatory attorney service in the civil context—issues such as the power of the courts to appoint uncompensated counsel, the obligations of the lawyer as an officer of the court, the assertion that mandated service is an impermissible taking without compensation, a violation of the equal protection clause, or an imposition of involun-

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tary servitude. The law with respect to the constitutionality of mandated service is unsettled at best and therefore not dispositive. The assessment of mandatory service instead must be undertaken in the context of the surrounding political realities. Proponents of mandatory pro bono in civil cases in state after state have failed to garner the support of their colleagues for even the most modest proposals. In those few jurisdictions where a program which arguably falls within the definition of mandatory pro bono has been implemented, there have been no effective empirical studies of the impact of those programs. Anecdotal information suggests that these programs have met with limited success at best and have not accomplished the goals established by their proponents. The events of the last decade strongly suggest that the heat and light accompanying the mandatory pro bono debate have diverted considerable resources from the real issue, ensuring access to justice regardless of economic status, without measurably improving such access.

I. THE SCOPE OF MANDATORY PRO BONO

The debate about mandatory pro bono has not served to clarify the concept. Because pro bono publico service historically has referred to charitably donated assistance, the term "mandatory pro bono" is itself a problem—a classic oxymoron, not unlike jumbo shrimp and military intelligence. Beyond the simple imprecision of the term itself, mandatory pro bono has been used to refer to a broad spectrum of actions, including membership requirements adopted by voluntary local bars, quantitative guidelines or definitions of pro bono established by local bars, and programs established by the federal courts under which lawyers are appointed without compensation to represent in forma pauperis litigants.

Of course, none of these programs are mandatory in the literal sense, and their inclusion only serves to confuse and blunt the anal-

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5. Despite the ambiguity of the term "mandatory pro bono," the author will, for the sake of convenience, employ the term in this article.
7. See Miskiewicz, supra note 3, at 8, col. 1.
8. See Graham, supra note 6, at 62. Jurisdictions which have adopted these programs include "the Eastern and Western Districts of Arkansas, the Northern and Central Districts of Illinois, the Northern and Southern Districts of Iowa, the District of Connecticut and the San Antonio division of Texas’ Western District." See also Miskiewicz, supra note 3, at 1, col. 1.
ysis of mandatory pro bono. Voluntary bar programs which condition membership on the commitment to provide service or funds, like the program in Orange County, Florida, certainly are not mandatory since the only “sanction”—the inability to join the local bar—has no direct economic or professional impact on the attorney. Bar guidelines which merely suggest a minimum level of voluntary effort, like those adopted by the Chicago and Los Angeles bars, also clearly are not mandatory requirements. While some federal appointment programs appear to be truly mandatory, in practice they are voluntary in nature and impose no sanctions for failure to participate. They also typically include generous provisions for opting out of cases deemed nonmeritorious by the attorney. In any event, the Supreme Court’s decision in Mallard v. The United States District Court for the Southern District of Iowa—holding that title 28, section 1915(d) of the United States Code does not give a federal court the authority to require attorneys to represent indigents in civil cases—has, at least for the present, foreclosed any argument that these can be described as mandatory programs.

9. See Marin-Roso & Stepter, Orange County: Mandatory Pro Bono in a Voluntary Bar Association, 59 FLA. B.J. 21, 21-22 (Dec. 1985). The Orange County Bar Association requires its members to take two pro bono cases per year or to make a $250 financial donation to the Legal Aid Society. Id. at 21. There is no indication that the “sanction” of dismissal from the voluntary bar is enforced.


11. See, e.g., E.D. ARK. R. 34. Although appointments by the court “shall be mandatory,” a large portion of the rule is devoted to establishing guidelines for declining an appointment, and there are no corresponding sanctions for doing so. In fact, the name of the withdrawing attorney simply is placed back on the master list used for selecting attorneys rather than being used for the next assignment. Id.; see also Shapiro, supra note 4, at 755 (noting that, in the context of court-imposed assignments, “there is a dearth of precedent involving the imposition of sanctions on attorneys for refusal to represent an indigent litigant on a court assignment”).


13. In Mallard, the District Court selected Mallard to represent indigent inmates. When Mallard tried and was not allowed to withdraw from this court-imposed service, he appealed to the District Court, which denied him relief. When the Court of Appeals denied his petition for a writ of mandamus, Mallard appealed to the Supreme Court which held that 28 U.S.C. § 1915(d)—which provides that federal courts may “request an attorney to represent any person claiming in forma pauperis status”—does not give a federal court the authority to require attorneys to represent indigents in civil cases. Id. at 1816. Although this decision sets the immediate question to rest, it is worth noting that the Court ruled only on the validity of 28 U.S.C. § 1915(d).

Although respondent and its amici urge us to affirm the Court of Appeals’ judgment on the ground that the federal courts do have such authority, the District Court did not invoke its inherent power in its opinion below, and the Court of
The term "mandatory pro bono" should be applied only to those proposals which condition a lawyer's ability to continue to practice law on the fulfillment of a quantifiable public service obligation and which provide for a reporting and enforcement mechanism for those who fail to meet that obligation. Because authority over the licensure and discipline of attorneys varies from state to state, the obligation may be put in place by an integrated bar association, a state court, or a legislature. Each of the attributes noted above—a quantifiable, enforceable, and enforced obligation which is a condition of continuing licensure—must be present if the obligation is to be truly mandatory in nature. Proposals which seek to amend a state's ethical rules without providing a quantifiable goal and without making provision for enforcement should be seen as only quasi-mandatory in nature.

Beyond the core definition of mandatory pro bono which focuses on the clarification of the "mandatory" nature of these proposals, there are a series of issues, often unresolved and even unidentified in the debate over mandatory pro bono, which address the second aspect of the definition; the identification of what constitutes "pro bono" service. Here, as with the core definition of mandatory service, there is little clarity and less uniformity. If mandatory pro bono is to address the purposes for which it is established, clarity with respect to the second element of the definition is essential.

The first issue surrounding the definition of pro bono service is determining which members of the bar will be included in the scope of the proposal. Arguably, if mandatory pro bono is a condition of bar licensure, all licensed attorneys should be covered. There are categories of attorneys, however, who arguably should be exempted from mandatory service. Judges obviously present a problem, as do inactive attorneys who are not practicing in the jurisdiction or who are retired or located in the jurisdiction but not engaged in legal work. This category of attorneys is perhaps the easiest to accommodate through an exemption for those who are not registered as practicing attorneys in the jurisdiction.

Government attorneys who often are barred statutorily from the private practice of law or who may have broadbased conflicts problems present another category that might seek exemption.

Appeals did not offer this ground for denying Mallard's application for a writ of mandamus. We therefore leave that issue for another day.

*Id.* at 1823.
Since these lawyers enjoy the privilege of practicing in the jurisdiction, consistency would argue against their exemption. The limitations on the ability of government attorneys to serve could be addressed through the amendment of existing statutes, a realistic analysis of conflict of interest, or some form of alternative service which avoids the special problems of this group.

A hotly debated issue involving the scope of a mandatory pro bono requirement is the inclusion of legal services lawyers and public defenders. Lawyers who work full time for poor people at salaries which are a fraction of those paid to their colleagues in private practice essentially have “given at the office,” and it could be argued that the imposition of a mandatory requirement would place an extra burden on those in our profession who are most public spirited. On the other hand, the exemption of any category of practicing attorney might violate the principles of professionalism and equity which underlie mandatory proposals. In addition, there are attorneys in private practice who focus their efforts on public interest law; therefore an exemption solely for staff attorneys in nonprofit organizations could be considered arbitrary.

Finally, in defining which attorneys would be subject to mandatory service, there is the issue of collective versus individual responsibility. The quantifiable mandatory obligation, however it is ultimately defined, could be viewed as the non-transferable obligation of each individual lawyer. Alternatively, law firms could be allowed to meet collectively the obligation by aggregating the services performed by their attorneys. Because law firms are seen as single entities for disciplinary purposes in other contexts (for example, conflicts of interest), such a practice, some proponents argue, is feasible, more efficient, and produces more hours and higher quality pro bono work.14

If the threshold question of identifying those attorneys who should be subject to mandatory service is fraught with complexity, it pales in comparison to the core issue of defining the scope of pro bono service which would meet the mandatory requirement. The task of defining “mandatory pro bono” can itself be problematic;15 indeed, it is possible that the definition might purposefully be

14. The possibility of collective efforts to meet a mandatory obligation raises interesting disciplinary questions. For example, would an entire law firm be disciplined, perhaps through censure or suspension of each of its members, if it failed to meet the mandatory standard?

15. For a discussion of the ambiguities inherent in the term “mandatory pro bono,” see supra text accompanying notes 5-8.
blurred in an attempt to gain broadbased support for a mandatory initiative. If the impact of mandatory pro bono efforts is to be evaluated, clarity of definition with respect to the scope of activity is critical. Five basic issues, with literally scores of sub-issues, dominate the debate on this aspect of mandatory pro bono.

First, there is the lawyer versus citizen debate. Simply put, the issue is whether community service activities undertaken by an attorney which do not relate directly to her or his professional role should be counted toward a quantifiable mandatory obligation. Because one of the most consistent underlying rationales for mandating service is the special role of the lawyer within society, it seems obvious that activities which reflect good citizenship, such as service on the board of a community organization or non-profit group like the symphony or a home for abused children, should not constitute pro bono activity for this purpose. A number of proposals, however, incorporate these activities, undoubtedly in an effort to make them more palatable to the majority of lawyers.

For those proposals which do limit the quantifiable, mandatory obligation to services performed as a lawyer, a second, even thornier issue remains—the issue of client representation versus other activities. The critical need to provide legal services to indigents in order to ensure equal access to the justice system is the dominant motivation for many mandatory proposals. Therefore one could argue that only activities related to the direct representation of target groups or individuals should constitute quantifiable activity for purposes of reporting, monitoring, and enforcement. For some attorneys, however, direct representation is not the only method—and certainly not the most efficient method—of ensuring and enhancing access. Proponents of a broader definition of service cite activities such as service on the board of a legal services program or public interest legal organization, service on a bar committee which

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16. For a discussion of the impetus for mandatory pro bono, see infra text accompanying notes 21-30.

develops an effective pro se program, and the provision of training or support to other pro bono attorneys as examples of activities which may do more to advance the cause of justice than individual representation. One difficulty with this credible approach is the problem of where to draw the line. Should lawyers receive mandatory pro bono "credit" for serving on the board of directors of a bar association which makes support for legal services a priority? For directing lawyers fund drives to raise money for legal services? For attending training programs in poverty or civil rights law to improve their pro bono representation?

A third definitional issue is the category of clients to be served by mandatory pro bono efforts. Many proposals focus on the legal needs of our poorest citizens, while others anticipate the inclusion of the near poor, the handicapped, special groups like children and the elderly, non-profit organizations, and other underserved groups. When the definition expands from service to the poor and their advocate organizations to service in the public interest, the definitional and political problems become more complex. If service in the public interest should be included, then unpopular causes or individuals may fall within the scope of the proposal despite their polarizing effect on the public at large and the legal profession. To avoid perceptions of ideological bias, some would argue that the types of clients served by conservative legal foundations also should qualify despite the fact that they often have considerable financial resources.

A fourth issue in defining pro bono for the purposes of mandatory programs is whether the service is to be provided without compensation or at reduced rates of compensation. While recent mandatory proposals, to the extent that they address this issue at all, appear to anticipate that mandated service will be provided without compensation, there is considerable disagreement about this issue. The American Bar Association's (ABA) definition of public service, adopted in 1975 and still the official policy of the Association, includes partially compensated service. This approach is supported by the argument that limiting service to uncompensated

18. See, e.g., ACTION PLAN, supra note 17, at 6 (the Maryland Legal Services Corporation "set[s] the income eligibility standard for legal assistance at not greater than 50 percent of the State's median family income"). See generally THE LEGAL NEEDS OF THE POOR OF FLORIDA, supra note 17; A WORKABLE PLAN FOR CIVIL LEGAL SERVICES, supra note 17; PRELIMINARY REPORT OF NEW YORK, supra note 17.
19. See, e.g., ACTION PLAN, supra note 17, at 32.
20. SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE OF THE AMERICAN BAR ASSOCIATION, IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATION app. at 19
representation discriminates against the less affluent segments of the bar. Once again, one can identify the prospect of a definitional task so fraught with conflict and compromise that it overwhelms the potential value of the services to be provided. Should lawyers who accept criminal appointments at rates that certainly are minimal be permitted to apply that representation to meet the civil requirement? Would representation at the hourly rate of $100, by an attorney whose customary hourly rate is $250, comply?

The final issue, and perhaps the most controversial, is the question of monetary contributions in lieu of service, described colloquially as a “buy out” provision. Those who argue that pro bono service is the *sine qua non* of professionalism find the buy out provision unhelpful and demeaning. Others believe that for lawyers who have no particular interest or expertise in serving disadvantaged clients a buy out provision is the most efficient means of providing increased services. Within this broader definitional question, of course, lurk many other issues. If a buy out is permitted, should it be partial or total? What should the buy out rate be, and should it be graduated to avoid a regressive policy which places a greater burden on nonaffluent lawyers? A monetary contribution may be tax deductible, while donated services are not; therefore, does a buy out option create further inequities?

These critical issues, which often have been ignored in the initial enthusiasm for a mandatory pro bono proposal, must be addressed in shaping any mandatory service requirement. Yet these issues are part of the larger debate in the legal profession about the

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(1977) [hereinafter SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE]. The American Bar Association (ABA) defines public interest service as:

- 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.
  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.

*Id.* (emphasis added).
role and future of the profession. Their presence in the pressure cooker that is mandatory pro bono inevitably causes debate to reflect the uncertainties and schisms in our profession. As a result, they often are addressed in terms of pragmatic political concerns and are not resolved in a consistent manner which advances the goals of the mandatory proposal.

II. THE IMPETUS FOR MANDATORY PRO BONO

Here is not a classic confrontation between progress and reaction—the good guys against the bad guys. Rather, we have on both sides lawyers of high principle and good will who want essentially the same thing—for the legal profession to meet what they see as a serious professional obligation.21

Barlow Christiansen’s observation about the proponents and opponents of mandatory pro bono is as true now, in the midst of a second flurry of activity with respect to mandatory pro bono, as it was in 1981 in the midst of the first controversy about mandatory service.

Three common themes comprise the rationale for mandatory pro bono. The first, and undoubtedly the most powerful, is the extent to which the need for legal services, particularly among the poor, is unmet.22 Indeed, it can be argued that the primary impetus for the growing number of mandatory pro bono proposals during the past two years is the existence of several recently completed, empirically sound studies which demonstrate the gap between legal resources and unmet legal needs.23 The increase in the number of Americans living at or below the poverty threshold in the 1980s, the increasing complexity and "legalization" of our society,24 and the stagnant federal funding for legal services in the context of the fed-

22. Recent empirical studies at both the state and national level consistently find that only between 15-20% of the critical legal needs of low income persons presently are being met. See, e.g., A WORKABLE PLAN FOR CIVIL LEGAL SERVICES, supra note 17, at 17; PRELIMINARY REPORT OF NEW YORK, supra note 17, at 12; see also SPANGENBERG REPORT, IN TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (Sept. 1989).
23. See supra note 22; see also ACTION PLAN, supra note 17 at 6-25.
24. See Wentzel, Justice Denied, The Evening Sun (Baltimore), May 21, 1987, at A10, col. 1 (quoting U.S. Rep. Benjamin Cardin: "There have been major changes in the complexities of laws and we have more poor people today.").
eral deficit,\textsuperscript{25} have resulted in a sense of urgency on the part of concerned citizens, particularly the organized bar, about the need to find creative new methods to increase resources.

The second wellspring of mandatory pro bono is a broader concern about the commercialization of the practice of law and the need to reaffirm our commitment to law as a profession. This commitment is reflected in a number of themes among proponents. One strand of this argument is an emphasis on the traditional role of the lawyer as an officer of the court and an instrumentality of justice with a duty to serve those who are unable to retain counsel.\textsuperscript{26} A variation on this theme is the idea that pro bono service is required of every lawyer as a condition of the monopoly on access to the courts which lawyers enjoy. Some commentators use both themes to support mandatory pro bono. "Lawyers have a \emph{pro bono publico} obligation, arising both from the profession's tradition of service before gain and from the lawyer's essential and monopolistic position in the justice system."\textsuperscript{27} In distinguishing the lawyer's monopolistic role from that of other regulated professions (to address the argument that "doctors don't do it, dentists don't do it, why should we"), some have emphasized that lawyers are not simply gatekeepers; they contribute directly to the problem of unmet legal need through the use of their exclusive privilege for affluent clients in an adversarial system.\textsuperscript{28}

The final justification advanced for mandatory pro bono is a somewhat surprising one—a sense of disappointment with the con-

\textsuperscript{25} In Maryland, for example, federal funding for civil legal services diminished by $3.5 million in the early 1980s. While Congress rejected President Reagan's efforts to totally eliminate federal funding for legal assistance to the poor, it did reduce appropriations to the U.S. Legal Services Corporation (principal funding source of Maryland's Legal Aid Bureau) by 25%. At the same time, Maryland (responding to federal cuts to Maryland's Title XX Social Services funds) reduced the State's Judicare program funding from $2.5 million to $249,000.


\textsuperscript{26} One of the earliest manifestations of this view is a 1494 English statute entitled "A mean to help and speed poor persons in their suits." \textit{11 Hen. 7, ch. 12 (1495), reprinted in W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 395 (2d ed. 1960).} The statute reads in part "the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same." \textit{Id.}; see also Shapiro, supra note 4, at 741.

\textsuperscript{27} Christiansen, supra note 21, at 1.

tributions lawyers have made on a voluntary basis. While this rationale first surfaced in 1981, it is noteworthy that it is once again a critically important motivation for mandatory pro bono in 1990 despite nine years of growth in voluntary pro bono programs.

Each of the justifications advanced for mandatory pro bono is compelling and valid. The degree to which those with critical legal needs are denied assistance, simply because they cannot afford such assistance, is intolerably high in a society which claims its basis in law, justice, and equality. Concerns about the decline in professionalism among attorneys also are well-grounded. Finally, supporters of public service should be concerned greatly about the present status of voluntary pro bono. The promise of organized volunteerism has not been met. Nevertheless, despite the validity of the well-springs of mandatory pro bono, it is not clear that mandatory pro bono is the only—or even the most effective—solution to these concerns. To ascertain whether mandatory pro bono programs are responsive to these three issues, it is essential to assess the growth of voluntary pro bono programs in the 1970s and 1980s and to analyze the outcome of mandatory pro bono proposals during that same period.

III. A BRIEF HISTORY OF VOLUNTARY PRO BONO

Organized volunteerism among lawyers has existed in this nation since the beginning of the twentieth century. Voluntary pro bono efforts waned, however, with the advent of the Legal Services Corporation and increased federal funding for legal services for the poor in civil matters, as well as with the expansion of the constitutional right to appointed counsel for criminal defendants.

29. See Christiansen, supra note 21, at 12-14.
32. See J. Handler, E. Hollingsworth & H. Erlanger, Lawyers and the Pursuit of Legal Rights 125 (1978) (attempting to verify the perception that pro bono work by large law firms had declined since the 1960s).
33. See J. Dooley & A. Houseman, Legal Services History 1-16 (2d draft 1985).
34. See id. at 16-27.
By the late 1970s, many bar associations, which had sponsored at least rudimentary volunteer pro bono programs in the past, had little or no involvement in pro bono activities. Despite some important pockets of activity and innovation, the latter half of the 1970s was a quiet time for voluntary pro bono efforts on the whole.

A series of unforeseen events, however, revitalized voluntary pro bono programs. In 1981, the Reagan administration sought to eliminate the Legal Services Corporation completely, then funded at $321 million dollars. This threat mobilized the support of Congress and of the organized bar. Federal funding was retained, but at a drastically reduced level. As a result of its role in ensuring the survival of legal services for the poor, the organized bar at the national, state, and local levels, became acutely aware of the unmet need for legal services and of the diminishing resources available to address that need. This consciousness manifested itself in unremitting support for increased funding for legal services on the part of lawyers and the organized bar. Within the ABA and in many communities, it also led to the adoption of expanded voluntary pro bono services as one of the bar's major priorities.

The outcome of these events represents one of the most dramatic developments in the history of legal services for the poor. In 1981 there were approximately fifty voluntary pro bono programs, many of them quite limited in scope. Currently there are almost 600 voluntary programs. The decision in 1981 by the Board of Directors of the Legal Services Corporation to require that its beneficiaries use a portion of their federal funds to encourage pro bono

37. See M. Kessler, Legal Services for the Poor 8-9 (1987).
38. See Id. at 9. The 1984 budget for the Legal Services Corporation was $241 million.
39. See Harrell, The Continuing Need for Private Bar Involvement in the Delivery of Legal Services to the Poor, 17 CLEARINGHOUSE REV. 227, 227 (1983) (in 1981 "more than 400 state and local bars joined with the ABA and other groups to express support for the Legal Services Corporation . . . ").
40. Id. at 227-28; see also McCoy, Pro Bono Publico: Federal Legal-Aid Cuts Spur the Bar to Increase Free Work for the Poor, Wall St. J., Mar. 30, 1984, at 1, col. 1.
41. Miskiewicz, supra note 3, at 1, col. 1.
42. See PBI DIRECTORY, supra note 30, at 179-83; E. Lardent, supra note 36, at 2; see also 1 NEW YORK STATE BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO REVIEW THE PROPOSAL PLAN FOR MANDATORY PRO BONO SERVICE 10-11 (Oct. 16, 1989) [hereinafter NEW YORK STATE BAR ASSOCIATION] (describing the scope of various New York pro bono programs).
and reduced fee efforts provided the resources to support a more professional and organized voluntary pro bono effort.

As a result of the prominence given pro bono by the bar and the increased funding available, organized pro bono programs with professional staff administrators are now in place in virtually every area of the nation. Despite greatly intensified and highly creative recruitment efforts, the participation figures reported by pro bono programs show that, on the average, only 16.9% of the nation's lawyers are involved in organized pro bono programs for the poor.

In the 1980s, voluntary pro bono programs enjoyed an unparalleled level of support, funding, and growth. Despite the strengths of these programs, as well as the presence of many innovative and effective programs, two factors appear to presage a trend toward stagnancy among voluntary pro bono efforts.

The first is the dramatic change experienced by private practitioners, particularly those in large law firms, with respect to the economics of law practice. There is no question that law firms have become more business-like in recent years, with a greater emphasis on administration and on the bottom line. Commentators cite a variety of reasons for this trend. Some identify the staggering inflation in starting associate salaries as the culprit. Others cite the increased legitimacy of competition and marketing among larger firms and the increase in advertising by smaller firms and sole practitioners. The emphasis on billable hours, per-partner draws, profitability, and the expanded importance of rainmakers also has

43. Miskiewicz, supra note 3, at 1, col. 1.
44. PBI Directory, supra note 30, at 182-83. These self-reported figures may be inflated. The author has visited numerous pro bono programs to provide technical assistance or to evaluate the programs' effectiveness. Typically, program volunteer participation lists may include attorneys whose preferred areas of volunteer service rarely are needed, attorneys who provide brief service once a year, and volunteer mentors and trainers who rarely participate.
45. See E. Lardent, supra note 36, at 2; see also 1 New York State Bar Association, Report of the Special Committee to Review the Proposal Plan for Mandatory Pro Bono Service 10-11 (Oct. 16, 1989) (hereinafter New York State Bar Association) (describing the scope of various New York pro bono programs).
been blamed.\textsuperscript{49} The changes in the legal profession which have destabilized firms by making lateral transfers, mergers, and law firm dissolutions commonplace have so eroded loyalty to the individual firm that compensation has become a determinative factor in career decisions.\textsuperscript{50} Finally, some lawyers assign the blame to legal newspapers, whose surveys now highlight and broadly disseminate financial information previously not widely known even within each firm.\textsuperscript{51} Commentators disagree on the causal significance of these developments, but the result has been a growing emphasis on financial concerns within the legal profession. Regardless of cause or effect, it is unfortunate that the dramatic acceleration of bottom line decision-making has made it more difficult to encourage enhanced voluntary efforts, particularly from large law firms.

The second factor that has inhibited the effectiveness of voluntary pro bono efforts is the culture which has arisen among the voluntary programs of the 1980s.\textsuperscript{52} Developed at a time when legal services programs were concerned with survival and faced deep funding cuts, these programs were not always created with a careful attention to purpose, structure, and function. Surprisingly, despite nine years of growth, there has been no substantial effort to define the role of voluntary pro bono in addressing unmet legal needs. In addition, there has been no comprehensive effort to establish program norms and standards. In the absence of a clear mission and of formal assessment criteria, an informal but very powerful measurement system has arisen. This system relies upon quantitative, external criteria. Program success typically is measured by the number or percentage of attorney volunteers, the number of cases handled (an often dubious measure because of the lack of uniformity in the definition of a case), and the success and scope of the program's public relations efforts.\textsuperscript{53} While quantifiable information and program reputation certainly are important aspects of program effectiveness, there is too little emphasis on key qualitative aspects of program operations. Programs are not judged by their impact on the most critical legal needs of low-income persons or by the quality of the legal assistance provided by volunteers. In many instances, these

\textsuperscript{49} See Young, Carlton, Mayden & Molod, \textit{Greed is Good?}, 15 BARRISTER 13 (Winter 1988) (excerpting a debate on the causes of the decline in young lawyers' commitment to pro bono).

\textsuperscript{50} See E. Lardent, supra note 36, at 8-9.

\textsuperscript{51} See, e.g., \textit{The NLJ} 250, supra note 47, at 19, col. 1 (listing starting salaries for associates at the 250 largest law firms in the nation).

\textsuperscript{52} E. Lardent, supra note 36, at 3.

\textsuperscript{53} Id. at 4.
programs are understaffed or staffed by administrators who do not have substantive legal expertise.\(^{54}\) Many volunteer programs do not have effective systems for oversight of cases, training, support, and other essential elements of program administration. Typically, these programs focus only on relatively simple matters and on cases which do not involve mainstream poverty law issues.\(^{55}\)

A number of voluntary pro bono programs have increased participation levels substantially, enhanced program quality, and developed innovative approaches to address emerging legal needs.\(^{56}\) These programs, however, are the exceptions. Many voluntary pro bono programs are moving toward stagnancy and irrelevancy. As a result, the strongest proponents of pro bono service are frustrated by the apparent inability of voluntary programs to galvanize the support of the bar and to address the increasing volume of legal needs. They have become, often reluctantly, the most passionate supporters of a mandatory system.

IV. THE DEVELOPMENT OF MANDATORY PRO BONO PROGRAMS

In light of the relatively low profile of pro bono service in the 1970s, it is somewhat surprising that the first wave of mandatory pro bono proposals began in 1977.\(^{57}\) The apparent impetus for many of these proposals was the ABA’s pro bono resolution, adopted in 1975.\(^{58}\) Although this resolution—known as the “Montreal resolution”—did not address the mandatory pro bono issue, it did define for the first time “pro bono practice,” and it significantly heightened the visibility of pro bono among state and local bar associations.\(^{59}\) In 1977, the ABA’s Special Committee on Public Interest Practice, the sponsor of the Montreal resolution, prepared and disseminated a report\(^{60}\) calling upon state and local bars to take an active role in supporting pro bono and introduced the notion of a quantifiable,

\(^{54}\) Id. at 4-5.
\(^{55}\) Id.
\(^{56}\) See New York State Bar Association, supra note 42, at 9-11; see also J. Tyrrell, The Law Firm Pro Bono Manual 19-22 (discussing special pro bono projects for law firms); id. at 31-34 (listing pro bono opportunities at one particular large firm); Hill & Calvocoressi, The Corporate Counsel and Pro Bono Service, 42 Bus. Law. 675, 684-90 (1987) (discussing pro bono work of in-house counsel at several large corporations).
\(^{57}\) See Rosenfeld, Mandatory Pro Bono: Historical and Constitutional Perspectives, 2 Car- dozo L. Rev. 255, 261 (1981) (noting the simultaneous mandatory pro bono proposals set forth by the ABA and the New York City Bar Association).
\(^{58}\) Special Committee on Public Interest Practice, supra note 20, at 19.
\(^{59}\) Id.
\(^{60}\) Id.
though still voluntary, contribution of pro bono service.\textsuperscript{61}

An officer of the State Bar of California and a Special Committee of the Association of the Bar of the City of New York responded to the ABA's initiative by advocating a mandatory pro bono program. The president of the California bar proposed a forty hour per year requirement for each practicing attorney. The proposal was extremely controversial and was defeated by the bar.\textsuperscript{62} In New York, a special committee created in 1978 undertook a thoughtful analysis of the pro bono issue and also recommended a mandatory pro bono requirement. The report of the Bar's Special Committee on the Lawyer's Pro Bono Obligations\textsuperscript{63} recommended a minimum initial standard of thirty to fifty hours of service per year, with a gradual increase of fifty to seventy hours annually.\textsuperscript{64} In terms of the definitional issues surrounding mandatory pro bono outlined above, the New York proposal took a moderate approach. Its definition of public service was relatively broad, going beyond direct representation to include activities related to the improvement of the administration of justice, but excluding nonlegal "good citizen" and general bar association activities.\textsuperscript{65} The committee considered and opposed, by a divided vote, a buy out provision as well as a collective law firm approach to the obligation.\textsuperscript{66} Finally, and most notably, the committee largely sidestepped the question of enforcement, adopting a self-reporting requirement which envisioned enforcement only in the most egregious of circumstances.\textsuperscript{67} Despite the fact that the proposal adopted a moderate position on the most controversial aspects of mandatory pro bono, the Committee's report, like the California proposal, created a firestorm of protest and was not adopted.\textsuperscript{68}

The intensity of many lawyers' opposition to even the most modest quasi-mandatory pro bono proposal became evident in 1980, with the preliminary report of the Kutak Commission in its

\textsuperscript{61} Id. at 3-5 (resolving that "public interest legal service is legal service provided without fee or at a substantially reduced fee," which falls into the categories of poverty law, civil rights law, charitable organization representation, or administration of justice).


\textsuperscript{63} ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER (1980).

\textsuperscript{64} Id. at 5.

\textsuperscript{65} Id. at 12-16.

\textsuperscript{66} Id. at 18-20.

\textsuperscript{67} Id. at 24-25.

\textsuperscript{68} For a more extensive discussion of the New York report, see Rosenfeld, supra note 57; Torres & Stansky, In Support of a Mandatory Public Service Obligation, 29 EMORY L.J. 997 (1980).
revision of the Code of Professional Responsibility. The Commission’s draft contained language in the proposed model rules which would make pro bono service mandatory. In many respects, however, the Commission’s proposal fell far short of a mandatory pro bono obligation as defined in this article. For example, the proposal did not include a specific hourly requirement, provided no enforcement mechanism, and included only a general reporting requirement which was later dropped because of intense opposition. This proposal, which could not become the basis for any meaningful or enforceable pro bono obligation, nevertheless proved as controversial as the California and New York proposals. The ABA, which five years before had affirmed its commitment to pro bono service, compromised with salutary, nonmandatory language, no reporting requirement, a broad—or at least highly ambiguous—definition of pro bono, and no quantifiable standard whatsoever. By 1980, based on the experiences of these national,
state, and local bar associations, each with a strong commitment to pro bono, it appeared that mandatory pro bono was a dead issue.

Most communities responded to the funding cutbacks for legal services in the early 1980s by developing voluntary pro bono programs. A very few, despairing of the likelihood that voluntary pro bono would succeed in their areas, elected to try the mandatory pro bono route. In Florida, where the Furman case resulted in some of the earliest legal needs studies and, accordingly, a heightened sense of urgency about unmet legal needs, several mandatory pro bono proposals surfaced. Despite the fact that the sponsors and supporters of these proposals included some of the most prominent lawyers in the state, including past presidents of the Florida Bar, the Bar itself consistently opposed proposals for mandatory pro bono. Petitions to establish a mandatory program did not prevail in the Florida Supreme Court.

The most successful mandatory programs of the early 1980s were two court-ordered programs in El Paso, Texas and Westchester County, New York. In El Paso, at the urging of the local legal services program, the local bar association approved a mandatory pro bono plan. An order implementing the plan was then entered

76. Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979). The referee in the case suggested that the court require the Bar to conduct a study to determine the most effective means of providing legal services to the poor. In response, the court stated "[w]ithout question, it is our responsibility to promote the full availability of legal services. By [addressing this issue in a separate proceeding] under our supervisory power, we insure a thorough consideration of the overall problem without delaying the present adjudication." Id. at 382.

77. See The Legal Needs of the Poor of Florida, supra note 17; The Florida Bar, Report of the Special Commission on Access to the Legal System (June 1985).

78. See In re Emergency Delivery of Legal Services to the Poor, 432 So. 2d 39 (Fla. 1983).

We believe that a person's voluntary service to others has to come from within the soul of that person. Our canons in this area are designed to be directory, to enlighten one's conscience, to focus attention on what is right for lawyers to do, but, historically, have not been meant to force an involuntary act. Id. at 41 (footnote omitted). In the footnote accompanying the text the court stated: "Furthermore, the assurance that effective legal services are available to all is not the sole responsibility of lawyers but is one to be shared by the government and society." Id. at 41 n.1; see supra text accompanying note 28; see also Maher, supra note 28, at 980 n.38.

79. The El Paso program came about as a result of bar leaders' discouragement over the low number of legal services provided by volunteers. "[B]ar leaders ... lined up the support of . . . district judges and . . . persuaded bar members to approve the mandatory pro-bono scheme. Within two weeks, a state-court order requiring participation was in place." McCoy, supra note 40, at 16, col. 2; see also Miskiewicz, supra note 3, at 8, col. 2 (the El Paso program "drew national attention in 1982, when a county district court
Since there has never been a comprehensive, objective evaluation of the El Paso program, it is difficult to determine whether that program is in fact mandatory in nature and how effectively it operates as a mandatory program. There is no current information about the number of attorneys who simply refuse to comply with the court's orders, but it does not appear that any sanction process is in place. As of October 1986, however, approximately 150 members of the bar had been granted informal exemptions. A number of firms have contracted with other attorneys, for a fee, to meet their obligations under the program. Although the number of participating attorneys undoubtedly is higher than it would be in the average voluntary program, it is not clear that the aggregate services provided are greater. A report of the program's activities indicates that the average attorney accepted 1.5 cases annually, expending an average of 10 hours per case, for an annual commitment of 15 hours, significantly below the average commitment identified in mandatory and voluntary programs. In addition, the variety of cases accepted in El Paso is extremely limited. Without additional information and evaluation, it is difficult to assess the impact of the El Paso program. Despite a flurry of controversy and opposition when the program was initiated, it appears to be relatively noncontroversial today. However, it certainly is possible that the lack of opposition reflects the nonenforcement of the lawyer's obligation and the very modest amount of service required rather than any real acceptance of the mandatory concept.

In Westchester, as in El Paso, it appeared to the legal services program that efforts to establish a voluntary program would be futile. Indeed, a solicitation letter sent to three thousand members of the bar yielded only two volunteers. In 1981, the Westchester County Supreme Court agreed to appoint attorneys as uncompensated counsel in individual divorce cases. As with the El Paso pro-

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80. McCoy, supra note 40, at 16, col. 2.
82. REPORT ON THE EL PASO PRO BONO PROJECT 7 (prepared by Prof. W. Frank Newton, Baylor University School of Law) (copy on file with Maryland Law Review).
83. McCoy, supra note 40, at 16, col. 2.
85. Id. Because of severe staff reductions, Westchester County Legal Services was
gram, no objective evaluation of the Westchester program has been undertaken. In many respects, however, it appears that the experience and actual implementation of the two programs has been quite similar. After some initial opposition, lawyers apparently have accepted the program. As with the El Paso program, however, there is a real question about the impact of the Westchester program on critical legal needs and the true acceptance of the program among the bar. Once again, the level of participation is limited; only family law attorneys are included in the mandatory pool. A bar with more than three thousand members handled only seven hundred cases in a five-year period. This reflects a participation level lower than many voluntary pro bono programs. Again, the emphasis is on a narrow type of case rather than the broad range of legal problems. As with El Paso, there is little indication that sanctions are imposed upon those who refuse to meet their obligation, making these programs only quasi-mandatory in nature. More limited versions of the Westchester program are now being implemented in other areas of New York. It is encouraging that opposition to these court-ordered plans appears minimal. Nevertheless, the paucity of information about the actual impact of these programs—as well as their limited scope—makes it very difficult to generalize about the impact or feasibility of mandatory pro bono on the basis of these experiences.

The mandatory pro bono initiatives of the early 1980s were few in number and modest in scope. The past two years, however, have seen a revival of interest in mandatory pro bono and an unprecedented level of activity in devising proposals for mandatory programs. Mandatory pro bono proposals have surfaced in recent years in states as varied as Florida, which currently has a new mandatory

forced to stop accepting divorce cases. In response to the great unmet need for legal services by indigents in this area, an administrative judge decided to appoint "matrimonial attorneys on a mandatory basis to represent poor persons seeking divorces." Id. 86. Compare Dean, supra note 84 and Norlander, Court Appointed Divorce Counsel For Poor Persons, 56 N.Y. St. B.J. 92 (Apr. 1984) and Fink, Why We Don't Have Waiting List for Divorces, PRIVATE BAR ACTIVITIES REPORT, Dec. 1986, at 2 (bi-monthly publication of the Committee on Legal Aid of the New York State Bar Association) with REPORT ON THE EL PASO PRO BONO PROJECT, supra note 82 and letter from Cathy M. Barnes, supra note 81 (all sources discussing the respective problems and successes of implementing the Westchester and El Paso programs).

87. Norlander, supra note 86, at 33.

88. Fink, supra note 86. But see Dean, supra note 84, at 2, col. 1 (indicating that 683 participating attorneys were assigned 895 cases during the same 5-year period).

89. See, e.g., Dean, supra note 84.

90. See In re Petition for Provision of Legal Aid to the Poor, No. 89-74,538 (Fla. filed Aug. 8, 1989); see also Graham, supra note 6, at 62.
pro bono proposal couched in terms of the power of the courts to appoint counsel, Maryland, \(^91\) New York, \(^92\) North Dakota, \(^93\) and Washington. \(^94\) These proposals have been driven, as their predecessors were, by a number of factors including legal needs studies which dramatically demonstrated the extent of unmet legal problems, \(^95\) growing concerns about the lack of professionalism among the bar as a whole, \(^96\) and a sense of despair about the lack of growth in voluntary programs. \(^97\) While action on a number of these proposals is still pending, the pattern with respect to mandatory pro bono proposals is strikingly similar to the mandatory efforts of the late 1970s. In almost every instance, a committee of the bar dominated by those deeply concerned about the lack of access to legal services adopts a plan of action to expand legal services, with mandatory pro bono as one element of that plan. The response to the committee's proposal is, typically, a watering-down of the

91. See *Action Plan*, supra note 17, at 32 (recommending that the Maryland Court of Appeals adopt a rule requiring all private attorneys to accept at least one pro bono case a year on behalf of an indigent person).

92. See *Preliminary Report of New York*, supra note 17; see also Dean, supra note 84.

93. See Graham, supra note 6, at 62 ("A special Civil Legal Services Committee in North Dakota will submit a mandatory plan to the state bar association's board of governors").

94. See *Legal Aid Committee of the Washington State Bar Association, A Report on the Need for Civil Legal Services for Persons in the State of Washington* (Nov. 1988); see also Graham, supra note 6, at 62. In Washington State, legislative hearings were held on mandatory pro bono and the view was that the legislature might "revisit" the issue if the private bar failed to increase voluntary pro bono activities. *Id.*

95. See supra note 17. "A draft report by North Dakota's Civil Legal Services Committee suggests that 97 percent of the civil legal needs of the state's poor and 'near poor' are not being met." See Graham, supra note 6, at 62.

Maryland's experience with a mandatory pro bono proposal is very much in line with the history of mandatory service in other jurisdictions. See *Action Plan*, supra note 17, at 28-29. In light of the direct experience that other contributors to this debate have had with the Maryland efforts, the author will not undertake a detailed analysis here.


"The public view is that the profession is losing its professionalism..." [O]ne of the most prevalent and damaging perceptions the legal profession must fight is that lawyers serve themselves rather than the public. The general impression seems to be that, at one time, lawyers as a profession traditionally contributed much to pro bono causes, charitable endeavors and society as a whole. Today, however, it is felt they give very little.

*Id.* at 6-7.

97. See Graham, supra note 6, at 62 (quoting former Secretary of State Cyrus Vance, now a partner with a New York law firm: "For years I have hoped that we lawyers would be able to meet our obligations by voluntary actions... As the years have passed, however, I am forced to conclude that this is unlikely. Therefore, I believe that... pro bono service for all lawyers should be mandated.").
mandatory aspect, rendering the plan toothless, and finally an abandonment of any mandatory pro bono plan.

V. PRACTICAL DIFFICULTIES IN IMPLEMENTING MANDATORY PRO BONO

In addition to the often insurmountable political difficulties encountered in seeking support for a mandatory pro bono plan, the implementation of mandatory programs presents a host of practical problems which have not been addressed in most states.98

Existing pro bono programs often find their resources stretched to the limit as they coordinate the pro bono efforts of the approximately seventeen percent of the bar currently participating in organized pro bono programs.99 Many programs find that they do not have the staff or resources to train volunteers effectively, monitor cases, or even maintain accurate and up-to-date referral records. Although mandatory pro bono ideally would free up the considerable program resources expended on recruitment efforts, some type of recruitment likely would still be necessary to prompt reluctant participants to serve.

Mandatory pro bono would not only increase the number of attorneys that programs would be required to manage; it also would increase dramatically the administrative complexity of each step in the process of referring a pro bono case. Materials on the administration of voluntary pro bono programs cite essential program elements and operations which ensure successful programs.100 In a mandatory system, these essential elements, often undeveloped or completely absent in many voluntary programs, would become critical. For example, recordkeeping must be accurate when there is a threat of sanctions. In the likely event that the obligation is defined broadly, including some kind of partial or total financial buy out, the recordkeeping requirements would become unmanageable for most programs. The likelihood of carryover provisions, in which excess hours or cases in one year would be counted toward the next, would

98. See, e.g., Advisory Council of the Maryland Legal Services Corporation, First Hearing on the Draft Report of the Advisory Council of the Maryland Legal Services Corporation, Summary of Testimony Presented (Oct. 19, 1987) (the testimony of John Michener, Director of the Maryland Volunteer Lawyers Services, does not recognize the devastating impact that a mandatory program will have on existing organized pro bono programs) (copy on file with Maryland Law Review).

99. See PBI DIRECTORY, supra note 30, at 182-83.

further complicate record-keeping systems, because the body charged with enforcement of the obligation surely will look to the pro bono programs for timely and accurate records on the annual level of participation of each attorney. Training, support, and case monitoring, always critical to the success of a pro bono program, become even more essential when there are reluctant participants. Some substantial funding would have to be provided for litigation related costs, malpractice insurance, and other expenses in an involuntary program. Additional resources would have to be provided to review reports, enforce the obligation, hear appeals, process requests for exemption, and determine whether a particular effort meets the definition for purposes of reporting.

Proponents of mandatory pro bono must ask themselves whether it is economically feasible or efficient to increase current funding for pro bono five-fold to accommodate the increased caseload and administrative burdens; whether they are prepared to divert substantial funds from client services to the process of investigating and disciplining nonparticipatory attorneys; and whether most existing programs have the structural framework and expertise, even with additional resources, to accommodate a tidal wave of new cases and new volunteers.

VI. THE INEFFECTIVENESS OF MANDATORY PRO BONO

The administrative difficulties inherent in implementing a mandatory pro bono system, while daunting, are not insurmountable. It is essential, however, to determine whether, after the dust has settled on the mandatory debate, the resulting program is worth both the battle and the administrative expense.

Unfortunately, the end product of a successful campaign for a mandatory pro bono program probably will fail to meet the original goals of the program's proponents. Experience demonstrates that the political compromises involved in securing approval of such a program will result in a definition of pro bono service so broad that it encompasses activities already undertaken by virtually all lawyers.\(^{101}\) All lawyers will be in compliance, yet no additional services to address unmet legal needs will be provided.

Nor will the adoption of a mandatory program effect a change in the bar's diminishing sense of professionalism or in the public's perception of the bar. The unseemly wrangling which inevitably accompanies debates over mandatory pro bono only serves to rein-

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101. See, e.g., supra notes 72-73 and accompanying text.
force the public's perception of lawyers as self-interested and to make lawyers despair about their colleagues. The argument that lawyers, once forced to provide services, inevitably will embrace the cause of public service is not borne out by experience. Have lawyers grown to love the study of law for its own sake because of mandatory continuing legal education?

In most instances, of course, mandatory pro bono will not be adopted. But the same damage will be done. Definitions of pro bono work, even on a voluntary basis, will be expanded so as to institutionalize the status quo. The level of discourse during the inevitable hearings and debates will lower lawyers' self-esteem and the public's perception of the profession. There may be a backlash against voluntary programs, whose effectiveness will be put in question by the mandatory debate. In some instances, of course, the debate around mandatory pro bono may serve to focus and heighten the awareness of the bar and the public regarding the deficiencies of our justice system.\(^\text{102}\) The debate over mandatory pro bono, however, will so dominate the attention of the public and the profession that the really important story—the crisis in access to civil legal services—is lost.\(^\text{103}\)

**Conclusion**

Mandatory pro bono will not increase services, enhance professionalism, or improve the performance of existing pro bono programs. The emphasis on mandatory pro bono blurs the critical issue—the provision of legal assistance to low income persons and others currently unable to find assistance. It constitutes a troubling retreat from the central proposition that addressing that issue is primarily a matter of public, not professional obligation in the highly regulated and litigious American legal system. Proponents of mandatory pro bono would better serve the goals they seek by channeling their energies to ensure that this public obligation is met, whether through a "civil Gideon"\(^\text{104}\) case which establishes the right to counsel in civil matters or through legislative initiatives which en-

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102. The Maryland experience, which has resulted in a broadbased, effective campaign to increase both public and private resources for the provision of legal services is a laudable model. *See Action Plan, supra* note 17.

103. In New York State, for example, the results of the State's recently completed legal needs study may be eclipsed by the furor surrounding the debate over mandatory pro bono.

sure access to justice for all regardless of their resources. Mandatory pro bono will not enhance the public service activities of the bar, a laudable and vitally important goal. Instead, there should be a commitment to making voluntary pro bono as effective as possible. This will involve creating real incentives for pro bono participation, including making the commitment to pro bono work a key factor in decisions regarding partnership and compensation and providing special benefits to lawyers active in pro bono. Finally, there should be a commitment to improving the resources and operations of the current voluntary pro bono infrastructure so that the existing programs can begin to meet their potential. The current voluntary system is underfunded, unfocused, and inadequately structured. We should strive to make that system function effectively before we consider scrapping it for a mandatory system which offers an illusory promise of greater good.