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## Pro Bono Publico: Issues and Implications

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# Pro Bono Publico: Issues and Implications

by Debra Burke,\* Reagan McLaurin,\*\*  
and James W. Pearce\*\*\*

The lawyer is standing at the gate to Heaven and St. Peter is listening to his sins . . . the list goes on for quite awhile. The lawyer objects and begins to argue his case. He admits all these things, but argues, "Wait, I've done some charity in my life also." St. Peter looks in his book and says, "Yes, I see. Once you gave a dime to a panhandler and once you gave an extra nickel to the shoeshine boy, correct?" The lawyer gets a smug look on his face and replies, "Yes." St. Peter turns to the angel next to him and says, "Give this guy 15 cents and tell him to go to hell."<sup>1</sup>

## I. INTRODUCTION

Lawyer bashing is a common activity of the Nineties. The profession is seen as a "dour and greedy [one] that enriches itself through legal subtleties [which lawyers] have created."<sup>2</sup> Although anti-lawyer sentiment and distrust of lawyers as a class was present even in colonial America,<sup>3</sup> the public perception of the legal profession today is probably at its nadir. For example, a recent survey by the American Bar Association ("A.B.A.") revealed that lawyers had a favorability rating of only forty percent.<sup>4</sup> Only stockbrokers and politicians tested lower, with approval ratings of twenty-eight percent and twenty-one percent, respectively.<sup>5</sup> In fact, the approval rating for lawyers was higher among people who were the least likely to come into direct personal contact with them, while their approval rating was lowest among those who were most likely to come into contact with

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1. LARRY WILDE, *THE ULTIMATE LAWYER'S JOKE BOOK* 10 (1987).

2. *In re* Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin., 598 So. 2d 41, 59 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part).

3. *Faretta v. California*, 422 U.S. 806, 826-27 (1975).

4. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: A.B.A. Poll*, A.B.A. J., Sept. 1993, at 60, 62. Teachers had a favorability rating of 84%; pharmacists, 81%; police officers, 79%; doctors, 71%; accountants, 60%; and bankers, 56%. *Id.*

5. *Id.*

them.<sup>6</sup>

General complaints concerning attorneys include that attorneys lack caring and compassion, and that the profession fails to promote and police ethical behavior.<sup>7</sup> Another common complaint relates to tasteless advertising by attorneys,<sup>8</sup> a situation that many bar associations are attempting to remedy through regulation.<sup>9</sup> In response to questions about what the profession could do to promote a more positive perception, forty-three percent of the people surveyed by the A.B.A. said that providing free legal services to the poor, in other words, providing pro bono services,<sup>10</sup> would improve the public image of the legal profession.<sup>11</sup> Indeed, one attorney characterizes pro bono work as the vaccine which renders him immune to lawyer jokes and claims it provides an opportunity for the profession to counteract the negative, distorted image thrust upon it.<sup>12</sup>

This Article will first explore the historical, constitutional, practical, and ethical justifications for pro bono obligations.<sup>13</sup> This Article will then examine the controversies surrounding mandatory pro bono proposals.<sup>14</sup> Next, this Article will review current pro bono programs.<sup>15</sup> Finally, this Article will analyze empirically the relationship between the pro bono work performed by the largest United States firms and their financial performance, organizational structure, and minority membership.<sup>16</sup>

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6. *Id.* Minorities, the unemployed, members of low-income households, and adults under the age of 30 felt more favorably toward lawyers; whereas, upper middle class white-collar workers who were college graduates, that is, those persons most likely to be associated personally with lawyers, felt unfavorably toward them. *Id.*

7. *Id.*

8. Some advertising by attorneys is constitutionally protected speech under the First Amendment and cannot be prohibited by the state. *See, e.g., Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466 (1988); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

9. *See William E. Hornsby & Judith H. Shapiro, Advertising: States Revamp Their Rules*, 56 TEX. B.J. 1026 (1993) (reprinted by permission from Bar Leader, July-August 1992).

10. Pro bono or "*pro bono publico*," is defined as being for the public good, for the welfare of the whole. BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).

11. Hengstler, *supra* note 4, at 61. Other suggestions included volunteer in the drug war (42%), prosecute criminals (39%), help draw agreements (33%), protect those discriminated against (33%), promote mediation (32%), keep order in society (20%), and defend the average person (17%). *Id.*

12. Mark E. Allen, *Pro Bono Attorneys Do It For Free*, WASH. ST. B. NEWS, Nov. 1991, at 21, 21.

13. *See infra* part II.

14. *See infra* part III.

15. *See infra* part IV.

16. *See infra* part V & app. For an explanation as to why the study focused on large firms, *see infra* note 114.

## II. THE PRO BONO OBLIGATIONS OF ATTORNEYS

Proponents of mandatory pro bono find support for legal service obligations in historical, constitutional, practical, and ethical justifications.

### A. Historical Justifications for Pro Bono Obligations

Historical justifications for requiring pro bono of attorneys include the "officer of the court" argument and the closely related implied consent theory. These theories hold that attorneys, as officers of the court, must assist in the administration of justice:<sup>17</sup> because of "the lawyer's historical professional responsibility to represent the poor,"<sup>18</sup> a lawyer implicitly consents to assume these obligations *cum onere*, or as part of an onerous tradition, upon entering the profession.<sup>19</sup> Some legal historians trace this burden to the ecclesiastical courts of the thirteenth century;<sup>20</sup> whereas, others find its root in the English courts

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17. See, e.g., *Ruckenbrod v. Mullins*, 133 P.2d 325 (Utah 1943) (holding that appointed attorneys have no right to compensation). Some states hold that, while an attorney must serve, the attorney has a right to compensation. *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 437 (Alaska 1987). See generally C.T. Drechsler, Annotation, *Right of Attorney Appointed By Court For Indigent Accused To, And Court's Power To Award, Compensation By Public, In Absence of Statute Or Court Rule*, 21 A.L.R. 3d 819 (1968).

18. *In re D.B.*, 385 So. 2d 83, 92 (Fla. 1980).

19. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 573 So. 2d 800, 806 (Fla. 1990); *Weiner v. Fulton County*, 148 S.E.2d 143, 146 (Ga. Ct. App.), *cert. denied*, 385 U.S. 958 (1966); see also *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 317 (1989) (Stevens, J., dissenting) (obligation to participate in program providing representation for indigent litigants existed since program was in operation when attorney was admitted to practice).

Learned professions, such as law, theology, and medicine, historically have been characterized by a spirit of public service. For example, Dean Roscoe Pound described the spirit of public service as motivating professionals to act even with no expectation of reward, and asserting that, while gaining a livelihood was involved in all callings, it was incidental to a professional calling. *State Bar of Ariz. v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 6 (Ariz. 1961) (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 6, 10 (1953)). The practical effect of being characterized as a learned profession was that historically federal antitrust laws were not applied actively to such practitioners. See, e.g., *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932) (discussing the Sherman Antitrust Act); *FTC v. Raladam Co.*, 283 U.S. 643 (1931) (discussing the Federal Trade Commission Act); see generally Michael J. Kaplan, Annotation, "Learned Profession" Exemption in Federal Antitrust Laws (15 U.S.C. §§ 1 *et seq.*), 39 A.L.R. FED. 774 (1978); Craig C. Beles & Daniel W. Wyckoff, Comment, *The Washington Consumer Protection Act v. The Learned Professional*, 10 GONZ. L. REV. 435 (1975). Nevertheless, despite their common bond to professionalism and Latin, lawyers and doctors do not share a pro bono obligation. But see Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1013 (1991).

20. Zino I. Macaluso, *That's O.K., This One's On Me: A Discussion of the*

and their traditions.<sup>21</sup>

Nevertheless, some scholars find no merit in this "onerous tradition" rationale for uncompensated service.<sup>22</sup> They reason that while English sergeants-at-law, who had the exclusive right to practice in the Court of Common Pleas, may have been considered to be officers of the court,<sup>23</sup> modern attorneys more closely resemble English barristers, who were never considered to be officers of the court.<sup>24</sup>

### B. Constitutional Justifications for Pro Bono Obligations

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel in federal prosecutions.<sup>25</sup> The right to counsel has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>26</sup> Because the right to counsel in criminal cases is fundamental, an attorney must be provided whether or not the accused has an ability to pay for the services to be rendered. While the government must provide an attorney for an indigent defendant, the government does not have a commensurate

*Responsibilities and Duties Owed by the Profession to Do Pro Bono Publico Work*, 26 B.C. L. REV. 65, 66 (1992).

21. *United States v. Dillon*, 346 F.2d 633, 636-38 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). In addition to this common law tradition, some early American statutes codified the obligations. *Id.* at 637.

22. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980); Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545, 567-68 (1991).

23. Matalon, *supra* note 22, at 567.

24. See Shapiro, *supra* note 22, at 740-53. Unlike modern attorneys, sergeants-at-law held public offices and sometimes were compensated by the government. *Id.* at 746. See also Beth M. Coleman, Note, *The Constitutionality of Compulsory Attorney Service: The Void Left By Mallard*, 68 N.C. L. REV. 575, 586 (1990). Whether or not the English tradition, if it exists, was incorporated into American jurisprudence has also been questioned. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 760-61 (Mo. 1985) (en banc). The Supreme Court may not endorse the officer of the court doctrine as the sole justification for an attorney's obligation to serve. See *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 304 (1989); see also Matalon, *supra* note 22, at 564-65.

25. U.S. CONST. amend. VI. The amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

26. U.S. CONST. amend. XIV. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel when imprisonment possible); *In re Gault*, 387 U.S. 1 (1967) (right to counsel for juveniles when institutionalization possible); *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel in capital case). The conclusion that a lawyer is essential to a fair trial, arguably, might even allow a state to constitutionally impose a lawyer upon an unwilling defendant. See *Faretta v. California*, 422 U.S. 806, 832-33 (1975).

obligation to pay the attorney to represent the defendant.<sup>27</sup>

No constitutional right to have the assistance of counsel exists in civil cases.<sup>28</sup> In addition, it is still far from settled whether attorneys may be constitutionally required to serve in civil disputes without compensation.<sup>29</sup> In 1892, Congress passed the *In Forma Pauperis* Act (the "Act") to open federal courts to indigent civil plaintiffs.<sup>30</sup> The Act allows indigents to sue without liability for costs and allows judges to assign counsel.<sup>31</sup> In *Mallard v. United States District Court*,<sup>32</sup> the

27. *State v. Davis*, 153 S.E.2d 749, 756-57 (N.C.), *cert. denied sub nom. Nivens v. North Carolina*, 389 U.S. 828 (1967); *State v. Clifton*, 172 So. 2d 657, 667-68 (La. 1965); *see generally* Kim Schimenti, *Pro Choice for Lawyers in a Revised Pro Bono System*, 23 SETON HALL L. REV. 641, 653-72 (1993). Even nonresident attorneys may be required to handle their share of indigent cases as a requirement for admission to a state's bar. *Barnard v. Thorstenn*, 489 U.S. 546, 557-58 (1989). Arguably, however, court-appointed attorneys need not pay the costs or expenses of maintaining a proper defense. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. 1981) (en banc), *cert. denied*, 454 U.S. 1142 (1982).

28. *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1214 (1983); *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1980); *see also* *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25-27 (1981) (right to appointed counsel exists only if litigant may lose physical liberty). Consequently, legislatures have never been thought to have a duty to finance representation for civil indigents as opposed to criminal indigents. *Colbert v. Rickmon*, 747 F. Supp. 518, 521 (W.D. Ark. 1990).

29. *See, e.g., Colbert*, 747 F. Supp. 518 (courts have no inherent power to compel representation of civil rights plaintiffs without compensation); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (en banc) (courts cannot compel civil appointments without compensation); *see generally* Judy E. Zelin, Annotation, *Court Appointment of Attorney to Represent, Without Compensation, Indigent In Civil Action*, 52 A.L.R. 4th 1063 (1987) (discussing the divergence of views of requiring an attorney to serve a civil appointment without compensation). Nevertheless, the rules of a few federal district courts allow for the mandatory appointment of uncompensated counsel in indigent civil cases. Deborah Graham, *Mandatory Pro Bono: The Shape of Things To Come?*, A.B.A. J., Dec. 1987, at 62.

30. 28 U.S.C. § 1915(a)-(e) (1988). The title of the Act literally means "[i]n the character or manner of a pauper." BLACK'S LAW DICTIONARY 779 (6th ed. 1990). The Act provides in pertinent part:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefore;

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(d) 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.

28 U.S.C. § 1915(a), (d).

31. Other statutes as well, both at the state and federal level, allow for the appointment, and often the compensation, of attorneys in civil suits. *See* Carolyn Elefant, *Can Law Firms Do Pro Bono? A Skeptical View of Law Firms' Pro Bono*

Supreme Court was asked to interpret the Act to determine whether or not federal district courts could compel appointment in civil cases.<sup>33</sup> A bare majority of five held that the use of the word "request" by Congress to describe the authority of courts negated any suggestion that compulsory appointment was intended.<sup>34</sup> By limiting its holding to the statutory interpretation issue, however, the Court did not rule on the constitutionality of compulsory assignments generally.<sup>35</sup> Therefore, while the government's interest in providing counsel under the Sixth Amendment may be compelling and may outweigh the rights of the individual attorney appointed in criminal cases,<sup>36</sup> on balance the government's interest in providing counsel to represent indigents in civil suits may not be as compelling.<sup>37</sup>

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*Programs*, 16 J. LEGAL PROF. 95, 117-19 (1991). Often, however, the legislative body fails to establish a fund for payment of attorneys fees. See *Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 516 (9th Cir. 1984) ("Unfortunately Congress has not been as generous in providing compensation for counsel as it has in authorizing court appointments.").

32. 490 U.S. 296 (1989).

33. *Mallard*, 490 U.S. at 298. See generally Coleman, *supra* note 24 (examining the *Mallard* decision in light of its legislative history and statutory language); Lisa M. Windfeldt, Note, *Pro Bono Representation—A Lawyer's Statutory Right to "Just Say No": The End of Compelled Indigent Representation—Mallard v. United States District Court*, 25 WAKE FOREST L. REV. 647 (1990) (analyzing the impact of the Court's decision in *Mallard* on an attorney's statute-based right to decline an indigent referral).

34. *Mallard*, 490 U.S. at 301-02. Ironically, *Mallard* argued that he should be permitted to withdraw from the case to which he was appointed because forcing him to represent indigent inmates in a complex trial would compel him to violate his ethical obligation to take only those cases which he could handle competently. *Id.* at 299-300.

35. *Id.* at 306-08. The dissent argued that the Act embodied the historical authority of courts to order counsel to represent indigent litigants. *Id.* at 314 (Stevens, J., dissenting). However, the Court did not rule on the inherent authority of courts to compel appointment. *Id.* at 306-08. See *infra* notes 43-53 and accompanying text for a discussion of the authority of a court's justification for mandating pro bono.

Justice Kennedy, in a concurring opinion, concluded that, while the Act did not authorize compulsory appointments, the professional responsibility of lawyers obliged them to answer the call. *Id.* at 310-11 (Kennedy, J., concurring). See *infra* notes 54-57 and accompanying text regarding lawyers' ethical responsibility.

The contingency fee system and one-way fee shifting statutes may inspire attorneys to represent indigent plaintiffs in some civil cases. See Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1117 (1991); Silverman, *supra* note 19, at 1094-99. Judge Posner endorses the contingency fee system, arguing that the marketplace should determine the availability of legal services based on the merit of the case. See *Merritt v. Faulkner*, 697 F.2d 761, 769-71 (7th Cir.) (Posner, J., concurring in part, dissenting in part), *cert. denied*, 464 U.S. 986 (1983).

36. For a discussion of the constitutional objections raised by attorneys to mandatory pro bono proposals see *infra* notes 73-86 and accompanying text.

37. Arguably, in civil cases the interests of all parties should be balanced on a case by case basis; however, mandatory pro bono programs do not allow such individualized consideration. See John C. Scully, *Mandatory Pro Bono: An Attack on the*

### C. *Practical Justifications for Pro Bono Obligations*

One practical justification for requiring pro bono is the legal monopoly theory. According to the legal monopoly theory, States award an exclusive monopoly to lawyers to represent the public in legal matters. The monopoly power allows the States to license, control, and regulate attorneys as well as to establish and maintain the rules of access to the judicial system. Because attorneys receive an exclusive franchise from the state which licenses them, lawyers must render pro bono services or risk looking suspiciously like “the foxes . . . establishing the rules of access to the hen house.”<sup>38</sup> Critics of this rationale argue that mandating a public service obligation in exchange for the privilege of exercising a degree of monopoly power is not a viable justification given the competitive nature of the practice of law today.<sup>39</sup>

Another practical consideration centers on the complexity of the legal system. Some lawyers argue that the complexities of today’s procedural and substantive laws can be neither understood nor applied effectively by a layperson; therefore, the absence of legal assistance is equivalent to a denial of equal access to justice.<sup>40</sup> While lawyers may not hold the keys to the courthouse doors exclusively, lawyers do help preserve the rights of individuals,<sup>41</sup> primarily because such rights are adjudicated in an adversarial system in which effective representation is of paramount importance.<sup>42</sup> Therefore, lawyers are obligated to

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*Constitution*, 19 HOFSTRA L. REV. 1229, 1243 (1991).

38. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d 41, 60 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part).

39. Cramton, *supra* note 35, at 1134-36 (notion that protection from internal and external competition provides practitioners with material security and makes possible uncompensated public service is fanciful); Jonathon R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1122 (1992) (entry restrictions in the form of state bar licensing rules do not justify imposing a mandatory pro bono requirement on lawyers currently in practice).

40. *See In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 55-58 (Kogan, J., concurring in part, dissenting in part). In the context of criminal proceedings, the Supreme Court has acknowledged that “even the intelligent and educated layman has small and sometimes no skill in the science of law.” *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *But see Caruth v. Pinkney*, 683 F.2d 1044 (7th Cir. 1982) (court’s refusal to appoint counsel in civil suit should not be disturbed on appeal since plaintiff, a prison law clerk, had access to prison library and basic understanding of the judicial process).

41. Victor Marrero, *Committee to Improve the Availability of Legal Services—Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 782 (1991) [hereinafter *Marrero Report*].

42. Matalon, *supra* note 22, at 562. Adversarial systems allow some citizens to triumph at the expense of other citizens. Therefore, while grocers may not make the condition of the hungry worse by selling groceries to people who can afford them, the same observation is not necessarily true with respect to the commercial activities of



assist those who cannot afford legal assistance in gaining access to the legal system, both to vindicate individual rights and to advance the system itself.

An additional rationale for conscripting attorneys into pro bono service lies in the inherent authority of the court itself to order such service as a condition of practice.<sup>43</sup> The state judiciary has the authority to regulate the professional conduct of attorneys.<sup>44</sup> In *In re Hunoval*,<sup>45</sup> an attorney was appointed to represent an indigent defendant charged with a capital offense.<sup>46</sup> The defendant was convicted and the attorney petitioned the state supreme court for a stay of execution so that a writ of certiorari could be filed with the United States Supreme Court.<sup>47</sup> The stay was granted, but the attorney refused to perfect the appeal.<sup>48</sup> The attorney wrote the North Carolina Supreme Court, stating that he was not "an eleemosynary institution" and that some judicial official in the state needed to promise him compensation on a reasonable basis in order for him to continue with the case because he could not "justify working for nothing or at a rate less than that received by a garage mechanic."<sup>49</sup> The court, however, had no problem justifying the attorney's obligation to continue providing legal services in the case or the court's inherent authority to discipline attorneys for unprofessional conduct.<sup>50</sup> The court suspended Mr. Hunoval from the practice of law for a year.<sup>51</sup>

The United States Supreme Court has tentatively suggested that federal courts also might possess inherent authority to compel lawyers to serve; and that attorneys might be under a strong ethical obligation to render assistance as well.<sup>52</sup> Arguably, the officer of the court and

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lawyers. See Silverman, *supra* note 19, at 1015-16. Some observers have even suggested that lawyers are partially responsible for widening the gap between the rich and the poor. See Macaluso, *supra* note 20, at 67. Moreover, not only are individual rights litigated in a given case under an adversarial system, but each case may also set precedents which transcend the case at bar. Such is not the case in many other countries where the ability to challenge governmental action is more limited. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 42-43.

43. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 573 So. 2d 800, 804-05 (Fla. 1990).

44. See *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 461 A.2d 938, 943-44 (Conn. 1983).

45. 247 S.E.2d 230 (N.C. 1977).

46. *Id.* at 231.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 232-33.

51. *Id.* at 233.

52. *Mallard*, 490 U.S. at 305 n.4. Such an inherent authority to appoint counsel

related implied consent rationales, coupled with the legal monopoly theory and the recognition of an ethical obligation, afford courts with more than enough inherent authority to compel uncompensated appointment.<sup>53</sup>

#### D. Ethical Justifications for Pro Bono Obligations

Indeed, the final argument in support of compulsory pro bono rests upon the ethical duty owed by attorneys to perform public service. The Model Rules of Professional Conduct (the "Model Rules") provide that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year" and that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ."<sup>54</sup> The predecessor to the Model Rules, the Model Code of Professional Responsibility (the "Model Code"), also recognized that lawyers owe a duty to provide legal services to those who cannot afford to pay.<sup>55</sup> Thus, quite apart from other legal foundations, lawyers owe a modern ethical obligation to provide pro bono services.<sup>56</sup> Nevertheless, the ethical duty embraced by both the

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might extend to civil cases as well. *See, e.g., Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 518 (9th Cir. 1984) (coercive appointments may be proper for some civil rights cases); *Tyler v. Lark*, 472 F.2d 1077, 1079-80 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973) (denial of fees to attorney representing indigent prisoner in civil rights case).

53. *See Matalon, supra* note 22, at 557-74.

54. MODEL RULES OF PROFESSIONAL CONDUCT Rules 6.1 and 6.2 (1992); *see generally* Lisa G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1150-52 (1991).

55. The Model Code provides that:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . . Every lawyer should support all proper efforts to meet this need for legal services.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT EC 2-25 (1986). Many states have adopted the Model Rules, although a minority still adhere to some version of the Model Code. Lerman, *supra* note 54, at 1151 n.37.

56. *See Macaluso, supra* note 20, at 86. In *Mallard* the Supreme Court observed that "in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest." *Mallard*, 490 U.S. at 310.

Model Rules and the Model Code is aspirational in nature.<sup>57</sup> Neither authority mandates pro bono, nor provides disciplinary sanctions for failure to perform pro bono work.

### E. Need

The primary justification for requiring pro bono of practitioners, overshadowing the historical, constitutional, practical, and ethical justifications discussed above, is quite simply need.<sup>58</sup> In the mid-1970s, Congress passed the Legal Services Corporation Act<sup>59</sup> which established a central corporation to disburse federal funds for the legal needs of the poor to community-based centers.<sup>60</sup> Unfortunately, in the 1980s the Reagan administration drastically cut funding to the corporation,<sup>61</sup> causing a trickle-down effect upon the community delivery systems.<sup>62</sup> As a result of the Reagan administration's cutbacks, it is now estimated that only fifteen to twenty percent of the civil legal needs of the poor are being met,<sup>63</sup> even though their legal problems

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57. Cramton, *supra* note 35, at 1123. As one justice noted, "[e]ven though it is not an admirable course of conduct, if lawyers want to use their talents in a selfish and miserly manner, I believe they have that right." *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 54 (McDonald, J., concurring). The Canadian Bar Association Professional Conduct Handbook is even less explicit in requiring pro bono, possibly because the need for legal assistance is not as great as in the United States given the legal aid programs funded by the Canadian government. Macaluso, *supra* note 20, at 68.

58. See Schimenti, *supra* note 27, at 672-74. The significant increase in federal habeas corpus petitions in capital cases has adversely affected the availability of attorneys for other cases. See generally Debra C. Moss, *Death, Habeas, and Good Lawyers: Balancing Fairness and Finality*, A.B.A. J., Dec. 1992, at 83; Vincent W. Perini, *Stirring the Death Row Pot*, 56 TEX. B.J. 332 (1993); *A Study of Representation in Capital Cases in Texas*, 56 TEX. B.J. 333 (1993).

59. Pub. L. No. 93-355, 88 Stat. 388 (1974) (codified as amended at 42 U.S.C. § 2996 (1988)).

60. Silverman, *supra* note 19, at 983.

61. Funding for the corporation was reduced by 40% per capita from 1981 to 1989. Lerman, *supra* note 54, at 1144. This cut occurred at a time when the right to counsel for criminal defendants grew, along with government regulation and the numbers of unrepresented people in society. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 43.

62. Half the legal services offices in Washington State were closed in response to funding cuts. Jack R. Dean, *The Law Fund Challenge*, WASH. ST. B. NEWS, Nov. 1991, at 27, 28-29.

63. See *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d 41 (containing a report of the Florida Bar Foundation Joint Commission on the delivery of legal services to the indigent in Florida); John Katzman, *The Dream, The Reality, The Future: TYLA Symposium Addresses Legal Services to the Poor*, 55 TEX. B.J. 621, 621 (1992); George J. Zweibel, *Access to Justice in Washington Revisited*, WASH. ST. B. NEWS, Nov. 1990, at 7; see also *Marrero Report*, *supra* note 41, at 768 (explaining that the unmet need for civil legal services for the

often involve questions concerning access to the necessities of life.<sup>64</sup> The bar has responded to this problem by establishing Interest on Lawyer's Trust Account (IOLTA) programs in which the interest paid is used to help fund legal services programs,<sup>65</sup> and by intensifying voluntary pro bono efforts.<sup>66</sup> Although such efforts are certainly commendable, they are currently insufficient to meet the increasing need for legal representation.<sup>67</sup>

In sum, a duty may be owed by the legal profession based upon historical, constitutional, practical, ethical, and need-based justifications. Nevertheless, the exact parameters of that duty, as well as the absoluteness of a court's ability to compel the performance of the duty, may be weaker in cases not implicating Sixth Amendment rights.<sup>68</sup>

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poor in New York is a critical problem). *But see* Scully, *supra* note 37, at 1238-39 (claiming that the Marrero Report was based on unsubstantiated assumptions about the poor). To qualify for subsidized civil legal services under federal law a family of four can receive no more than \$16,750 annually. Ada Shen-Jaffee, *The Legal-service Programs of Washington State*, WASH. ST. B. NEWS, Nov. 1991, at 46.

64. George J. Zweibel, *Debunking the Myths About Access to Justice in Washington*, WASH. ST. B. NEWS, Nov. 1991, at 13. While public assistance benefits may not be terminated without due process, due process has not been defined as a right to a hearing and representation by counsel at that hearing. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

65. Schimenti, *supra* note 27, at 692. However, this funding source alone probably is insufficient to meet the increased need for services. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 45. Some states also divert filing fees to such programs. Zweibel, *supra* note 63, at 9.

66. For an excellent summary of the history of the bar's voluntary efforts in response to federal funding and cuts in such funding see Esther Lardent, *The Uncertain Future of Attorney Volunteerism: Pro Bono*, 56 TEX. B.J. 166, 166-67 (1993).

67. It is estimated that only 15% to 30% of all licensed attorneys participate in pro bono activities. *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 598 So. 2d at 49; Graham, *supra* note 29, at 63; *Marrero Report*, *supra* note 41, at 777. Moreover, while the gross number of volunteers may be growing, in reality the net number of volunteers who actually handle cases may be shrinking because so many volunteers later become inactive. Margaret O'Donnell, *The National Perspective—Developments On the Pro Bono Program Front*, WASH. ST. B. NEWS, Nov. 1991, at 50, 50-51.

68. *See supra* notes 28-37 and accompanying text. Of course, some states have statutory schemes for appointing and compensating attorneys who represent indigent criminal defendants. *See, e.g.*, 55 ILL. COMP. STAT. ch. 55, § 5/3-4006 to 4007 (West 1992); N.Y. COUNTY LAW § 722-b (McKinney 1991). Additionally, Congress has authorized federal district courts to authorize appointment of counsel for indigent persons to whom the Sixth Amendment right attaches. This statute, the Criminal Justice Act, also provides for remuneration of counsel upon petition to the court. 18 U.S.C. § 3006A (1988). Nevertheless, the attorney fees allowed may be less than magnanimous.

*In In re Snyder*, 734 F.2d 334 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985), an attorney complained about the "extreme gymnastics" which were required to receive "puny amounts" under the Criminal Justice Act, and stated that he was "extremely disgusted" by

The cry for mandatory pro bono programs encompassing both criminal and civil cases is becoming resoundingly loud.<sup>69</sup> Thus, the question becomes whether the bar should require attorneys to work a certain number of pro bono hours annually in order to meet the legal needs of indigent litigants in these cases.

### III. OPPOSITION TO MANDATORY PRO BONO

The response by many members of the bar to the question of whether pro bono should be required is: "Why should lawyers in particular be expected to donate their professional services?" These critics argue that even though lawyers are granted a privilege to practice by the State, this does not imply a requirement to assume pro bono obligations, because other practitioners also licensed by the State are not required to donate their services.<sup>70</sup> Furthermore, they assert that it is not as if lawyers hold the keys to the courthouse doors; just as property owners can secure construction permits and build without contractors, litigants can proceed pro se.<sup>71</sup> Finally, opponents of mandatory pro bono express concerns about whether pro bono services infringe upon the duties owed by lawyers to their other clients, and on a more personal level, their own families.<sup>72</sup>

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the treatment afforded him, that he no longer wished to be considered for court appointments, and that he had "simply had it." *Id.* at 336. Unimpressed with his protest, the Eighth Circuit ruled that a six month suspension from the practice of law would be appropriate, unless the attorney provided the court with a sincere letter of apology for his disrespectful remarks. *Id.* at 344. The Supreme Court reversed, finding that the attorney's conduct did not warrant suspension from practice. *In re Snyder*, 472 U.S. at 645-47. The Court, however, did not rule on whether or not suspension would be proper for the attorney's refusal to serve in Criminal Justice Act cases because of his objections to the allegedly biased administration of the statute.

69. See generally *Marrero Report*, *supra* note 41.

70. See *supra* notes 17-24 and accompanying text (discussing the officer of the court and implied consent justifications for requiring pro bono); see also *Colbert v. Rickmon*, 747 F. Supp. 518, 527 (W.D. Ark. 1990) (memorandum opinion) ("This court agrees with those courts which have held that attorneys do not 'impliedly consent' to their being forced to represent civil rights litigants without pay, just as hairdressers, also licensed by the state, do not impliedly consent to perform free haircuts for the needy.").

71. See *supra* notes 38-39 and accompanying text (discussing the legal monopoly theory). The bench has special obligations with respect to *pro se* litigants. See *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982). Other licensed entities, such as utilities, enjoy state sanctioned monopoly power without a commensurate obligation to provide free service to the poor. See Paul E. McGreal, *Are We To Be A Profession?*, 56 TEX. B.J. 38, 38-39 (1993) (urging that pro bono service be required because of a professional obligation).

72. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 392 (1923). See *Webb v. Baird*, 6 Ind. 13, 17 (1854) ("To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of

Opponents of mandatory pro bono also raise constitutional concerns about such proposals.<sup>73</sup> For example, opponents argue that even if there are good reasons why attorneys should volunteer their services, state action compelling such service may violate the Equal Protection Clause of the United States Constitution.<sup>74</sup> Singling out attorneys may, however, bear a rational relationship to a legitimate governmental interest.<sup>75</sup> Critics of mandatory pro bono also assert that requiring an unconsenting lawyer to serve may violate the Thirteenth Amendment's prohibition against involuntary servitude.<sup>76</sup> Most courts would reject such a proposition,<sup>77</sup> although the fact that some attorneys would raise that issue may call into question the wisdom of coercive appointments.<sup>78</sup> Critics of mandatory pro bono also argue that uncompensated, compelled service could constitute a taking of property without just compensation or due process in violation of the Fifth and

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the merchant, or the crops of the farmer, or the wares of the mechanic."). Financial pressures fuel many attorneys' objections to mandatory pro bono. *See also* Macaluso, *supra* note 20, at 72.

73. *See generally* Schimenti, *supra* note 27, at 680-89; Zelin, *supra* note 29, at 1065. The committee which was appointed to study mandatory pro bono in New York State concluded for various reasons that their final proposal was constitutionally sound. *Marrero Report*, *supra* note 41, at 857-61.

74. U.S. CONST. amend. XIV. *See generally* Scully, *supra* note 37, at 1258-60.

75. The appropriate level of review with respect to the interpretation of the Equal Protection Clause is the rational basis test, whereby classifications are constitutionally permissible if they are reasonably related to a legitimate governmental objective. *See, e.g.,* Pennell v. City of San Jose, 485 U.S. 1 (1988) (ordinance establishing rent controls); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (statute regulating retail sale of milk containers); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978) (federal statute regulating highway billboards).

Classifications based upon race, religion, national origin, and arguably gender, are suspect, as are classifications which infringe upon fundamental rights guaranteed by the Constitution. These classifications are subject to strict scrutiny review and must be necessary to promote a compelling state interest. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); McLaughlin v. Florida, 379 U.S. 184 (1964) (anti-miscegenation law).

76. U.S. CONST. amend. XIII.

77. *In re* Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin., 573 So. 2d 800 (Fla. 1990). The Florida Supreme Court concluded that the Thirteenth Amendment's prohibition against involuntary servitude required threat of legal confinement or physical restraint. *Id.* at 805; *see also* Flood v. Kuhn, 407 U.S. 258, 265-66 (1972) (amendment not applicable when individual can choose freedom even if that choice results in substantial economic loss); Butler v. Perry, 240 U.S. 328, 333 (1916) (Thirteenth Amendment not intended to interfere with enforcement of duties owed by individuals to the state such as military service or jury duty).

78. Bradshaw v. United States Dist. Ct., 742 F.2d 515, 517 (9th Cir. 1984) ("When the degree of resistance is so high that attorneys would rather confront the court with questionable Thirteenth Amendment arguments than provide counsel for an indigent, the helpfulness of coercive appointment is subject to question.").

Fourteenth Amendments.<sup>79</sup> While most courts again would probably answer in the negative,<sup>80</sup> that issue is more debatable particularly with respect to compelled appointment in civil cases.<sup>81</sup> Opponents further argue that mandatory pro bono programs could violate the First Amendment guarantees of freedom of speech and the right of association. Although such rights are recognized with respect to the practice of law,<sup>82</sup> mandatory pro bono probably would not constitute a violation so long as the system of appointment was sufficiently flexible.<sup>83</sup> Finally, critics assert that if an attorney was compelled to represent an indigent client with respect to a criminal matter with which the attorney had no experience, such an action could violate the client's Sixth Amendment right to have the effective assistance of counsel.<sup>84</sup> That attorneys who are required to serve are not immune from malpractice suits<sup>85</sup> should lessen the likelihood of this possibility occurring; yet, it is precisely that lack of immunization which causes many attorneys to fear mandatory pro bono proposals.<sup>86</sup>

Aside from these constitutional concerns, there are practical objections to mandatory pro bono proposals. Opponents of these proposals note that poverty law is a specialized field in which the average attorney may not possess sufficient expertise; therefore, the quality of

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79. The practice of law is a privilege which is subject to constitutional protection. *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989); *see also* *Coleman*, *supra* note 24, at 584-85.

80. *See, e.g.*, *United States v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *In re Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin.*, 573 So. 2d at 805; *see also* *Warner v. Commonwealth*, 400 S.W.2d 209, 211-12 (Ky. Ct. App.), *cert. denied*, 385 U.S. 858 (1966) (appointment of counsel for indigent criminal defendant).

81. Such appointments may violate state constitutions. Moreover, if an uncompensated appointment would have a significant impact on the individual attorney's income, an argument could be made for a violation of the Fifth Amendment. *Scully*, *supra* note 37, at 1255-57. Also, compelling an attorney to pay expenses without reimbursement could be unconstitutional. *Williamson v. Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir. 1982).

82. *See* *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (where the court found that compulsory bar dues cannot be used to advance political or ideological causes); *In re Primus*, 436 U.S. 412 (1978) (offer by lawyer of representation for furtherance of ideological and political causes was protected activity).

83. Cash contributions in lieu of service is one option. *See generally* *Scully*, *supra* note 37, at 1249.

84. This concern led the attorney in *Mallard* to seek a court order dismissing his appointment. *See supra* note 34.

85. *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979); *McLaughlin v. Royster*, 346 F. Supp. 297, 301 (E.D. Va. 1972).

86. *Bradshaw v. United States Dist. Ct.*, 742 F.2d 515, 516 (9th Cir. 1984). That fear is particularly sensible today given the cost of malpractice insurance. *See infra* notes 89-94 and accompanying text (discussing other practical considerations).

the legal services rendered under a mandatory system may be less than effective.<sup>87</sup> Critics further assert that it is questionable whether or not the implementation of a system of compulsory service is an economically efficient allocation of resources.<sup>88</sup>

Some critics propose that a better solution might be to require donations of money to fund legal aid projects staffed by specialists, rather than to require donations of time.<sup>89</sup> Of course both suggestions presuppose that an indigent individual would prefer to have a lawyer for an hour instead of one hundred dollars in cash, an assumption which again implicates resource allocation issues.<sup>90</sup> Other opponents of mandatory pro bono suggest that instead of merely increasing the indigent population's access to attorneys, perhaps efforts should concentrate on increasing their access to justice. Reforms which streamline matrimonial and housing courts, thus allowing indigents to appear pro se effectively,<sup>91</sup> which provide more options for alternative dispute resolution, and which allow paralegals to assume a more active role in the provision of legal services,<sup>92</sup> might be a more effective means for achieving the goal of equal access to justice.<sup>93</sup> Some observers also argue that it is the collective responsibility of society, not the

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87. Even the Supreme Court has recognized the reality of specialized practices and observed that a court's appointment of counsel for criminal defendants should be cognizant of that fact. *Barnard v. Thorstenn*, 489 U.S. 546, 558 (1989). Nevertheless, attorneys in most cases are able to rise to the occasion when circumstances so demand. See Lawrence T. Welch, *Patent Law and Pro Bono Practice—Activities for the Benefit of the Public*, 70 MICH. B.J. 914 (1991). Additionally, many of the present voluntary programs have some sort of mentor system. See Allen, *supra* note 12, at 21.

88. Sol Wachtler, *Introduction to Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 739, 740-41 (1991). It also can be argued that mandatory pro bono proposals will have a more severe adverse economic effect on small firms, as opposed to large firms, and that such programs will result in a transfer of wealth from the smaller firms to the larger firms. Macey, *supra* note 39, at 1119-20. Many attorneys in smaller firms, sole practitioners, and minority attorneys already subsidize pro bono activities with reduced fee arrangements. Elefant, *supra* note 31, at 121 n.128. Moreover, for these practitioners, in particular, billable hours never equal collectible hours. *Id.*

89. See Elefant, *supra* note 31, at 109-17.

90. See Macey, *supra* note 39, at 1117-23; Scully, *supra* note 37, at 1234-35. Furthermore, society might suffer as a result of the private subsidization of litigation which might encourage unmeritorious suits. Statutory fee shifting arrangements might be more efficient and provide more effective representation. See Cramton, *supra* note 35, at 1138.

91. Scully, *supra* note 37, at 1236-37.

92. Currently, however, lawyers are under an ethical obligation to assist in preventing the unauthorized practice of law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1983).

93. See *supra* notes 40-42 and accompanying text (discussing the problem of the complexity of the legal system).



bar, to both implement and fund full legal services for the indigent.<sup>94</sup> In the absence of a collective effort to improve conditions for the poor, however, some help by lawyers is probably better than no help by anyone.

#### IV. PRO BONO TODAY

Currently no federal or state bar association mandates pro bono as a condition of membership.<sup>95</sup> The A.B.A. recently adopted a model rule which urges lawyers to perform fifty or more hours of pro bono work a year, and to devote a substantial majority of that time to the legal needs of the poor.<sup>96</sup> Many state bar associations also have set such

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94. *Colbert v. Rickman*, 747 F. Supp. 518, 527 (W.D. Ark.) (memorandum opinion). See also Schimenti, *supra* note 27, at 690-91. While the committee which was appointed to study proposals for mandatory pro bono in New York recognized that governmental financial support of civil legal services for the poor was necessary, it acknowledged that such support would probably not be forthcoming, and therefore, the initiative rested in the hands of the bar. *Marrerro Report*, *supra* note 41, at 781-82. For a discussion of the reduction in federal funding under the Legal Services Corporation Act, see *supra* notes 59-64 and accompanying text. For a brief discussion of legal assistance in other countries see Macaluso, *supra* note 20, at 80-81.

95. Although a committee appointed by the Chief Judge of the State of New York to study the availability of legal services recommended an actual mandatory minimum of 40 hours of qualifying pro bono legal services every two years, the implementation of that plan has been put on hold. Wachtler, *supra* note 88, at 742-43. Initially Chief Judge Wachtler suspended implementation of the plan for two years in order to give the bar's proposal for a voluntary system a chance to succeed; that deadline passed in the spring of 1992. *Id.*

In contrast to the federal and state bar associations, many local bar associations, in which membership is voluntary, do require a certain amount of pro bono service. See generally Scully, *supra* note 37, at 1263-65. Such a requirement is legally permissible. *Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (en banc). The quality and effectiveness of these local programs, however, has been questioned. Lardent, *supra* note 66, at 167-68.

In addition, mandatory pro bono programs have been instituted in several law schools, including Seton Hall University, Tulane University, the University of Pennsylvania, Valparaiso University, Florida State University, the University of Hawaii, the University of Louisville, the University of Richmond, Stetson University, and the Touro College of Law. Schimenti, *supra* note 27, at 695.

96. The Model Rule provides:

[A] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to

aspirational goals. For example, Michigan adopted a voluntary standard of thirty hours or \$300 in contributions to non-profit programs which deliver civil legal services to the poor.<sup>97</sup> The Board of Governors of the Washington State Bar passed a resolution which also suggested an annual thirty hour commitment to servicing the unmet civil legal needs of low income people.<sup>98</sup> Some state bar associations encourage attorneys to meet the voluntary quota by offering vouchers for free or reduced admission to continuing legal education seminars.<sup>99</sup> For instance, the State Bar of Texas Board of Directors established a goal of fifty hours and adopted a voluntary reporting requirement.<sup>100</sup> Additionally, the Texas Board established a Pro Bono College to recognize attorneys who perform seventy-five hours or more of eligible pro bono service a year.<sup>101</sup> Thus far, Florida is the only state to adopt a mandatory reporting requirement for the

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individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services of limited means.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993). *See also* Mark Hanson, *Reporting Pro Bono*, A.B.A. J., Oct. 1993, at 16.

97. *Voluntary Standard for Pro Bono Participation By All Members of the State Bar of Michigan*, 70 MICH. B.J. 930 (1991). The standard also allows attorneys to choose whether to combine service and monetary donations in order to meet the goal, or to provide representation without charge to low income individuals. *Id.* *See generally* Paul R. Abrahamsen, *Pro Bono Involvement*, 70 MICH. B.J. 896 (1991).

98. Zweibel, *supra* note 63, at 10.

99. Oregon awards attorneys who donate 40 or more hours one free seminar or a CLE publication. *Pro Bono Snapshots*, 55 TEX. B.J. 619 (1992). Washington awards a set number of vouchers to recipients who are selected at the local level. Stewart A. Estes & Marla Elliott, *Learn Something Through Pro Bono*, WASH. ST. B. NEWS, Nov. 1991, at 42. Arizona, Colorado, Kansas, Maine, Minnesota, Nebraska, South Carolina, Wisconsin, as well as some local bar associations, have similar incentive programs. *Id.* at 42-43.

100. *State Bar of Texas Pro Bono Policy*, 55 TEX. B.J. 864 (1992). While attorneys are strongly encouraged to satisfy the requirement and report their qualifying hours, there is no disciplinary sanction for failing to comply with either requirement. *Id.* at 865.

101. *Giving Credit Where Credit is Due: Pro Bono College Created*, 55 TEX. B.J. 620 (1992). Attorneys receive a certificate to commemorate their service, and after five or more years of membership in the College, a plaque is awarded. *Id.*

state's aspirational goal of twenty hours of service or a cash contribution of \$350 yearly.<sup>102</sup> Under the Florida bar's program, nonresident attorneys are not exempt, while government attorneys who are prohibited from doing pro bono work are exempt.<sup>103</sup>

## V. PRO BONO IN LARGE FIRMS

In addition to the emphasis placed on pro bono service by state and local bar associations, and the ethical obligation of lawyers to perform pro bono service, there are practical reasons that suggest large firms should support pro bono service.<sup>104</sup> Pro bono service is a way for firms to attract recent law school graduates<sup>105</sup> and for newly-licensed attorneys to gain experience in litigation.<sup>106</sup> Pro bono work also can lead to potential business contacts and beneficial relationships with other members of the bar and the bench,<sup>107</sup> while promoting a positive public image.<sup>108</sup>

These factors, coupled with the public service obligation inherent in the profession of law,<sup>109</sup> should serve as ample incentive to motivate large law firms to perform pro bono service. In fact, large firms do seem to be cognizant of their social responsibility, as evidenced by the

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102. While attorneys must report their hours or monetary contributions, there are no disciplinary sanctions for failing to *perform* pro bono services or for failing to *contribute*. For the complete report on Florida's new policy see *In Re* Amendments to Rules Regulating the Fla. Bar and Rules of Judicial Admin., 598 So. 2d 41, 45-54 (Fla. 1992). Ohio and Tennessee are considering similar plans. Hanson, *supra* note 96, at 16.

103. Historically, governmental attorneys have been barred from participating in pro bono projects because of potential conflicts of interest and prohibitions against the use of government resources for private practice, although that taboo is becoming less prevalent. See Lerman, *supra* note 54; see also Stewart A. Estes, *The Government Lawyer and Pro Bono*, WASH. ST. B. NEWS, Nov. 1990, at 19; John Katzman, *Government Attorneys and Pro Bono—Overcoming the Obstacles*, 55 TEX. B.J. 862 (1992).

104. See Elefant, *supra* note 31, at 104-08. Arguably, such secondary goals are ethically suspect. In other words, if professional ethics give rise to a duty to serve, then the fulfillment of that calling should be sufficient and should provide full satisfaction.

105. Lardent, *supra* note 66, at 172.

106. *Making It Happen*, 55 TEX. B.J. 618, 619 (1992). One attorney related that he had experienced the thrill of arguing before the United States Supreme Court, an opportunity which probably otherwise would not have been available to him. Welch, *supra* note 87, at 920.

107. Macaluso, *supra* note 20, at 69.

108. Pro bono service performed by corporate counsel also can serve to enhance the corporation's public image. Nina Harlan, *Corporate Counsel and Pro Bono: How and Why to Get Involved*, WASH. ST. B. NEWS, Nov. 1990, at 21. See generally Steve Boerjack & Tom Saybolt, *Corporate Pro Bono Programs—Making a Difference*, 70 MICH. B.J. 900 (1991).

109. See *supra* part II.

fact that some firms give billable hour credit for the pro bono efforts of their associates.<sup>110</sup> There is also evidence that large firms have contributed substantially to public interest litigation that has benefited the disadvantaged economically,<sup>111</sup> and that large firms have initiated and participated in low profile programs which have had a significant impact on the poor.<sup>112</sup> Nevertheless, large firms have often been criticized for targeting their pro bono efforts at high profile charities and high impact cause-oriented cases which bear no direct correlation to improving the plight of the impoverished.<sup>113</sup>

#### A. *Pro Bono in Large Firms: An Empirical Analysis*

In an attempt to examine the potential ramifications of mandatory pro bono, a study<sup>114</sup> was undertaken to analyze the relationship between pro bono work and three variables: firm performance, organizational structure, and minority membership.<sup>115</sup>

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110. Carole L. Hollon, *What Washington Law Firms are Doing*, WASH. ST. B. NEWS, Nov. 1990, at 23, 23-24; see also Thomas C. Clinton, *Law Firms and Pro Bono*, 70 MICH. B.J. 904 (1991). For an example of a firm policy, see *Model Law Firm Pro Bono Policy*, 70 MICH. B.J. 931 (1991).

111. For example, one program, the Litigation Assistance Partnership Project, sponsored by the A.B.A., matches large law firms with legal services programs so that they may provide needed assistance in high impact cases dealing with such issues as Medicaid coverage of obstetrical services and the employment rights of migrant workers. Ann Barker, *LAPP: An Innovative National Approach to Pro Bono*, 70 MICH. B.J. 928, 928-29 (1991).

112. For an impressive and refreshing article on one large firm's experience with establishing a satellite office to assist the needy in Richmond, Virginia, see George H. Hettrick, *Doing Good: How One Law Firm Started a Low-Fee Branch Office to Help Those in Need*, A.B.A. J., Dec. 1992, at 77.

113. Elefant, *supra* note 31, at 117; Scully, *supra* note 37, at 1267.

114. Large firms were selected for this Study for three reasons. First, the relevant data was readily available for the one hundred largest law firms in the country. This availability is significant because law firms are not publicly held entities. Thus, their financial performance information is not in the public domain and is generally inaccessible. Second, only large firms have the critical mass necessary to examine the relationship between women, minorities, and pro bono work because there must be sufficient numbers of women and minorities to make statistically valid inferences. Third, large law firms are more likely to have the resources available to perform certain pro bono services, such as defending death penalty cases and litigating large-scale class action suits where the amount recoverable per individual is de minimis: It is valuable to examine the relationship between performing such service and certain variables which characterize the firm.

115. The research design was constrained due to scarcity of available data. The variables that were explored provide an insightful look into firm performance, firm structure, minority membership, and the relationship of these variables to pro bono. While the Study does not evaluate the pro bono efforts of large firms qualitatively, it does quantify their efforts in comparison to specific variables.

Supporting data for the Study was derived from two sources: *The American Lawyer* and the annual directories published by the National Association of Law Placement, Incorporated ("NALP").<sup>116</sup> Since 1984, *The American Lawyer* has published a yearly synopsis of performance data for the highest revenue-producing law firms in the United States.<sup>117</sup> In addition, the 1992 survey by *The American Lawyer* used in this analysis included both traditional firm performance data, as well as pro bono performance data.<sup>118</sup> The second source, the yearly directories of NALP, provided the demographic information used in this study.<sup>119</sup>

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116. *The American Lawyer* is a bi-monthly publication of American Lawyer Media, L.P., which publishes articles of general interest to attorneys. Since 1984, the American Lawyer has published a profitability survey of the largest law firms in America. NALP is a voluntary association of law schools, law firms, and private and governmental agencies which establishes and maintains standards for law firm placement and hiring. DIRECTORY OF LEGAL EMPLOYERS I-3 (National Association for Law Placement ed., 1993).

117. See, e.g., Steven Brill, *America's One Hundred Highest-Grossing Firms*, AM. LAW., July-Aug. 1989, at 8 [hereinafter *One Hundred Highest-Grossing Firms 1989*]; Steven Brill, *America's One Hundred Highest-Grossing Firms*, AM. LAW., July-Aug. 1993, at 50A [hereinafter *One Hundred Highest-Grossing Firms 1993*]. These firms are generally large in number of attorneys as well. *Id.* The study did not always encompass the top one hundred firms. See, e.g., Steven Brill, *America's Fifty Highest-Grossing Firms*, AM. LAW., July-Aug. 1985, at 89 [hereinafter *Fifty Highest-Grossing Firms 1985*].

*The American Lawyer* obtains its data through personal and telephone interviews with managing partners, other partners, and various inside sources. *One Hundred Highest-Grossing Firms 1989*, *supra*, at 7. The publication then uses several methods of cross-validation to confirm accuracy. For example, contacts routinely are made with current and former clients, former partners and associates, and other sources to verify the information. *Id.* at 7-9. Such a triangular approach helps to confirm key performance and size information for each law firm in the data base.

Finally, prior to publication, *The American Lawyer* asks managing partners at each firm surveyed to confirm or correct the tabulated performance and size data. Steven Brill, *America's One Hundred Highest-Grossing Firms*, AM. LAW., July-Aug. 1992, at 16 [hereinafter *One Hundred Highest-Grossing Firms 1992*]. While the methodology employed virtually assures a high degree of accuracy, nevertheless the research is not comparable to a public audit in the sense that law firms are not mandated by statute to report their profitability. These firms voluntarily report their profitability to *The American Lawyer*. Inaccurate reporting, however, does not subject them to civil or criminal liability. Nevertheless, the voluntariness of the study does not necessarily undermine its accuracy because the study is conducted on an annual basis. Therefore, firms can review the results in a timely manner and correct any erroneous information before the next study. *One Hundred Highest-Grossing Firms 1992*, *supra*, at 7. Such continuity thus tends to increase the accuracy of the results.

118. *One Hundred Highest-Grossing Firms 1992*, *supra* note 117, at 16. *The American Lawyer* defined pro bono work as time spent by lawyers, not paralegals or support staff, performing legal services. *Id.*

119. DIRECTORY OF LEGAL EMPLOYERS (National Association for Law Placement ed., 1992). Each year NALP solicits and then publishes information about law firms that

*The American Lawyer's* study used a weighted average of two factors to grade each firm: (1) the firm's average number of pro bono hours per lawyer (two-thirds of the score); and (2) the percentage of lawyers who did more than twenty hours of pro bono work annually (one-third of the score).<sup>120</sup> The study assigned grades to each firm on a curve from A to D based upon the weighted pro bono scores. Firms which failed to participate in *The American Lawyer's* survey, or provided only partial information, received an F.<sup>121</sup>

The quantitative nature of the three criteria explored in our Study, law firm performance, organizational structure, and minority membership, dictated a correlation analysis approach which measured the extent to which these criteria were related to each other.<sup>122</sup> To facilitate this quantitative analysis, our Study converted the pro bono scores from letter grades to five point Likert-scaled<sup>123</sup> variable scores whereby an A became equivalent to five points, a B to four, and so

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might be of interest to graduating law school students seeking employment. *Id.* While NALP's questionnaire contains no firm performance data, it does request information such as staffing levels, primary practice areas, employment, and partnership data, as well as demographic information, such as the race and sex of the attorneys. *Id.* The information contained in the 1992 NALP directory was matched on a firm-by-firm basis with the 1992 data in *The American Lawyer. One Hundred Highest-Grossing Firms 1992*, *supra* note 117, at 12.

120. A simple average is used when all variables are given equal importance. A weighted average is an average in which one or more variables is given more importance than other variables. See STEPHEN B. JARRELL, *BASIC STATISTICS* 88-91 (1994). The proportional weighting was based upon the Model Code's directive which provides that "[t]he basic responsibility for providing legal services . . . rests upon the individual lawyer . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980).

121. Either failing to respond or providing only partial information about pro bono participation resulted in an "F" pro bono grade because: (1) no firm complained about receiving an "F" grade; (2) generally, firms that perform well in pro bono wish for that information to be widely known; and (3) since pro bono activities are a strong recruiting tool, the partial disclosure or total failure to disclose pro bono activities reflects a lack of commitment by the firm to pro bono. Telephone Interview with JoAnne Laurence, Special Report Editor, *The American Lawyer* (Nov. 5, 1992).

122. Two variables which change in a regular, predictable manner are said to be correlated. Correlation analysis measures the strength of the association between the two variables, but does not imply any cause and effect relationship. That is, changes in one variable do not necessarily cause the other variable to change. JARRELL, *supra* note 120, at 490. For example, consider the relationship between telephone poles and crime. Telephone poles and crime levels are positively correlated. However, an increase in telephone poles does not cause an increase in crime. Rather, the increases in both are probably caused by population increases. That is, as population increases, both the number of telephone poles and the level of crime generally increase.

123. A Likert scale represents an odd number of possible values where one end of the scale represents the low and the opposite end represents the high. The middle value represents the mean. THOMAS S. BATEMAN & GERALD R. FERRIS, *METHOD & ANALYSIS IN ORGANIZATIONAL RESEARCH* 241-52 (1984).

forth.<sup>124</sup> The Study tested the correlation analysis at a significance level of at least five percent.<sup>125</sup>

### 1. Pro Bono and Large Firm Financial Performance<sup>126</sup>

There is a strong indication that pro bono work is negatively related to firm profitability.<sup>127</sup> Because pro bono service is by definition non-billable, as firms increase the amount of pro bono work, presumably various aspects of firm performance should decrease. In the Study, revenue per lawyer, costs per lawyer, profits per partner, and profits per lawyer were all negatively and significantly correlated with pro bono efforts.<sup>128</sup> Gross revenues, total costs, and net profits were all negatively, but not significantly, correlated with pro bono efforts.<sup>129</sup> In other words, higher pro bono performance is associated with low

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124. The Statistical Analysis System (SAS), a statistical software package, was used for the correlation analysis. This software allows users to analyze large amounts of data to determine frequency distributions, to compute descriptive statistics, and to accomplish various other sophisticated data manipulations. *See generally* SAS USER'S GUIDE: BASICS (5th ed. 1985).

125. In the charts in the Appendix, *infra* pp. 91, 93, 97, "p" represents the level of statistical significance. For example, a "p" of .05 means that there is only a five percent probability that the statistical relationship is due to chance, rather than to a true correlation between the two variables under consideration. A "p" of .01 represents an even greater degree of significance. Consider the proposition that there is a relationship between pro bono performance and profits per partner (PROF). In order to test this proposition, or hypothesis, the null hypothesis is stated as: "[T]here is no relationship between pro bono performance and PROF." The purpose of the hypothesis test is to determine whether or not a real relationship exists. If the null hypothesis can be rejected, then it is expected that the proposition is true. As shown in Table 1B in the Appendix, *infra* p. 91, the correlation between pro bono performance and PROF is -.23, with a significance level of  $p < .01$ . This finding indicates that the probability of a spurious relationship, that is, a relationship due to random chance only, is less than one out of one hundred. Thus, the null hypothesis of no relationship may be rejected, and the proposition presumed to be true. Smaller p-values indicate stronger support for the proposition. In contrast, larger p-values indicate weaker support for the proposition. For a discussion of statistical significance, *see generally* JARRELL, *supra* note 120, at 438-40.

126. Any measure of long-term performance must include indices of profitability as well as the ability to attract and keep clients. However, the study herein focused on traditional absolute and relative measures of performance. For example, total revenue is a measure of absolute performance for a firm, while revenue per lawyer is a measure of marginal performance, which allows for a comparison of law firms of varying sizes. David Maister, *Profitability: Beating the Downward Trend*, AM. LAW., July-Aug. 1984, at 6. Profits per partner, perhaps the best indicator of firm performance from a partner's perspective, is analogous to earnings per share in corporate profitability studies. Profitability per equity position is a common and important measure of performance for both law firms and traditional manufacturing firms. *Id.*

127. *See infra* app., tbl. 1B.

128. *See infra* app., tbl. 1B.

129. *See infra* app., tbl. 1B.

firm performance for every measure used in this study.<sup>130</sup>

This conclusion strengthens the objections to mandatory pro bono service.<sup>131</sup> These findings also support the belief that donating services rather than money is not economically efficient.<sup>132</sup> Nevertheless, since pro bono work by large firms may have a negative impact upon performance, a decision to engage in such service, which is not legally required,<sup>133</sup> arguably represents one of the highest levels of social responsibility.<sup>134</sup>

## 2. Pro Bono and Organizational Structure

Law firm size may be related to pro bono service because, theoretically, as an organization grows it becomes more formalized and differentiated, and less responsive to the concerns of its individual

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130. See *infra* app., tbl. 1B. Even though both total costs and costs per lawyer are negatively correlated with pro bono performance, that is, a decrease in costs is associated with an increase in pro bono scores, the expected association between lower costs and higher profits does not necessarily exist for large law firms. Large law firms are not cost-driven, but revenue-driven. Ward Bower, *Strategies for Profitability*, 13 LEGAL ECON. 44, 50 (Oct. 1987). The strong negative association between profits per partner and pro bono performance demonstrates that lower costs were still not sufficient to increase profits per partner. In other words, as pro bono scores increased, costs and revenues decreased; however, revenues decreased faster than costs, which resulted in lower profitability.

131. See *supra* notes 70-94 and accompanying text.

132. See *supra* notes 89-90 and accompanying text.

133. See *supra* note 95 and accompanying text.

134. One model for evaluating the social responsibility of organizations divides such responsibility into four levels. The first level of social responsibility is economic responsibility. The business organization is, above all, the basic economic unit of society. Its responsibility is to produce the goods and services which society desires and to maximize profits for its owners. The second level of social responsibility is legal responsibility. This level defines what society considers important with respect to appropriate organizational behavior, since organizations are expected to fulfill their economic goals within a legal framework. The third level of social responsibility is ethical responsibility and includes behaviors that are not necessarily codified, as well as those which may not serve the organization's direct economic interests. The final level of social responsibility for organizations is discretionary responsibility. This form of responsibility is purely voluntary and is guided by an organization's desire to make social contributions and not mandated by economics, law, or ethics. This level of responsibility is the most difficult to achieve because it requires a proactive approach. The organization must recognize a duty which exceeds societal expectations and become an active participant in providing for the community's welfare. See generally Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGMT. REV. 497 (1979); David B. Fritz & Helmut Becker, *Linking Management Behavior to Ethical Philosophy—An Empirical Investigation*, 7 ACAD. MGMT. J. 165 (1984); Eugene Sz wajkowski, *Organizational Illegality: Theoretical Integration and Illustrative Application*, 10 ACAD. MGMT. REV. 558 (1985) (discussing three underlying factors—environment, structure, and choice processes—in business crime theory).



members or the community it serves.<sup>135</sup> The size of a law firm most often is measured by the total number of lawyers in the firm including both partners<sup>136</sup> and associates.<sup>137</sup> While this absolute number is an

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135. See generally Richard L. Daft & Patricia J. Bradshaw, *The Process of Horizontal Differentiation: Two Models*, 25 ADMIN. SCI. Q. 441 (Sept. 1980) (examining process through which new academic and administrative departments at a university are established); Richard H. Hall & Charles R. Tittle, *A Note on Bureaucracy and Its "Correlates"*, 72 AM. J. SOC. 267 (Nov. 1966) (associating greater bureaucratization with organization's concern for objects rather than ideas and finding less correlation between degree of bureaucratization and size of organization); Stanley Lieberman & James F. O'Connor, *Leadership and Organizational Performance: A Study of Large Corporations*, 37 AM. SOC. REV. 117 (Apr. 1972) (comparing impact of leadership changes with yearly, industry, and company influences); Thomas A. Mahoney et al., *The Conditioning Influence of Organizational Size Upon Managerial Practice*, 8 ORG. BEHAV. & HUM. PREF. 230 (1972) (analyzing relationship between organization size and organizational behavior or managerial practice); Paul M. Nemeroff & David L. Ford, Jr., *Task Effectiveness and Human Fulfillment in Organizations: A Review and Development of a Conceptual Contingency Model*, 1 ACAD. MGMT. 69 (Oct. 1976).

One reason for this tendency is the need to divide the increased workload of the organization. Thus, increasing the number of members requires that an organization become more formalized in order to maintain effectiveness. This formalization process, which is characterized by an attempt to control organizational behavior in a strict manner, seems to be an unavoidable consequence of growth. Studies of organizational growth have associated differentiation, specialization, routinization, and impersonalization, along with decreases in participation by top managers, to increases in size. Daft, *supra*; Hall, *supra*; Lieberman, *supra*; Mahoney, *supra*; Nemeroff, *supra*.

136. A full or general partner is defined as one "who participates fully in the profits, losses and management . . . and who is personally liable for its debts." BLACK'S LAW DICTIONARY 1120 (6th ed. 1990). Partners are the owners of the firm and normally hold equity positions in the firm. As such, they are responsible for the overall management of the firm and direct the major functional divisions of the firm. They are also primarily responsible for client relations, billings, and the generation of new business. Partners divide the net profits of the firm after all expenses are paid, including salaries paid to associates. Some firms have different classes of partners who share disproportionately in the distribution of firm profits. See generally Maister, *supra* note 126, at 6-9.

137. An associate is defined as one "having subordinate status." BLACK'S LAW DICTIONARY 121 (6th ed. 1990). Associates are employed by the firm and earn salaries based upon their contribution to the firm. Any share of the profits in the form of a bonus paid to associates is largely a matter of discretion with the partnership. Bonuses, of course, would be considered an expense to the firm.

Historically, firms have grown by adding associates who were recent law school graduates or who completed a judicial clerkship immediately upon completion of school prior to joining the firm. Occasionally, firms would hire associates from other firms. Lateral hiring of partners was less common than lateral hiring of associates. Today, however, firms may grow and expand in other ways. For example, firms sometimes selectively hire associates and partners from other firms, or hire wholesale groups of partners and associates from other firms. Occasionally, large firms essentially buy smaller firms by merger or acquisition. Compared to traditional methods, such growth for large firms is not always orderly or in proportion to the existing ratio of associates to partners. These changes in the composition of the firm sometimes result in major structural changes which have wide-ranging implications on the performance of the firm. See generally Bower, *supra* note 130.

important measure of firm capacity, the ratio of total lawyers, divided by the number of equity partners, or "leverage," is also an important indicator of a firm's organizational structure.<sup>138</sup>

Leverage is the means by which the legal skills and marketing ability of the partners are multiplied.<sup>139</sup> By leveraging associates, partners are able to achieve returns to scale by billing the associates' hours at multiples of the associates' actual cost to the firm.<sup>140</sup> To the extent that a firm is able to increase this ratio, its leverage improves. For firms of equal size as measured by total lawyers, firms with a higher leverage are thought to be in a position to earn higher profits per partner.<sup>141</sup>

There is no significant relationship between the pro bono grade and firm size, number of partners, number of associates, or leverage.<sup>142</sup> Thus, size does not appear to be associated with the amount of pro bono work performed in large firms. The number of domestic branches correlates positively and almost significantly with pro bono,<sup>143</sup> therefore, the recent trend to increase domestic branch offices may be associated with higher pro bono performance. On the other hand, the number of foreign branches correlates negatively with pro bono.<sup>144</sup> This relationship suggests that increasing the number of foreign branches, also a recent trend in global marketing for large firms,<sup>145</sup> is associated with lower pro bono scores.

The number of paralegals and support staff is also negatively associated with pro bono,<sup>146</sup> suggesting rather ironically that firms which

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138. Maister, *supra* note 126, at 6-7.

139. *Id.* Consider two firms, A and B, each having one hundred lawyers. Assume that firm A has 50 equity partners and that firm B has 25 equity partners. Firm A's leverage of 2.0 is less than firm B's leverage of 4.0. Thus, firm B is better leveraged than firm A, which means that partners at firm B can expect higher profits per partner, assuming that all other factors are equal.

140. *Id.*

141. *Id.*

142. *See infra* app., tbl. 2B. In other words, there is no correlation between pro bono work and the organizational variables related to the size of large law firms. The correlation table shows no pattern of association. Thus, any expectation that the largest of these large firms perform more pro bono service than the other firms is not supported.

143. *See infra* app., tbl. 2B. Though not statistically significant, the number of domestic branches appears to have a positive relationship to pro bono performance.

144. *See infra* app., tbl. 2B. There is a significant negative relationship between pro bono performance and the number of foreign law offices for each firm. In other words, firms with more foreign branches have lower pro bono scores.

145. *See Bower, supra* note 130, at 49.

146. *See infra* app., tbl. 2B. In other words, there is a significant negative relationship between pro bono performance and the number of paralegals and support

may have a greater potential for productivity may not participate in pro bono service. Thus, although the relationship between pro bono, paralegals, and support staff is intriguing, there is very little evidence of a significant relationship between the pro bono grade and the overall organizational structure of the firm.

### 3. Pro Bono and Minority Membership

Increasingly, ethnic minorities and women are pursuing a legal education.<sup>147</sup> Few minority law school graduates, however, become lawyers with large firms.<sup>148</sup> Where minorities do join large firms, minority representation appears to be inversely related to pro bono work; that is, as the number and ratio of minority representation in the firm increases, the firm's pro bono performance decreases.<sup>149</sup>

Since pro bono work most often is performed for underprivileged individuals, and since women, racial minorities, and handicapped persons historically have enjoyed fewer privileges than others, this conclusion seems counterintuitive. One possible explanation for this apparent anomaly relates to behavioral learning. In order to be successful in an organization, members must learn about the aggregate values and attitudes of the firm, and then must model their behavior after the group norms.<sup>150</sup> Therefore, if the law firm does not value pro bono work as a vital part of its social responsibility, then its members, whatever their gender or ethnicity, may tend to adopt that view upon being socialized into the firm. In large firms, then, the drive to succeed and to be accepted may overshadow the individual's sense of personal professional responsibility.

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staff. As the number of paralegals and support staff increases, the pro bono scores decrease.

147. Steven Keeva, *Unequal Partners*, A.B.A. J., Feb. 1993, at 50, 54.

148. See Carole Juarez, *Minorities in Majority Firms*, 55 TEX. B.J. 958 (1992); Cynthia L. Spanhel & Lori Cook, *A Profile of Minority Lawyers in Texas*, 55 TEX. B.J. 952 (1992). It is even more rare for a minority attorney to make partner and choose to remain associated with a large firm in a profession which still remains highly segregated. Keeva, *supra* note 147, at 50.

149. See *infra* app., tbl. 3B. There is a significant negative relationship between the pro bono grade and the number of female lawyers, the number of African American lawyers, the number of Asian lawyers, the ratio of African American lawyers in the firm, the ratio of Asian lawyers in the firm, and the ratio of handicapped lawyers in the firm. *Id.* There is a negative, but not significant, relationship between the pro bono grade and the number of Hispanic lawyers, the number of handicapped lawyers, the ratio of female lawyers, and the ratio of Hispanic lawyers. *Id.* Neither the number nor the ratio of Native American lawyers was related to pro bono work at a significant level. *Id.*

150. See generally ALBERT BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* (1969); Daniel C. Feldman, *The Multiple Socialization of Organization Members*, 6 ACAD. MGMT. REV. 309 (Apr. 1981) (discussing behavioral and attitudinal variables as criteria for measuring progress in socialization).

## VI. CONCLUSION

For a variety of reasons, there are rumblings that state bar associations in the future may require its members to perform a set number of hours of pro bono service annually.<sup>151</sup> Although attorneys may owe duties to perform pro bono service for indigent litigants which are historically,<sup>152</sup> constitutionally,<sup>153</sup> practically,<sup>154</sup> and ethically based,<sup>155</sup> as well as need-based,<sup>156</sup> mandating that such service be made available to indigent civil litigants may raise legitimate concerns.<sup>157</sup> This empirical Study reveals some interesting implications with respect to the current issues surrounding pro bono.

The Study examined the relationship surrounding pro bono performance and three groups of variables: (1) firm performance; (2) organizational structure; and (3) minority membership. Firm performance was negatively, and in general, significantly related to pro bono performance.<sup>158</sup> In other words, the performance of more pro bono service appears to be associated with lower overall firm performance. Firms with higher pro bono scores appear to earn less than those firms with lower scores. On the other hand, pro bono performance was not related to firm size; that is, in the population of large firms, it appears that pro bono service is insensitive to size.<sup>159</sup> Of the eight organizational structure variables, only the number of foreign branches, paralegals, and support staff were associated with pro bono performance at a significant level, and these variables were negatively related.<sup>160</sup> The finding regarding paralegals and support staff is somewhat discouraging, since firms with more paralegals and support staff presumably could provide better pro bono service than firms with less support. Finally, pro bono performance clearly was negatively related to the representation of minorities in firms.<sup>161</sup> The strong negative correlation between virtually every measure of minority representation and pro bono performance is surprising. It may be that

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151. See *supra* notes 95-103 and accompanying text.

152. See *supra* notes 17-24 and accompanying text.

153. See *supra* notes 25-37 and accompanying text.

154. See *supra* notes 38-53 and accompanying text.

155. See *supra* notes 54-57 and accompanying text.

156. See *supra* notes 58-69 and accompanying text.

157. See *supra* notes 70-94 and accompanying text.

158. See *supra* notes 126-34 and accompanying text; *infra* app., tbl. 1B.

159. See *supra* notes 135-46 and accompanying text; *infra* app., tbl. 2B.

160. See *supra* notes 144-46 and accompanying text; *infra* app., tbl. 2B.

161. See *supra* notes 147-50 and accompanying text; *infra* app., tbl. 3B.

even minority lawyers in large firms are socially removed from the clients served in pro bono efforts.

Although this Study involves only large firms, and the results may not be generalized necessarily to firms of all sizes, the one hundred firms in the study represent the entire population of the largest firms in the United States. Thus, the inferences made come from examining these relationships in an entire population, rather than just a random sample. As such, the inferences provide a strong statistical basis for generalizing these results to large law firms. The findings of statistical studies gradually and incrementally build a body of knowledge with respect to the subject analyzed, just as precedents set by courts gradually and incrementally build a body of law. No one case defines the law; likewise, no one study defines the subject analyzed. This undertaking represents, however, an important first step in empirically testing the presence or absence of associations, as opposed to presuming their existence or nonexistence without a critical examination of the relevant data. The bar should determine the most effective and efficient way to meet its social responsibility of providing access to justice for people of all socioeconomic classes. Therefore, it will become increasingly important to explore the relationship between these and other variables, and the potential practical effect of mandatory pro bono proposals.

## APPENDIX

*A. Pro Bono and Large Firm Financial Performance*

This aspect of the Study considered the following specific firm performance measures and associated variables: (1) Total revenue: Total revenues received by the firm for the year less reimbursements for costs advanced by the firm ("GROSS"); (2) Revenue per lawyer: Total revenue divided by the total number of lawyers in the firm ("REVLAW");<sup>162</sup> (3) Total cost: Direct and indirect expenses of associates, support personnel, and paralegals, as well as rent and other overhead items which reduce the amount ultimately available for distribution to the partners ("COST"); (4) Cost per lawyer: Total cost divided by the total number of lawyers in the firm ("COSTLAW"); (5) Net operating income: Total revenue less total cost, that is, the profit available for distribution to the partners ("NET"); (6) Profits per partner: Net operating income divided by the number of partners ("PROF");<sup>163</sup> and (7) Profit per lawyer: Net operating income divided by the total number of lawyers in the firm ("PROFLAW"). Table 1A shows the average performance levels for each level of pro bono performance, as well as the average firm performance for all firms. Table 1B shows the correlation of each firm performance variable with pro bono performance.

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162. While total revenue captures the overall output of the firm, this measure is perhaps the best measure of marginal output.

163. Just as net operating income captures the overall profitability of the firm, this measure captures the extent to which the overall profitability translates into profits for the individual partners. However, the measure does not capture the spread among the partners, that is, the range in profit distribution between the highest and lowest paid partners. Thus, profit per partner is a measure of centrality not distribution and only represents the mythical average partner's share.

TABLE 1A

## Pro Bono and Firm Performance:\* By Pro Bono Performance

Firm Performance Variable	Pro Bono Performance					All Firms
	A	B	C	D	F	
GROSS	142	94	136	167	132	146
REVLAW	.368	.319	.359	.415	.394	.381
COST	91	63	88	106	87	93
COSTLAW	.22	.21	.23	.26	.26	.24
NET	52	32	49	61	46	52
PROF	.421	.307	.391	.502	.419	.433
PROFLAW	.15	.11	.13	.15	.14	.14

\* Figures shown are millions of dollars rounded to the nearest million.

TABLE 1B

Pro Bono and Firm Performance: Correlation  
with Pro Bono Performance

Firm Performance Variable	Correlation with Pro Bono
GROSS	-.15
REVLAW	-.37**
COST	-.18
COSTLAW	-.31**
NET	-.14
PROF	-.23**
PROFLAW	-.25**

\*\* =  $p < .01$



### *B. Pro Bono and Organizational Structure*

This aspect of the Study considered the following specific measures of organizational structure and associated variables: (1) Partners: Number of equity partners in the firm ("PART"); (2) Associates: Number of associates in the firm ("ASSOC"); (3) Lawyers: Total number of lawyers, both partners and associates, in the firm ("LWYR"); (4) Leverage: Total number of lawyers in the firm divided by the number of equity partners in the firm ("LEV"); (5) Domestic branches: Number of domestic branch offices of the firm in the United States ("DOM"); (6) Foreign branches: Number of foreign branch offices of the firm outside of the continental United States ("FOR"); (7) Paralegals: Number of paralegal assistants employed by the firm ("PARA"); and (8) Support personnel: Number of support personnel, other than paralegals, employed by the firm ("SUPP").

Table 2A shows the average values of each organizational structure variable for each level of pro bono performance, as well as for all of the firms. Table 2B shows the correlation of each organizational structure variable with pro bono performance.

TABLE 2A  
Pro Bono and Organizational Structure

Organizational Structure Variable	Pro Bono Performance					All Firms
	A	B	C	D	F	
LWYR	423	302	380	394	337	386
PART	141	107	129	123	115	127
ASSOC	281	196	251	271	222	259
LEV	3.0	3.1	3.2	3.2	3.0	3.1
DOM	4.4	4.6	3.8	3.6	3.0	3.8
FOR	1.3	.20	1.7	2.3	2.1	1.8
PARA	41	37	49	58	71	52
SUPP	314	271	359	417	417	368

TABLE 2B

Pro Bono and Organizational Structure: Correlation  
with Pro Bono Performance

Organizational Structure Variable	Correlation with Pro Bono
LWYR	-.03
PART	-.00
ASSOC	-.04
LEV	-.06
DOM	.18 (p = .09)
FOR	-.31**
PARA	-.36**
SUPP	-.28**

\*\* = p < .01

### *C. Pro Bono and Minority Membership*

This aspect of the Study considered the following specific measures of minority representation and associated variables: (1) Females: Number of female lawyers, both partners and associates, in the firm ("FEM"); (2) Female ratio: Ratio of female lawyers to total lawyers in the firm ("FEM-RATIO"); (3) African Americans: Number of African American lawyers, both partners and associates, in the firm ("AFAM"); (4) African American ratio: Ratio of African American lawyers to total lawyers in the firm ("AA-RATIO"); (5) Hispanic: Number of Hispanic lawyers, both partners and associates, in the firm ("HISP"); (6) Hispanic ratio: Ratio of Hispanic lawyers to total lawyers in the firm ("HISP-RATIO"); (7) Indian: Number of Native American Indian lawyers, both partners and associates, in the firm ("IND"); (8) Indian ratio: Ratio of Native American Indian lawyers to total lawyers in the firm ("IND-RATIO"); (9) Asian American: Number of Asian American lawyers, both partners and associates, in the firm ("ASIAN"); (10) Asian American ratio: Ratio of Asian American lawyers to total lawyers in the firm ("ASIA-RATIO"); (11) Handicapped: Number of handicapped lawyers, both partners and associates, in the firm ("HAND"); and (12) Handicapped ratio: Ratio of handicapped lawyers to total lawyers in the firm ("HAND-RATIO").

Table 3A shows the average minority membership variables for each level of pro bono performance as well as for all firms. Table 3B shows the correlation of each minority membership variable with pro bono performance.

TABLE 3A  
Pro Bono and Minority Representation

Minority Representation Variable	Pro Bono Performance					All Firms
	A	B	C	D	F	
FEM	64	54	75	76	80	72
FEM-RATIO	.18	.18	.21	.20	.25	.20
AFAM	4.9	3.6	5.5	6.2	8.4	5.8
AA-RATIO	.01	.01	.02	.02	.03	.02
HISP	3.1	1.3	3.1	3.8	3.0	3.3
HISP-RATIO	.01	.01	.01	.01	.01	.01
INDIAN	.33	1.0	.2	.3	.25	.29
IND-RATIO	.00	.00	.01	.01	.01	.01
ASIAN	6.3	1.7	4.5	7.4	9.6	6.4
ASIA-RATIO	.02	.01	.01	.02	.03	.02
HAND	.88	0	.6	1.1	1.2	.88
HAND-RATIO	.01	0	.01	.01	.00	.01

TABLE 3B

Pro Bono and Minority Representation Correlation  
with Pro Bono Performance

Minority Representation Variable	Correlation with Pro Bono
FEM	-.21*
FEM-RATIO	-.18
AFAM	-.26**
AA-RATIO	-.26**
HISP	-.15
HISP-RATIO	-.16
INDIAN	.04
IND-RATIO	.01
ASIAN	-.23*
ASIA-RATIO	-.24*
HAND	-.22
HAND-RATIO	-.28 (p = .07)

\*\* = p < .01

\* = p < .05.

