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*FEATURE ARTICLE*

**PRO BONO OR PROBLEMO:  
CAN A MORAL OBLIGATION  
EFFECTIVELY BRIDGE THE  
'JUSTICE GAP?'**

*by* JESSICA RATNER

**W**elcome to the 'justice gap!' Say 'hello' to a nation in which the number of people who qualify for legal aid—with incomes at or below 125 percent of the federal poverty level—is nearing an all-time high.<sup>1</sup> Take a look at the studies finding that 80 percent of the civil legal needs of low-income people go unmet.<sup>2</sup> Open your eyes to a legal system bogged down by self-



represented litigants who do not know how to navigate the courts or effectively identify their rights.<sup>3</sup>

While the need for public interest attorneys for low-income individuals is crystal-clear, the solution to eliminating the ‘justice gap’ is not so obvious.

#### TAKING ACTION: MAKING PRO BONO MANDATORY

Judge Jonathan Lippman of the New York Court of Appeals took matters into his own hands last May when he proposed a state rule requiring new attorneys to complete at least 50 hours of qualifying pro bono service before applying for admission to the New York State Bar.<sup>4</sup> According to Judge Lippman, one of the major purposes behind the new rule is to help fill the ‘justice gap.’<sup>5</sup> Judge Lippman reasoned that if each of the approximately 10,000 lawyers who apply to the New York State Bar every year were to contribute 50 hours of pro bono work, the poor would receive about 500,000 hours of badly needed legal services.<sup>6</sup>

## A CONFLICT OF INTEREST

Immediately after the New York rule was publicized, a fierce debate ensued among lawyers regarding ‘mandatory pro bono.’<sup>7</sup> Although the topic of ‘mandatory pro bono’ has been controversial for quite some time, Judge Lippman’s announcement paved the way for a very public discussion.<sup>8</sup>

One major concern expressed about the New York pro bono requirement is that it places an excessive burden on recent law graduates who are heavily in debt and having difficulties finding paying jobs.<sup>9</sup> Within a day of Judge Lippman’s announcement, an editor for *Above the Law* wrote: “The first thing we do, let’s kill indenture all the lawyers. Because forcing people who are already on food stamps to work for free is clearly the best option for improving access to pro bono legal services in New York.”<sup>10</sup>

Another criticism of the New York requirement is that law students are not qualified to take on pro bono cases since they lack relevant experience.<sup>11</sup> The petitioner in *Mallard*, an attorney who was assigned by a judge to represent indigent inmates in a complex case, raised a similar argument.<sup>12</sup> Mallard claimed that he should be permitted to withdraw from the case on the basis that he did not possess the necessary trial skills that would enable him to competently handle the case.<sup>13</sup>

Esther Lardent, President of the Pro Bono Institute, recognizes the danger of forcing unwilling attorneys to engage in pro bono work.<sup>14</sup> Although she generally supports pro bono requirements for law students, Lardent “worr[ies] about poor people with lawyers who don’t want to be there.”<sup>15</sup>

The advisory committee that formulated the final version of the rule addressed many of these concerns.<sup>16</sup> The new requirement, which applies to anyone accepted to the New York State Bar on or after January 1, 2015, takes a broad approach to defining what qualifies as pro bono work.<sup>17</sup> Although the 50 hours must be spent providing some type of public service, students have considerable flexibility in pursuing work that interests them.<sup>18</sup> While students are highly encouraged to fulfill the requirement by delivering legal services directly to the poor, students can also accumulate hours spent doing pro bono work for nonprofits, civil rights groups or any of the three branches of government.<sup>19</sup>

Furthermore, students are afforded three full years to complete their 50 hours of pro bono work.<sup>20</sup> The rule specifies that students can start fulfilling the requirement as soon as they begin law school and can continue to do so up until they file an application for the New York State Bar.<sup>21</sup> During the three-month hiatus between taking the bar and receiving test results, future graduates are not yet licensed attorneys and have ample time to complete pro bono hours.<sup>22</sup>

Finally, the rule takes into consideration concerns that law students lack qualifications and therefore requires pro bono hours to be completed under the supervision of a practicing lawyer, judge or member of a law school faculty.<sup>23</sup> According to Judge Lippman, “this idea that you have to be a lawyer with 25 years experience to provide a service doesn’t make any sense to me.”<sup>24</sup>

Many law schools across the country also have pro bono graduation requirements.<sup>25</sup> “The experiential component is a major benefit to students,” explains Victoria Ryan, coordinator of Valparaiso University Law’s Pro Bono Program.<sup>26</sup> “By working under the supervision of an attorney while they are still in school, students continually hone their legal skills and gain practical knowledge.<sup>27</sup> When they eventually take on their first cases as new attorneys, they are prepared to do so.”<sup>28</sup>

#### A COMMON GROUND

Although opponents and supporters of ‘mandatory pro bono’ may butt heads on many issues, they seem to share a common concern—that pro bono is not *the* answer to eliminating the ‘justice gap.’<sup>29</sup>

The demand for legal representation for low-income individuals is currently not being met.<sup>30</sup> In light of the recent recession, there has been a dramatic increase in the number of people with foreclosure, debt collection and bankruptcy cases who are unable to afford an attorney.<sup>31</sup> Furthermore, due to cuts in federal funding for the Legal Services Corporation (LSC), LSC-funded programs eliminated 241 full-time attorney positions in 2011 and expect that similar reductions will continue to be made.<sup>32</sup> These organizations anticipate that they will also need to restrict the types of cases that they accept.<sup>33</sup> While pro bono work is one important vehicle for supplying legal services to the

poor, it cannot replace the enormous contributions that could be made by full-time, federally funded programs.<sup>34</sup>

#### BREAKING BOUNDARIES: THE LEGAL AID SYSTEM IN FRANCE

French lawyers have traditionally recognized a professional duty to provide legal aid to indigent clients.<sup>35</sup> The legal aid system in France, which is organized by the French Bar, has two components: *aide juridictionnelle* and *accès au droit*.<sup>36</sup> *Accès au droit*, which is unpaid and completely voluntary, is intended to provide all indigent clients with equal access to legal information.<sup>37</sup>

*Aide juridictionnelle* provides actual representation to those clients who fall below a certain financial threshold.<sup>38</sup> However, *Aide juridictionnelle* would not be classified as 'pro bono' in the traditional American sense.<sup>39</sup> Although the indigent clients do receive full or partial legal services free of charge, the qualified attorneys who provide these services are actually paid small sums by the state.<sup>40</sup> Payment under *aide juridictionnelle*, which varies depending on the procedure that the attorney performs, is typically insignificant in comparison to what a private attorney would receive for providing the same service.<sup>41</sup>

Furthermore, under the system of *aide juridictionnelle*, the amount of legal aid an applicant receives depends entirely on the applicant's financial situation.<sup>42</sup> According to the 2012 eligibility criteria, applicants who earn \_ 929 or less a month are entitled to receive total legal aid.<sup>43</sup> Applicants who earn between \_ 930 and \_ 1,393 a month qualify for partial legal aid.<sup>44</sup> If an applicant is eligible for partial aid, the percentage of aid that the state covers ranges from 85 percent to 15 percent depending on the applicant's monthly income.<sup>45</sup>

One downside of the French legal aid system is that restrictions on legal advertising prevent lawyers and firms from targeting clients by offering pro bono services.<sup>46</sup> Therefore, lawyers in France who wish to do pro bono work must offer their services through the French Bar's *aide juridictionnelle* system, which provides attorneys to all financially qualifying clients with civil, criminal, and administrative cases.<sup>47</sup>

## A CHALLENGE FOR AMERICA

Although there are fundamental differences between the way legal aid is delivered under the French and American systems, there are many similarities between the legal systems in both countries. Specific aspects of the French *aide juridictionnelle* system offer guidance for how we can effectively address the ‘justice gap’ in the United States.

Similar to France, lawyers in the United States also have a professional responsibility to provide legal services to those unable to pay according to the concept of ‘pro bono publico.’<sup>48</sup> The American Bar Association recommends that lawyers fulfill this ethical obligation by contributing at least 50 hours of pro bono legal services per year.<sup>49</sup> Although ABA Model Rule 6.1 states that the majority of pro bono hours should be rendered free of charge, lawyers are also encouraged to accept a substantially reduced fee in return for providing services to people of modest means.<sup>50</sup>

Because lawyers in the United States are not prohibited from advertising pro bono services, it is not necessary for private attorneys to go through legal aid organizations to represent clients who are unable to pay legal fees. In fact, the LSC recognizes that contributions by private lawyers to decrease the overall demand for legal services are an essential mechanism for narrowing the ‘justice gap.’<sup>51</sup>

The lesson to be learned from the French system of *aide juridictionnelle* is that making a living and providing legal representation to low-income individuals are not mutually exclusive. As litigants and attorneys both face increasing financial burdens,<sup>52</sup> why isn’t it possible for them to help out each other?

Low-income individuals who can’t afford lawyers would greatly benefit from receiving legal representation at a reduced fee.<sup>53</sup> Judges frequently complain that self-represented people typically don’t know what legal points to argue or what motions to file.<sup>54</sup> Seventy-five percent of lawyers believe that people who represent themselves are more likely to lose their cases, according to the results of an ABA survey.<sup>55</sup> These opinions have evidentiary support, as studies indicate that tenants facing eviction who receive full legal representation are two to five times more likely to have favorable results than their unrepresented counterparts.<sup>56</sup>

Likewise, more private attorneys would be able to represent needy clients if they received some sort of compensation for their services. By taking reduced-fee cases on a 'pro bono' basis, lawyers unable to find full-time employment would gain meaningful experience while establishing themselves as practicing attorneys.

While this type of an arrangement might initially seem inconsistent with our traditional notions of 'pro bono' services, increasing access to legal representation is certainly 'for the good of the people.' While even a modified 'pro bono' system is not the sole solution to eliminating the 'justice gap,' it is certainly one of many, and may be a way to help struggling attorneys as well.<sup>57</sup>

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#### NOTES

1 Dave Collins, *Lawyers Across U.S. Urged to Give Away More Free Services*, HUFFINGTON POST (Aug. 19, 2012), [http://www.huffingtonpost.com/2012/08/20/lawyers-crisis\\_n\\_1811805.html?utm\\_hp\\_ref=business](http://www.huffingtonpost.com/2012/08/20/lawyers-crisis_n_1811805.html?utm_hp_ref=business).

2 LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE, at 2 (2012), *available at* [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf).

3 Collins, *supra* note 1; Leila Atassi, *When Most Needed, Legal Aid is Forced to Reduce Services*, CLEVELAND PLAIN DEALER, Mar. 12, 2012, 2012 WLNR 5361507.

4 Annie Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES (May 1, 2012), *available at* [http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-in-new-york-to-be-required-to-do-some-work-free.html?\\_r=1](http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-in-new-york-to-be-required-to-do-some-work-free.html?_r=1).

5 *Id.*

6 *Id.*

7 Sarah Randag, *Around the Blowgosphere: Bloggers Sound Off on New 50-Hour Pro Bono Prerequisite for NY Law License*, ABA JOURNAL (May 4, 2012), [http://www.abajournal.com/news/article/around\\_the\\_blawgosphere\\_new\\_york\\_pro\\_bono\\_50\\_hours](http://www.abajournal.com/news/article/around_the_blawgosphere_new_york_pro_bono_50_hours).

8 Barnard, *supra* note 4.

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10 *Id.*

11 Randag, *supra* note 7.

12 *Mallard v. U.S. Dist. Court for S. Dist. Of Iowa*, 490 U.S. 296, 299-300 (1989).

13 *Id.*

14 Barnard, *supra* note 4.

15 *Id.*

16 Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, N.Y. TIMES (Sept. 19, 2012), *available at* <http://www.nytimes.com/2012/09/20/nyregion/pro-bono-work-becomes-a-requirement-to-practice-law-in-new-york.html>.

17 Daniel Wiessner & Joseph Ax, *NY Pro Bono Rule Could Spur Fewer Hours Than Envisioned*, REUTERS, Oct. 15, 2012, [http://newsandinsight.thomsonreuters.com/Legal/News/2012/10\\_-\\_October/NY\\_pro\\_bono\\_rule\\_could\\_spur\\_fewer\\_hours\\_than\\_envisioned](http://newsandinsight.thomsonreuters.com/Legal/News/2012/10_-_October/NY_pro_bono_rule_could_spur_fewer_hours_than_envisioned).

18 *See id.* (explaining that Lippman chose to define pro bono broadly so that the requirement would cover a greater range of public service work and would be less difficult for students to fulfill).

19 Secret, *supra* note 16.

20 Secret, *supra* note 16.

21 Pro Bono Requirement for Bar Admission, N.Y. Codes R. & Regs. tit. 22, § 520 (proposed Sept. 14, 2012) (to be codified at 22 N.Y.C.R.R. §520.16), *available at* [http://www.nycourts.gov/attorneys/probono/Rule520\\_16.pdf](http://www.nycourts.gov/attorneys/probono/Rule520_16.pdf).

22 Randag, *supra* note 7.

23 Secret, *supra* note 16.

24 *Id.*

25 LEGAL SERVS. CORP., *supra* note 2 at 10; VALPARAISO UNIVERSITY LAW, PRO BONO REQUIREMENT (2009), <http://www.valpo.edu/law/wp-content/uploads/2012/02/1-CPC-013012-ProBonoReqPDF-1.pdf>; Wiessner and Ax, *supra* note 17.

26 Telephone Interview by Victoria W. Ryan, Esq., Senior Director, Career Planning Center, Valparaiso University Law School (Oct. 22, 2012).

27 *Id.*

28 *Id.*

29 Atassi, *supra* note 3; LEGAL SERVS. CORP., *supra* note 2.

30 Collins, *supra* note 1; LEGAL SERVS. CORP., *supra* note 2.

31 Collins, *supra* note 1.

32 LEGAL SERVS CORP., *supra* note 2.

33 Press Release, Legal Servs. Corp., Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-Funded Programs (Aug. 15, 2012), *available at* <http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded>.

34 LEGAL SERVS. CORP., *supra* note 2.

35 PRO BONO INST., *Pro Bono Practices and Opportunities in France*, in A SURVEY OF PRO BONO PRACTICES AND OPPORTUNITIES IN SELECTED JURISDICTIONS, at 2 (2010), *available at* <http://www.probonoinst.org/images/pdfs/global/latham/france.pdf>.

36 *Id.*

37 *Id.* at 4.

38 *Id.* at 2.

39 *Id.* at 3.

40 *Id.*

41 *Id.*

42 *See* Aide juridictionnelle [Legal aid], Direction de l'information légale et administrative (Premier ministre) et Ministère en charge de la justice [Agency of Legal and Administrative Information], Mar. 22, 2012, <http://vosdroits.service-public.fr/F18074.xhtml> (Fr.), *translated by* Google Translate (providing financial thresholds for legal aid eligibility for the year 2012).

43 *Id.*

44 *Id.*

45 *Id.*

46 PRO BONO INST., *supra* note 35, at 6.

47 *Id.* at 3, 6.

48 Am. Bar Ass'n, Model Rule of Professional Conduct 6.1, *available at* [http://www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1.html](http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html) (last updated Nov. 26, 2006).

49 *Id.*

50 *Id.*

51 LEGAL SERVS. CORP., *supra* note 2.

52 Barnard, *supra* note 4.

53 Collins, *supra* note 1.

54 *Id.*

55 *Id.*

56 Boston Bar Ass'n Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Mar. 2012, *available at* <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

57 Atassi, *supra* note 3; LEGAL SERV. CORP., *supra* note 2.