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Re-Defining Pro Bono: Professional
Commitment to Public Service

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Re-Defining Pro Bono: Professional Commitment to Public Service

By Gary A. Munneke* and Eileen Eck**

Part I. Introduction

Helping to build sound banking and financial systems in transitioning and developing countries, as well as neighborhoods in this country; litigating to preserve landmark buildings; protecting the environment from commercial development; representing Nobel Peace Prize winners; assisting in the formation of new nations—all are worthwhile causes that contribute to the public good. And yet none of these fit within the ABA's current definition of *pro bono*. This article suggests that the current version of Rule 6.1 of the Model Rules of Professional Conduct has not achieved its objective of fostering universal public and *pro bono* service among lawyers. The article proposes a change to the current rule that hopefully will be more successful in achieving these laudable objectives.

From the earliest days of the Anglo-American legal profession, lawyers have understood public, or *pro bono publico*, service to be fundamental to their identity as professionals. For at least 1,000 years lawyers engaged in a wide variety of public service activities in the community, state, nation, and world stage. Over time, the principle of public service evolved to meet the changing needs of legal practitioners, clients and society. During the last half of the 20th century, however, this evolution became a

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revolution, as *pro bono* increasingly came to be identified with free legal services to indigent clients, and public service as all other uncompensated legal work.

The American Bar Association first adopted a non-mandatory professional duty to provide *pro bono* and public interest legal services in the 1983 Model Rules of Professional Conduct, Rule 6.1.¹ In 1993 the Rules were amended to emphasize free legal services to indigents over other forms of public service, which were presented as an alternative for lawyers who were not in a position to do *pro bono* work.² The current version of the rule calls on, but does not mandate, lawyers to engage in fifty (50) hours of *pro bono* legal services each year, and is codified in Rule 6.1 of the 2007 Model Rules of Professional Conduct.³

In 2005 when then-ABA President Mike Greco appointed a Commission on the Renaissance of Idealism in the Profession,⁴ he simultaneously re-energized an old debate

¹ MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983) [hereinafter MODEL RULES].

² MODEL RULES R. 6.1, and Comments (1993).

³ MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

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 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 to persons of limited means. *Id.*

Every jurisdiction in the United States has a rule based on ABA Model Rule 6.1

⁴ Report of the Commission on the Renaissance of Idealism in the Profession, American Bar Association 2007 [hereinafter Renaissance Report]. Michael Greco, President, Am. Bar Ass'n, Address to the American Bar Association House of Delegates (Aug. 8, 2005).

about the responsibility of lawyers to engage in public service activities and *pro bono publico* legal representation.⁵ Greco opined that rising billable hour requirements for practitioners made them less able to perform *pro bono* AND community service than lawyers in prior generations.⁶ Greco posited that lawyers who were working all the time were not engaging in public service activities either, including *pro bono* services to people of limited means. He also suggested that the withdrawal of lawyers from participation in public affairs contributed to the decline in image suffered by the legal profession.⁷

Greco, however, incorporated both *pro bono* and public service in his description of activities that tended to be undermined by the increasingly burdensome billable hours worked by lawyers. This withdrawal from the public arena contributes to a decline in public confidence in lawyers and the legal system. The solution was to find ways to escape the tyranny of the billable hour in order to devote more time to public service as well as family and personal interests.⁸

By including public service and *pro bono* in the same discussion, President Greco, perhaps inadvertently, perhaps by design, raised a fundamental question about the nature of lawyers' professional responsibility to engage in public service activities. When Rule 6.1 was amended in 1993 to clarify the obligation to provide services to those unable to

⁵ Proceedings of the House of Delegates, Aug. 2005. Am. Bar Ass'n, Comm'n on the Renaissance of Idealism in the Legal Profession (2006).

⁶ Previous discussions of the billable hour issue had focused primarily on the issue of "balance" between work and family. The Renaissance Commission took the position that family time was not the only thing that was lost when lawyers faced increasingly burdensome billable hours requirements. Michael Greco, President, Am. Bar Ass'n, Remarks to the House of Delegates (Aug. 7, 2006).

⁷ *Id.*

⁸ The theory, it seems, is that lawyers do not engage in *pro bono* work not because they do not want to, but because they do not have enough time. Surveys have pointed to a steady increase in billable hours over the course of the past twenty years. See, e.g. Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L. J. 171, 176-80 (2005).

pay, the change relegated broader public service responsibilities to a secondary and arguably less-favored status.⁹ The 1993 amendments were quite controversial at the time,¹⁰ but in the years since their adoption, most of the focus of commentators has been on the need for lawyers and law firms to increase their commitment to *pro bono* legal services to individuals unable to pay.¹¹

The Task Force on the Renaissance of Idealism re-opened a debate about whether lawyers should primarily provide *pro bono* services and secondarily engage in public service, or whether lawyers have a broad duty to engage in public service activities including but not limited to *pro bono* work.¹² The purpose of this article is to look at this question anew and to re-cast the professional responsibility of lawyers in terms of public service in which *pro bono* legal services are a distinct subset of public service.

The term *pro bono publico* means “for the public good,” but contemporary gloss has narrowed the definition to mean 1) legal services, 2) to indigent persons, 3) without compensation. Proponents of the current version of Rule 6.1 have reworked the traditional definition of *pro bono* to fit a political agenda.¹³ The legal services

⁹ See *infra* notes 57-69 and text accompanying.

¹⁰ The House of Delegates voted 228-215 in favor of the changes. See ABA ACTIONS OF THE H. OF DEL. 1993. The debate has also been chronicled in law review articles and the legal press: see, e.g. James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 LAW & INEQ. 51, 58-62 (1994); Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 136-37 (2002).

¹¹ See, e.g., Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, LAW & SOC'Y REV. (2007); Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415 (2007).

¹² Am. Bar Ass'n, Comm'n on the Renaissance of Idealism in the Legal Profession (2006).

¹³ This article is agnostic as to the politics of *pro bono*, that is the question as to whether or not society has an obligation to provide legal services to individuals who lack the means to hire lawyers to represent them in legal matters. The point here is that the process of recasting the definition of *pro bono publico* has had the effect of relegating forms of public service other than the representation of indigents to second-class status, with a number of unfortunate, unintended consequences. A formulation of the lawyer's duty to engage in *pro bono* work should enhance both indigent and other forms of public legal services.

community, believing that all lawyers have a duty to provide legal services to the poor,¹⁴ and the neo-conservative movement, believing that the federal government should not be in the business of providing legal services,¹⁵ joined forces to make the case that lawyers had a professional duty to voluntarily provide legal services to the poor.¹⁶ The *pro bono* principle was adopted as a rule of professional conduct in Model Rule 6.1, although in its final form, the Rule was watered down from its original mandatory to its current non-mandatory form by a majority of the ABA House of Delegates, who were concerned about imposing a new duty on all lawyers.¹⁷

Over the years, government-funded legal services programs provided lawyers for the indigent, but many who do not qualify for or have access to these programs cannot afford private legal services either.¹⁸ The representation of lower income clients who earn

¹⁴ Deborah Rhode [hereinafter Rhode]. Professor Rhode has been perhaps the most articulate and vocal proponent of this position, but she is certainly not alone. See, e.g. Katja Cerovsek & Kathleen Kerr, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697 (2004).

¹⁵ The Reagan era call to “get government off our backs” was nowhere more clear than in the area of legal services, where in 1988, the Reagan administration sought defunding of the national Legal Services Corporation. Maggie Gallagher, *The New Serfs*, National Review, Aug. 5, 1988. Although suffering significant cuts in funding, the Legal Services Corporation survived, with conservatives calling for private lawyers to step up and provide services formerly provided by LSC on a volunteer basis. Kenneth F. Boehm, *The Legal Services Corporation: New Funding, New Loopholes, New Games*, May 17, 1996. The legal services community supported these calls for volunteerism as a means of replacing lawyers eliminated by the funding cuts, but always believing in a goal of complete funding. *Id.*

¹⁶ Lawyers serving indigent clients did not start in the 1980s. As Professor Rhode and others point out, the practice of providing legal services to poor clients without fee has a long history. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004); Kimberly McKelvy, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337 (2006). On the other hand, it took the cauldron of 1980s politics to produce the right ingredients for establishment of a professional duty to provide free legal services to the poor in the ethics rules of the legal profession. See Cummings at 18.

¹⁷ The arguments against mandatory *pro bono* service are set forth in Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845, 851-52 (2002); Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 464-65 (2001).

¹⁸ The precise definitions of the terms “indigent,” “limited means,” and “moderate means” are illusive. Generally, the first two terms describe individuals with legal problems who cannot afford the services of a lawyer, while the latter refers to people who earn enough money to survive day-to-day, but lack the resources to pay for unusual expenses such as legal services without incurring financial hardship. Guidelines for eligibility for legal services programs typically use a formula to determine whether or not the program may provide services to the individual. Those who do not qualify for government-funded legal

too much to be classified as indigent for purposes of qualifying for government-funded legal services inevitably falls to private practitioners or to no representation at all.

Because these clients lack the ability to pay for legal representation, the lawyers must provide these services *pro bono publico*, that is, without charge, or at a greatly reduced charge.

This article addresses whether it is time to redefine the duty enunciated in Rule 6.1 to include both legal services to the poor and broader public service. Part II of the article will explore the historical context of *pro bono publico* and public service among lawyers and the history of lawyers' public service tradition, including the roots of the 1993 debate. This section will show that beginning with the nascent legal profession in Norman England, legal services to the poor have represented a subset of a larger public service commitment—an important part of it, but not the only part.

Part III reviews the economic impact of providing *pro bono* services for law firms. This section will review billing practices in relation to the cost of providing representation without remuneration, as well as the implications of modern trends in hourly billing. A part of this discussion will be the extent to which lawyers and law firms are presently engaging in *pro bono* services under the current non-mandatory rule. Anecdotal evidence will show that most large firms have made substantial, sometimes dramatic, commitments to *pro bono* services, but that many of them define the term more broadly than just legal services to indigents. The section will suggest that the example set by lawyers in larger firms is both feasible and desirable in all sized firms, provided the

services are required to find representation among the private bar, often at reduced rates. *See generally* 17 GEO. J. LEGAL ETHICS 697 (2004).

definition of *pro bono* is broad enough to encompass the diverse public service interests of the individual lawyers who make up these firms.

Part IV further analyzes the ethical duties enunciated in Rule 6.1, including the philosophical underpinnings for a broad duty in society for citizens to contribute to the public good. This argument suggests that all members of a civilized society have a duty to sustain the society (*civitas*), whether they are lawyers or bricklayers, and that each must contribute according to his or her talents for society to work. Both lawyers and law firms have a duty to engage in public service activities, including but not limited to *pro bono* services to the poor. The section postulates that the profession should mandate this duty as a collective affirmation for both lawyers and organizations that employ lawyers; otherwise market pressures will continue to limit the opportunities for non-compensated work. In response to those who would give primacy to indigent legal services over other forms of public service, this section will suggest that a mandatory broad public service requirement will generate more hours of legal services to the poor than a non-mandatory moral duty to provide legal services to the poor. The section will conclude by proposing a new Rule 6.1, which incorporates the broad public service view of the professional responsibility of lawyers.

Finally, Part V concludes that these changes are needed in order to achieve the goals of the Renaissance Task Force, as well as to achieve the intent of the original drafters of the Model Rules to establish universal public and *pro bono* service among lawyers as a core professional value. Only a revised Rule 6.1, which recognizes both public and *pro bono* service, will be able to achieve this laudable objective.

Part II. Background

A. Historical Context

Although the legal community recognized the need to engage in public service in the ABA Model Rules of Professional Conduct, the ideas underlying the Rule have a much longer history. The broad concept of *pro bono publico* rests on the belief that all citizens have a duty to contribute to the good of the public.¹⁹ The term itself means “for the public good; for the welfare of the whole.”²⁰ In the context of the legal profession in the United States, however, as articulated in Rule 6.1, the term *pro bono publico* has assumed a narrower meaning.

Whatever the current definition of *pro bono publico* might be today, evidence drawn from its earliest roots points to a broader definition. The lawyers in Greco-Roman times were drawn from the upper classes.²¹ These public citizens may have accepted fees or tribute for serving as an advocate of others, but their personal and family wealth probably meant that they did not, strictly speaking, earn a livelihood from legal work.²²

In England, the Anglo-American legal profession developed a tradition of public service quite organically. After the Norman Conquest in 1066, the King began issuing writs to answer complaints in the King’s courts.²³ These courts, which ushered in the English Common Law and legal system, eventually replaced the feudal courts that had

¹⁹ Plato, *REPUBLIC* (2004).

²⁰ *BLACK’S LAW DICTIONARY* 1425 (8th ed. 2004).

²¹ James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 *LAW & INEQ.* 51, 52 (1994).

²² Barry Nichola, *An Introduction to Roman Law* 28 (1962).

²³ See J.H. Baker, *An Introduction to English Legal History*, 12 (4th ed. 2002). The motivation for this development may have been the widespread sense that justice in the feudal manorial courts was an uncommon commodity, or it may have involved an effort by the Normans to consolidate their base of power by undermining the authority of feudal lords, or it may have been some of both. The Magna Charta of 1215 is a reminder that the landed gentry resisted the King’s intrusion into their traditional perquisites.

operated prior to that time.²⁴ In part, because of the more complicated procedural framework and, in part, because many parties to legal proceedings did not speak French, the language of the court, it became accepted practice for litigants to be represented by another person, who understood the language, rules and customs of the court.²⁵

The earliest legal representatives were drawn from the gentry and provided their services not for remuneration but rather out of a sense of fealty to their sovereign. In time, England developed a bifurcated system of representation which included solicitors, who prepared the case for the client, and barristers, who argued the case in court.²⁶ Barristers tended to be members of the upper classes who, after a period of apprenticeship, entered their profession through invitation to membership in one of the Inns of Court. From the earliest days to modern times, barristers did not accept fees from clients;²⁷ rather, it was customary for the solicitor to drop a tip into a small black bag carried at the barrister's waist in lieu of formal payment, in order to carry on the tradition, if not reality, of representation without compensation out of a sense of public duty.²⁸

²⁴ *Id.* at 13-14.

²⁵ It is worth noting here that the term "court" can refer to the King's Court, the retinue of advisors, family and hanger's on who surrounded the King, as well as the institution (and place) where legal cases were tried. In the earliest times, these two were probably synonymous, as subjects petitioned the King for redress of their grievances as the Court traveled the countryside. The practice of issuing writs to compel the attendance of one complained against in a petition permitted the King and his advisors to hear disputes and make decisions, which—coming from the King—carried weight to be followed in other similar cases. In time, the courts split from the Court, and cases were heard by judges at a designated place—Westminster Hall in the City of London. Over time, the system evolved into something very recognizable today: trials presided over by judges, litigants represented by barristers, procedural rules and safeguards, reliance on precedent in making judicial decisions, and of course the use of English as the formal language of the courts of law. *See generally supra* note 23.

²⁶ *Supra* note 23 at 163-64.

²⁷ *Id.*

²⁸ In practice, the solicitor would include the amount to be passed on to the barrister in the client's bill for the solicitor's services, permitting barristers lacking personal or family wealth to serve the Crown. It may have been the case that as the legal system grew, it was not possible to attract enough barristers to meet the needs of the courts, or it may have been the case that democratizing influences opened the doors of the Inns of Court to individuals with less prominent pedigrees over time.

Even though barristers today do not work for free, the tradition of public service remains intrinsic to the professional identity of those who are “called to the bar.”²⁹

In the United States, a dearth of trained lawyers led to the emergence of a unified profession, where lawyers both prepared and argued their cases.³⁰ Yet, the language of professional values expressed by American lawyers is derived more from the customs and mores of the Inns of Court than the more plebian guiding principles of the solicitors.³¹ This may have been influenced by the presence of lawyers trained in England prior to the American Revolution, or trained in the English tradition after the Revolution.³² As America turned Westward, and Jacksonian populism emerged as a dominant philosophy, an increasing number of lawyers and judges entered the legal profession. Many of these new lawyers lacked any formal legal training—English-style or otherwise. These lawyers studied the law by correspondence or apprenticed with practicing lawyers until they were ready to submit themselves for membership in the bar.³³ They tended to be drawn from a different stratum of society—the upwardly-mobile—and they viewed the practice of law as a vehicle for their advancement and a means of procuring a livelihood.³⁴ The traditions and values of the English model were of

²⁹ *Supra* note 23 at 12.

³⁰ It may be that the modern distinction between litigation and transactional work is an echo of the earlier dichotomy between barristers and solicitors, but it is by no means a planned phenomenon. For most of the history of the American legal profession, individuals who were admitted to the bar were presumed to be competent in both areas of functionality.

³¹ *Supra* note 23 at 12.

³² Envisioning lawyers trained in the English tradition, it is easy to think of lawyers like Thomas Jefferson, Patrick Henry, John Adams, and others, who participated in the public debates leading up to and following the revolution. For these lawyers public service and legal services were virtually indistinguishable. The first law schools in America, William & Mary and Harvard fostered the values of *noblesse oblige* in the lawyers of the new Republic.

³³ Albert A. Woldman, *Lawyer Lincoln*, 17 (1936).

³⁴ Abraham Lincoln is probably the most notable example of the upwardly-mobile lawyer of this period. Born into poverty in 1809, Lincoln studied law by firelight, while pursuing a variety of day jobs, until at the age of 28, he became a lawyer. Between 1830 and 1860, Lincoln practiced law, first in Decatur and

less concern to immigrant frontier lawyers, and although many engaged in public service activities, others served society just by practicing law.

What emerges from a look at the 19th century legal profession is the picture of a dichotomy: one profession characterized by formal education for the sons of the affluent, and one profession characterized by a less formal, practical education for an immigrant population seeking a better life in the New World.³⁵ For the former group, mores and traditions handed down from the English barristers were integral to the American legal profession. For the latter group, a new set of client-oriented values emerged, relying less on tradition than on the pragmatic considerations of legal representation in the growing nation.

In time, the precepts of these two different bars melded into a unified set of rules for a common profession, although some concepts, like public service and *pro bono* played better among the affluent than the upwardly-mobile. The Canons of Professional Ethics,³⁶ the Code of Professional Responsibility,³⁷ and the Model Rules of Professional Conduct³⁸ all reflect the ultimate decision of American lawyers to maintain a unified profession, although they incorporate the values of both Jacksonian democrats and English barristers. One idea that made its way into our modern professional value system, despite ambivalence in some quarters, is the duty to engage in public service.³⁹ However, whatever else might be said, the conclusion that the lawyer's duty to provide *pro bono*

then in Springfield, Illinois. *Id.* at 25-26. Unlike many contemporaries, Lincoln contributed to the public good by participating in the political process, from local precincts up to the national stage. *Id.* at 31-32.

³⁵ Robert Stevens, *History of Legal Education in the United States*

³⁶ CANONS OF PROF'L ETHICS (1909) (amended various times until replaced in 1969).

³⁷ MODEL CODE OF PROF'L RESPONSIBILITY (1969) (amended various times until replaced in 1983).

³⁸ *Supra* note 3.

³⁹ Although the Canons and the Code do not have a provision analogous to Model Rule 6.1, they each mention public service. *See* CANONS OF PROF'L ETHICS (1909); MODEL CODE OF PROF'L RESPONSIBILITY (1983).

and public service is rooted deeply in the history and traditions of the American legal profession is inescapable.

The modern distinction between *pro bono publico* and public service for lawyers is much more recent. As noted by Professor Scott Cummings, in his article, *The Politics of Pro Bono*, “the very concept of ‘pro bono’—understood as professional duty, discharged outside the normal course of billable practice, to provide free services to persons of limited means or to clients seeking to advance the public interest—did not exist until quite recently.”⁴⁰ Professor Cummings notes that “for most of American history, *pro bono* was individual and ad hoc.”⁴¹ Notwithstanding the historical tradition, as the following discussion demonstrates, the term *pro bono publico* has come to have a narrower definition, limited to free legal services to indigent clients.

In her book, *Ethics in Practice*, Professor Deborah Rhode calls on lawyers to formalize an ethical duty for all lawyers to provide legal services to individuals of limited means.⁴² She offers an intellectual as opposed to historical argument for imposing such a requirement on lawyers.

No matter how well intentioned, lawyers regulating lawyers cannot escape the economic, psychological, and political constraints of their position. Those constraints compromise both the content and enforcement of ethical standards ... Opposition from lawyers has repeatedly blocked proposed requirements of even minimal contributions of pro bono services ... Attorneys play a central role in the structure of legal, economic, and political institutions. The principles that guide professional practice have crucial social consequences ... Unless the bar becomes more willing to address the underlying forces that erode professional values, a sharp disjuncture will persist between lawyers’ rhetorical commitments and daily practices.”⁴³

⁴⁰ See Scott L. Cummings, *The Politics of Pro Bono*, 52 U.C.L.A. L. REV. 1, 4 (2004).

⁴¹ *Id.* at 1.

⁴² See generally ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATIONS (Deborah Rhode ed. 2000).

⁴³ *Id.* at s13, 14, vii.

Foremost among Professor Rhode's reasons for supporting a duty to provide free legal services to individuals of limited means is the relationship between income generating work and work performed without remuneration. Rhode sees a conflict between fee producing work and professionalism, which would include non-fee work dedicated to improving the legal system.

“Preoccupation with the bottom line has compromised [lawyers] commitments... and one obvious casualty is pro bono work. Few lawyers come close to satisfying the ABA's Model Rules of Professional Conduct...Part of the reason involves firm policies that fail to count pro bono activity toward billable-hour requirements or to value it in promotion and compensation decisions...The tension between profit and professionalism is too self-evident to overlook, but also too uncomfortable to acknowledge fully.”⁴⁴

This view is echoed by former Yale Law Dean Anthony Kronman, who suggests that commercialization of the practice of law is an impediment to lawyers engaging in public responsibilities:

“The commercialization of law practice, especially in its upper reaches, at the country's largest and most prestigious firms, has introduced an element of competitiveness that has caused many lawyers in these firms to view their public responsibilities as a luxury they can no longer afford in the frantic scramble to attract business by appealing to the self-interest of clients.”⁴⁵

In 2005, Professor Rhode surveyed law firm *pro bono* practices, and explored the aspirational principles and actual practices that affect lawyers' *pro bono* service.⁴⁶ Her study, “An Empirical Analysis of Pro Bono Service among American Lawyers,” was

⁴⁴ *Id.* at 16. Rhode based her conclusions on a study conducted with 200 lawyers

⁴⁵ See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 257 (1990).

⁴⁶ Deborah Rhode, *Pro Bono in Principle and in Practice* at 2.

designed to provide the first broad-scale data about the personal characteristics, educational experiences, and workplace policies that influence *pro bono* participation.⁴⁷

Rhode found that in most jurisdictions, participation rates in *pro bono* activity ranged between 15% and 18%, and of those who participated, contributions ranged from an average of 42 hours per year in New York to a median of 20 hours in Texas.⁴⁸ The highest participation rate, 52%, was in Florida, the only state that both requires reporting of *pro bono* contributions and makes the information publicly available.⁴⁹ When adjusted for the number of lawyers who made no contributions, hourly assistance ranged from an average of 20 hours in New York and 18 hours in Florida to a median of 5 hours in Texas. Less than 10% of practitioners accepted referrals from federally funded legal aid offices or bar-sponsored poverty-related programs.⁵⁰ Only two-fifths of surveyed in-house legal departments participated in *pro bono* work, and the average yearly commitment was less than 8 hours per legal department employee.⁵¹

The survey found most lawyers to be no more charitable with their money than with their time. Reported financial contributions ranged from an average of \$82 per year in New York to \$34 per year in Florida.⁵² The research concluded that American lawyers averaged less than half an hour of work per week and under half a dollar per day in support of *pro bono* legal assistance.⁵³

⁴⁷ See *supra* note 42 at 125.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Almost half of the lawyers surveyed (47%) were in workplaces with no *pro bono* policy, and only a third (35%) reported a formal policy.⁵⁴ A quarter of surveyed lawyers' workplaces (25%) fully counted *pro bono* work toward billable hours. Fewer than a third counted a certain number of hours (20%) or a certain kind of work (10%).⁵⁵ In effect, *pro bono* participation was permissible only if it occurred "outside the normal work hours."⁵⁶

Rhode's survey gave lawyers an opportunity to indicate whether there was anything their firm could do to encourage more *pro bono* work. Of 237 responses to this open-ended question, the most common proposal, cited by 29% of lawyers, involved modifying policies toward billable hours, either by reducing the amount of billable time required or by counting public service equally toward [billable] hourly requirements.⁵⁷

It is impossible to argue with Professor Rhode and other supporters of legal services to the poor that the objective of improving access to justice is not an important one. Indeed, the legitimacy of the legal system depends on all citizens having access not only to the courts but to legal representation. Lawyers who provide their services on a voluntary basis to indigent clients fulfill a valuable function in the administration of justice.

The argument that only free legal services to indigents should be counted as *pro bono publico* service, or that other forms of public service are not important goes too far.⁵⁸ Lawyers might engage in *pro bono publico* work as part of their public service

⁵⁴ *Id.* at 137.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 150.

⁵⁸ For purposes of this article, the terms *pro bono* and *pro bono publico* will be used to refer to legal services provided to individuals of limited means for no fee or a reduced fee. Although historically the term was not so limited, its usage today has become closely associated with indigent legal services. In this paper,

responsibilities, because of their personal moral commitment to serve the poor; however, individual lawyers should be free to choose what form their public service responsibilities should take. Whereas, a broad duty of public service is appropriate for all lawyers, given the historical traditions of the legal profession, the decision of lawyers to provide legal services to the poor is one, but not the only, way to fulfill their public service obligation.

B. Current Rule 6.1

Proponents of *pro bono publico* have made headway since the 1980s, first by claiming the *pro bono* nomenclature to refer to indigent legal services, and second to persuade the framers of the Rules of Professional Conduct to include a rule on *pro bono* legal work. The earliest iteration of the standard in 1983 included a non-mandatory duty to perform public service legal work.⁵⁹ In 1993, this language was clarified by distinguishing *pro bono* from other forms of public service, and granting the former priority over the latter.⁶⁰ Calls by proponents of *pro bono* to make the duty mandatory, however, were rejected by the ABA House of Delegates in 2002.⁶¹

The version of Rule 6.1 originally adopted by the ABA in 1983 (which remained in effect until its amendment in 1993) provided as follows:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means *or* charitable groups or organizations, by service in

the term public service refers to legal and law-related services for public interest activities. A third category of work includes non-legal work in community activities and not-for-profit organizations.

⁵⁹ MODEL RULES R. 6.1 (1983).

⁶⁰ MODEL RULES R. 6.1 (1993).

⁶¹ See ACTIONS OF THE H. OF DEL. (Feb. 2002). The Commission to Review the Model Rules of Professional Conduct (the Ethics 2000 Commission) had stated that “amending Rule 6.1 to require all lawyers to provide pro bono legal service is not an appropriate response to the problem. Rather, the Commission encourages the ABA to heighten its efforts to find more appropriate and effective means to increase the voluntary participation of lawyers in the provision of legal services to persons of limited means.” Ethics 2000 Commission Report *available at* <http://www.abanet.org/cpr/e2k/home.html>

activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.⁶²

The 1993 amendment re-cast the responsibility as a duty to engage in *pro bono*, and acknowledged other public service activities only in situations where it was not feasible to perform *pro bono* services.⁶³ This re-ordering of the definitions in the Rule placed a higher priority on *pro bono* legal services, and a lower priority on public services than had been the case previously.

At present, Rule 6.1 recommends, but does not mandate, all lawyers to provide fifty (50) hours of *pro bono publico* legal services each year.⁶⁴ Comments to the Rule recognize that some lawyers may not be in a position to provide services directly to clients, and these lawyers may fulfill their responsibility by providing other forms of public service.⁶⁵

In 2002, the ABA's Ethics 2000 Commission added a sentence to the Comment to Rule 6.1 stating that "law firms should act reasonably to enable all lawyers in the firm to provide the pro bono services called for in this Rule,"⁶⁶ recognizing the implicit connection between individual lawyers engaging in *pro bono* work and the policies of the firms where those lawyers work.

⁶² MODEL RULES R. 6.1 (1983).

⁶³ MODEL RULES R. 6.1 c. 5 (1983).

⁶⁴ *Supra* note 3.

⁶⁵ *Supra* note 3.

⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

One problem with the current rule is the use of the word “should” to describe the obligation to do *pro bono* work.⁶⁷ Supporters have lobbied unsuccessfully for a mandatory *pro bono* requirement since earliest drafts of the Model Rules.⁶⁸ Yet the ABA House of Delegates has resisted every effort to impose mandatory *pro bono* on all lawyers. This has lead critics to question lawyers’ public spiritedness and to suggest that greed trumps service in the legal profession.⁶⁹ As this article will suggest, however, if the Model Rules included a broader definition of *pro bono* and public services, it would be much easier to adopt a mandatory rule that a majority of lawyers could accept.

Part III. The Economics of Working without Compensation.

Hourly billing is the predominant method law firms use to charge clients for their work.⁷⁰ Although some firms charge flat fees, contingency fees, and blended fees, hourly billing represents the *lingua franca* of law firm economics. In one sense, whether the client is actually charged on an hourly basis is irrelevant to the measurement of the value for legal services. For example, a law firm may say that it charges \$300 per hour for its services, and if a lawyer in the firm spends five hours on a matter, the client would be billed \$1,500 for the work. If the firm could reasonably predict that the work in question would take five hours to complete, it would be just as easy to charge a flat fee of

⁶⁷ MODEL RULES R. 6.1. It is perhaps emblematic of the schizophrenic attitude of lawyers toward *pro bono* that this is the only so-called rule that is not really a rule. If a lawyer chooses not to engage in *pro bono* or any other form of *public service*, the lawyer will not be subject to discipline, because the rule uses the word “should” instead of “shall.” *Id.* Lawyers know that “should” means they do not have to do *pro bono* if they do not want to, but it is not clear whether opposition to a mandate, but it is not clear whether opposition to a mandatory duty represents opposition to *pro bono*, opposition to *public service* generally, or distaste for regulation generally.

⁶⁸ See Proposed Model Rules of Professional Conduct Discussion Draft (1980).

⁶⁹ See Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415 (2007).

⁷⁰ See Richard C. Reed, *Beyond the Billable Hour: An Anthology of Alternative Billing Methods* (1989).

\$1,500.⁷¹ Regardless of the type of legal service, it is possible to reduce the total fee paid to an hourly rate by dividing the number of hours spent on the matter into the amount received.⁷² Furthermore, if the law firm maintained records of the expenses associated with the delivery of the legal work, it could also determine the overhead cost of providing the service.⁷³

When a firm does not charge a client a fee for services, or charges a reduced fee, the economic impact on the firm is the same as it is when the firm is unable to collect a fee. The firm has done the work, and invested the cost of producing the legal work, but does not generate revenue to recover its costs and produce a profit. One difference between uncollectible fees and free legal work is that the firm chooses not to charge a fee in the *pro bono* or public service case.⁷⁴ In the hypothetical five lawyer firm mentioned above, if each lawyer performed fifty (50) hours of *pro bono* and public service work each year, the firm would have collectively undertaken 250 hours of non-fee work. This amounts to 2.5% of the billable work of the firm, assuming 10,000 hours of billable

⁷¹ When a firm charges a flat fee, it assumes the risk that the matter will require more or less hours. If the work takes ten hours instead of five, the firm will earn only \$150 per hour, but if the firm can do the work in three hours it can earn \$500 per hour. If a firm handles enough of the same kind of matter, it may learn that on average the work takes five hours; some cases take two hours and some take ten, but taken together, if the firm charges a flat \$1,500 for the work, it will earn an average of \$300 per hour. Similarly, if a firm handles a simple contingency case, and recovers one-third of a \$4,500 settlement, if the firm invested five hours of time, the hourly rate for the contingency work would be \$300 per hour.

⁷² In a larger context, a firm might look at all the fees earned to determine its hourly rate of return. In a five lawyer firm where each lawyer bills 2,000 hours to client work each year and the firm collects \$3 million dollars, the hourly rate would be \$300 per hour. In reality, however, a firm that bills clients for 10,000 hours of legal work may have to write off or write down uncollectible fees, and therefore realize less than the full value of the work performed. In this example, if the firm collects 90% of the fees billed, it will earn only \$2.7 million. Thus, work billed to clients at \$300 per hour actually earns only \$270 per hour.

⁷³ This overhead amount would include salaries paid to employees, rent, equipment, and other costs not reimbursable by clients. If the overhead for a firm that billed 10,000 hours to clients were \$1 million, then the hourly overhead would be \$100 per hour. If the firm realized \$270 per hour against \$100 per hour overhead, the partners would earn \$170 for each hour worked, or \$1.7 million (\$850,000 per partner. Significantly, if the firm realizes less than \$100 per hour, it will not earn any profit at all.

⁷⁴ One practitioner described her uncollectible charges as “unintentional *pro bono*.” This would seem to suggest that law firms could do more *pro bono* work if they could manage their receivables more efficiently, without adversely affecting profitability.

work. The free work could be added on to the 2,000 hours billed by each lawyer for a total of 2,050 (one additional hour per week), or subtracted from the 2,000 (reducing the fee-producing work of each lawyer to 1,950). Assuming again a \$300 per hour billing rate and \$100 per hour overhead, it would cost the firm \$25,000 to generate 250 hours of legal work. By not charging for the work, the firm would not generate \$75,000 in gross income, or \$50,000 in net income (\$10,000 per partner).

The question whether one more billable hour per week or \$10,000 in pre-tax income per year represents an undue burden on lawyers is an intriguing one. One could argue that a *pro bono*/public service requirement constitutes a tax on the profession, although the fact that lawyers themselves make the Rules of Professional Conduct negates the argument that this is taxation without representation. It may be that the least economically successful lawyers would consider \$10,000 per year a heavy burden.⁷⁵ Economic surveys of lawyer income suggest, however, that a *pro bono*/public service requirement would not prove unduly burdensome for most lawyers.

A strong commitment to *pro bono* is clearly not inconsistent with commercial success. A significant number of the nation's most profitable firms have high participation levels. Some evidence suggests that, at least for large firms, *pro bono* participation is positively correlated with financial success.⁷⁶ Listed are the nation's top

⁷⁵ It may be the case that lawyers who make less charge less, so the *pro bono* cost to a lawyer who charges only \$100 per hour would be only \$3,333, and a lawyer who worked part time (for example, 20 hours per week) should only be expected to produce part time *pro bono* (25 hours per year) as well. It might also be the case that lawyers who do not earn as much may already be serving lower income populations where they reduce or forgive fees on an ongoing basis.

⁷⁶ *Supra* note 42 at 21.

ten firms by gross revenue⁷⁷ with their corresponding average number of *pro bono* hours per attorney.⁷⁸ See Chart I below:

Chart I

Skadden, Arps	62 hours
Latham & Watkins	80.7 hours
Baker & McKenzie	35.4 hours
Jones Day	35.63 hours
Sidney Austin	40.1 hours
White & Case	52.3 hours
Weil, Gotshal	71 hours
Mayer, Brown	39.3 hours
Kirkland & Ellis	58 hours
DLA Piper	65.38 hours

Data compiled on the country's top law firms indicates that about half of the firms surveyed are fulfilling the ABA's standard of a minimum of 50 hours of *pro bono* per attorney per year, reported in 2007,⁷⁹ contrasted with Rhode's findings that lawyers averaged less than 26 hours of *pro bono* per attorney per year, reported in 2005.⁸⁰ And while some firms have not met the minimum number of hours, some firms are doing significantly more. See Chart II below:

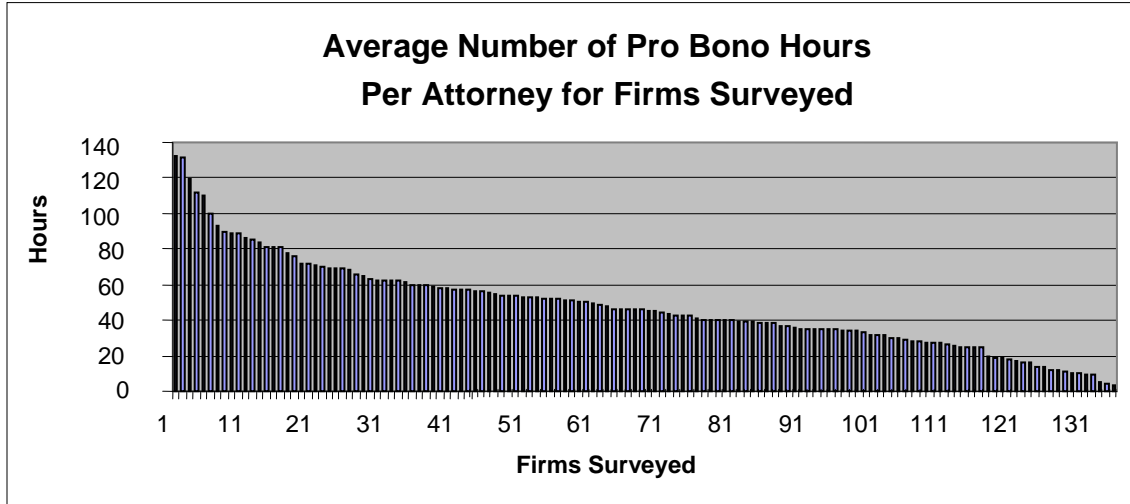
⁷⁷ The American Lawyer, May 2006.

⁷⁸ Vault Guide to Law Firm Pro Bono Programs, 2007 Edition. Vault Guide is a resource for information regarding pro bono practices at the 146 law firms that participated in the 2007 survey. The "book was developed to provide law students and lawyers with the essential objective information necessary to make an informed evaluation of these firms' pro bono culture and activities." 2006 Vault Inc.

⁷⁹ Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* (2004).

⁸⁰ *Supra* note 42 at 20.

Chart II



One of the factors that appear to influence *pro bono* participation among the law firms surveyed is whether associates can bring *pro bono* matters of interest to them to the firm, broadening the scope of *pro bono* representation. In firms where input from attorneys is permitted, there are often higher participation numbers indicating that when attorneys can work on *pro bono* matters important to them, they dedicate more of their time and more frequently involve their associates and partners. A review of the issues addressed in a recent survey indicates the definition of *pro bono* has expanded beyond representation of the poor.

There are consequences to the broadening of the practical definition of *pro bono*: more lawyers are giving more of their time in a larger spectrum of public service. They appear to be contributing to a larger body of legal issues in their local, national and global communities.

Clearly things have changed. Whether it is because of a renewed interest in professionalism and the values associated with *pro bono* and public service, a *de facto* re-definition of what public service encompasses, or the pressures of recruiting law students

who scrutinize law firms' track records, most larger law firms in the United States engage in significant *pro bono* and public service activities. Although there are differences among firms as to how they treat non-compensated work by lawyers, whether and how they staff *pro bono*/public services departments, and the amount of public service work performed, it is fair to say that there has been a shift since the 1990s, and a sea change since the days before the Model Rules were adopted.

Conversely, it is difficult to see much change in the *pro bono* and public service policies of small law firms and solo practitioners. The legal literature is exemplary by its silence.⁸¹ Many lawyers contribute to the public good in a variety of ways: they sit on and advise boards of directors for community not-for-profit organizations, contribute their expertise to political action groups supporting causes important to them, and donate time and money to local charities. It is likely that many lawyers reduce or forgive fees for clients facing economic adversity, take appointments when requested, and donate their talents to community causes in various ways. These forms of public service are consistent with lawyers' traditional role as public citizens, which preceded by centuries the Rules of Professional Conduct. It is an open question whether increasing demands to do paying work have eroded the traditional levels of community involvement by lawyers.⁸²

Even assuming that there has been no decline in the level of *pro bono* and public service work by smaller firms, it is still apparent that small law firms have not made the dramatic changes that characterize their large law firm counterparts. The numbers are

⁸¹ Although it is impossible to cite articles that do not exist, it is not difficult to infer that there is little to write about. This conclusion is consistent with informal anecdotal evidence suggesting that some small firms engage in *pro bono* and public service work, and some do not.

⁸² The change would not appear as a collective withdrawal from community-based work, but rather in fewer lawyers volunteering for *pro bono* and public service work, and fewer hours on average contributed by those who do. See *Renaissance Report*, *supra* note 4.

quite telling: According to the American Bar Foundation Lawyer Statistical Report, more lawyers practice in small firms and solo practices than in large firms.⁸³ See Chart III below:

Chart III

Size of Firm	Number of Organizations	Number of Lawyers	Percentage of Private Practice Population	Percent of Lawyer Population ⁸⁴
Solo	No statistic	324,903	48%	No statistic
2-5	36,380	99,235	15%	29%
6-100	10,827	152,872	23%	44%
Over 100	356	95,892	14%	28%

Thus, even with the shift in large firm *pro bono* and public service policies and the reality that many lawyers in smaller organizations do engage in such activities, the fact remains that a large segment of the bar does not.

More to the point, if large firms can find the commitment to engage in *pro bono* and public service work, small firms can as well. The cost of delivering services without compensation is no different in large firms than in small ones. One might argue that large firms can afford to do free work, because they are more economically successful, but it does not follow that the duty to engage in *pro bono* and public services should be dependant on income. In truth, the current 50 hour annual obligation articulated in Model

⁸³ 2004 Lawyers Statistical Report, American Bar Foundation (2004).

⁸⁴ The statistic show that there are just over 1,000,000 lawyers in the United States, of whom slightly more than 60% engage in the private practice of law. The remaining 40% work in as lawyers in corporations, government agencies, law schools, the court system, and associations, as well as a variety of nonlegal positions. Although the obligation to engage in public service work should apply to all licensed lawyers, it is arguable that some of these non-practicing lawyers are not in a position to engage in *pro bono* legal work, or already perform public service in their work. A broader duty to engage in either *pro bono* or other public service activities would allow this 40% of lawyers to meet their responsibilities without feeling like second class citizens. The focus of this article, however, is primarily on the cadre of lawyers who deliver legal services to the public as private practitioners. 2004 Lawyers Statistical Report, American Bar Foundation (2004). See also Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* (2004).

Rule 6.1 amounts to less than one hour per week. Depending on the lawyer's billing rate and hours worked, the burden would fall somewhat differently but not dramatically. See Chart IV, below:

Chart IV

Billing Rate	Annual Billable Hours	Gross Revenue	Opportunity Cost @50 Hrs	Percent of Gross Revenue
\$600	2,200	\$1,320,000	\$30,000	2.8
500	2,000	\$1,000,000	\$25,000	2.5
300	1,800	\$540,000	\$15,000	2.8
200	1,500	\$300,000	\$10,000	3.3

The argument that it costs small firms significantly more to engage in *pro bono* and public service work is illusory. The opportunity cost of engaging in these activities could be made up by a small increase in hourly fees, working an additional hour each week, improving collections slightly, or minimally enhancing efficiency in operations. If all practicing lawyers were to meet these obligations, there would be no competitive advantage to one firm over another.

It is worth observing also that the benefits of *pro bono* and public service are not just tangible monetary ones, but intangible benefits such as recognition in the community, better relations with clients, the satisfaction of doing something worthwhile and the improvement of the images of lawyers generally. In many instances, the positive publicity associated with public service activities will attract sufficient new clients to offset any loss of opportunity costs associated with non-billable services. For example, the honorary College of Law Practice Management, presented 2007 InnovAction Awards (given to innovative legal service providers) to two law firms, Holland & Hart, a Denver-based regional firm for its Holland & Hart Foundation, and the Washington, D.C,

international firm of DLA Piper.⁸⁵ Although not every law firm can receive an award for its *pro bono* program, there are no legitimate reasons for lawyers not to engage in *pro bono* and public service activities, especially if the scope of the obligation is defined broadly enough to cover both branches of the ethical duty.

Part IV. Need for a Revised Rule 6.1

If one begins with the previously stated premise that all citizens have a duty to contribute to the good of the public⁸⁶ and build on that with the belief that when someone has been given much that much will be required in return,⁸⁷ then attorneys aspire to a profession where concern for the public good is an inherent duty. So how it is that this concern has been relegated to a less prominent position? And how does the legal profession again take responsibility for fulfilling this duty? Franz Kafka wrote in *The Trial* (released in 1925): “it never occurred to the lawyers that they should suggest or insist on any improvements in the system.”⁸⁸ It may be time to do that.

“Law is a public calling which entails a duty to serve the good of the community as a whole, and not just one’s own good or that of one’s clients.”⁸⁹ Historically, a lawyer’s clients were members of the community in which the lawyer lived. With the growth of the large law firm, a lawyer’s client base ceased to be members of their

⁸⁵ See <http://www.colpm.org/pdf/Winners%20'07%20Press%20Release%20Final.pdf> (last visited Sep. 27, 2007). Holland & Hart encouraged lawyers and staff in all the firm’s offices to create personally rewarding programs, requesting that recipients “pay forward” their benefactors’ largesse. 2006 Annual Report of the Holland & Hart Foundation. DLA Piper dedicated the firm’s legal talent and resources to such diverse projects as assisting the government of Kosovo to create a justice system and supporting human rights litigation in southern Africa. *New Perimeter: Pro Bono on a Global Scale*, DLA Piper. Interestingly, some of the projects supported by these two firms would qualify as *pro bono* under the current Model Rule 6.1, while others would not.

⁸⁶ *Supra* note 19.

⁸⁷ Luke 12:48 “When someone has been given much, much will be required in return; and when someone has been entrusted with much, even more will be required.”

⁸⁸ Franz Kafka, *The Trial* PAGE (1st Am, ed. 1937).

⁸⁹ *Supra* note 45 at 31.

community and became members of a global marketplace. Clients became corporations rather than individuals...anonymity became possible. The client no longer turned to the attorney for representation but to the firm; the firm became the advocate rather than the attorney. This depersonalization of the legal profession made it easy for the attorney to dissociate from the one-on-one bond with the client, thereby fostering an erosion of trust on the part of the client. Unfortunately, this separation of attorneys from the general populace has contributed to a decline in the public's image of attorneys, personally and professionally.

One of the greatest challenges facing lawyers today involves finding a balance between work as a lawyer and service to the profession as a whole. The individual attorney must possess the drive, commitment and dedication necessary to achieve personal career goals and at the same time accomplish professional obligations to improve the system of justice and the rule of law. A related question involves how law firms should support the efforts of individual lawyers to balance these sometimes competing goals? Regardless of how large or small the practice, every law firm is comprised of individuals.

This article has demonstrated that the concept of *pro bono* has deep roots, dating from the origins of the system of justice. The work of lawyers serves the public interest by sustaining the rule of law in a fair and equitable system of justice. But lawyers have traditionally done more to contribute to the public good than to represent clients; they have affirmatively engaged in activities "for the good." It is possible to debate the nuances of meaning in the term "public good," but the fundamental precept that lawyers do engage in *pro bono publico* activities is unassailable. Their reasons for doing so may

differ, and the forms of public service they choose to provide may be diametrically opposed, but all forms of public service involve the fundamental commonality of legal services to larger good without compensation or with a reduced fee. It is interesting that a high percentage of entering law students express a desire to improve society or to make the world a better place as one of the reasons they chose the law.⁹⁰ By the time they graduate, competition for grades, jobs and career aspirations often push public service aspirations to the back burner. Yet the desire to engage in public service is not easily destroyed, and lawyers continue to seek opportunities to actualize their commitment to the public service aspect of being a lawyer.

Law firms can contribute to the latent interest in providing public and *pro bono* legal services by creating an atmosphere where individual lawyers are encouraged and facilitated in their efforts. This article proposes that law firms should acknowledge their position of influence with regard to public and *pro bono* service.

Among the largest and most financially successful firms in the United States, change has occurred with respect to the fifty (50) hours of annual *pro bono* service articulated in Rule 6.1. In fact, many firms meet the fifty (50) hour standard on a per attorney basis; and more partners are setting an example by providing or supervising *pro bono* service.⁹¹ During a decade when the average revenues of the 100 most profitable firms increased by over 50%,⁹² if we compare the Rhode numbers and the Vault numbers, it appears the average *pro bono* hours at these firms have almost doubled.⁹³

⁹⁰ Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1368 (2007).

⁹¹ *Supra* note 79.

⁹² *Supra* note 42 at 2.

⁹³ *Supra* note 79.

One of the reasons that larger firms have changed their policies is that new lawyers are expressing their desires to contribute to the public interest.⁹⁴ By responding to these lawyers, the firms create both an opportunity to engage in public service, but also to succeed in large firms while doing so.⁹⁵ Firms appear receptive to the new direction of associates bringing in *pro bono* matters, such as human rights and community issues, which reflect on the social consciousness of the firm, thereby creating a cycle of respect within the firm and the community.

Arguably, the changes that have occurred in larger firms should be implemented more broadly to include firms of all sizes. The progress that has been made in the largest organizations should be acknowledged, but it should also serve as a challenge to all firms of all sizes that support for *pro bono* is desirable. This article has demonstrated that it is economically feasible for law firms to dedicate fifty (50) hours per lawyer per year to non-fee and reduced fee work. However, since many smaller firms do not participate in the organized recruitment process that larger firms use to hire new lawyers, the same leverage for change may not exist. The will to change, therefore, will have to be drawn from the lawyers themselves.

One significant way that lawyers can foster public and *pro bono* service is to amend the rule governing *pro bono* activities. It is time to accept the fact that the debate over whether *pro bono* should include only services to individuals of limited means is an anachronistic throwback to a former era. The reality is that traditionally *pro bono publico* always included both services to indigents and other forms of public service. In fact,

⁹⁴ The preference for *pro bono* tends to arise during the recruitment process, when law students have the greatest leverage over the process, because firms compete aggressively for the top legal talent.

⁹⁵ It is questionable how many new associates in large firms would elect to engage in public service activities if doing so might have an adverse impact on their prospects at the firm. Forced with the choice between work and *pro bono*, most new lawyers choose work.

many large firms include both branches of *pro bono* in their firm policies. This article recognizes that the term *pro bono* has become attached with the indigent legal services branch, and refers to other activities traditionally considered *pro bono* as public service, thus avoiding definitional confusion.

The rule proposed in this article makes several changes in the current Rule 6.1: 1) it mandates fifty (50) hours of service per year; 2) it treats both services to clients of limited means (*pro bono* services covered by current Rule 6.1 (a)) and other forms of public service (covered by current Rule 6.1(b)) with equal priority; and 3) it makes clear that law firms as well as individual lawyers have a duty to engage in and support public and *pro bono* services. By expanding the scope of the Rule, hopefully, more lawyers will be willing to support a mandatory standard.⁹⁶ More to the point, the modifications proposed in this article represent a proposal for mandatory public and *pro bono* service that has a chance of passing the ABA House of Delegates and being adopted in the various states. The proposed revised Rule 6.1 follows;

6.1 Pro Bono and Public Service

(a) A lawyer should render at least (50) hours of public and *pro bono* legal services per year. In fulfilling this responsibility, the lawyer must provide services without fee or expectation of fee to:

- (1) persons of limited means,
- (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means;
- (3) 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;

⁹⁶ A non-mandatory rule inevitably means that many lawyers will not meet the aspirational expectation of the rule. Ironically, if *all* lawyers were required to engage in public and *pro bono* services, it is likely that the level of *pro bono* services to indigent clients would increase.

(4) 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 to persons of limited means.

(b) A lawyer may fulfill the requirements of (a) by providing legal services at a substantially reduced fee to persons and groups covered in sections (1)-(4);

(c) Law firms should support the efforts of individual lawyers to fulfill the requirements of this rule by:

(1) recognizing public and pro bono services for purposes of compensation and promotion;

(2) undertaking institutional public and pro bono services projects, which provide lawyers in the firm opportunities to fulfill their obligations under sections (a) and (b) of this rule.

Comments

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide public and pro bono legal services. Pro bono services include services provided without compensation to those who are unable to pay. Public services include other forms of legal service provided without compensation to charities and other individuals or groups operating in the public interest.

[2] Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide pro bono services annually to such persons.

[3] With regard to the fifty (50) hours of services mandated in this rule, States may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in the Rule.

[4] Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[5] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged by furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[6] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[7] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[8] Paragraphs (a)(3) and (4) recognize that lawyers may meet the requirements of this rule by engaging in other forms of public service. The inclusion of these forms of service does not minimize the importance or value of services covered under Paragraphs (a)(1) and (2), but rather recognizes alternative opportunities for lawyers to meet the requirements of this Rule.

[9] Paragraph (a)(3) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[10] Paragraph (a)(4) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[11] Paragraph (b) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[12] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule. This Rule provides in Paragraph (b)(1) that law firms should recognize public and pro bono

services for purposes of compensation and promotion. Where lawyers are not given credit for their hours of public and pro bono services, there is no incentive for them to strive to meet the demands of this Rule. Conversely, when public and pro bono services are recognized by law firms in tangible ways such as compensation and promotion, lawyers are more likely to meet or exceed the expectations of the Rule. Paragraph (b)(2) encourages law firms to undertake institutional public and pro bono services projects. Such projects provide lawyers in the firm opportunities to fulfill their obligations under sections (a) and (b) of this rule, and allow institutional resources not available to individuals to support public and pro bono services.

[13] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage legal services on behalf for public service and pro bono causes. Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1), (2), (3) or (4). Accordingly, where those restrictions apply, government and public sector lawyers and judges may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[14] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exist among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[15] A lawyer who does not work full-time may reduce the number of hours of *pro bono* and public service hours in proportion to the number of hours actually worked. A lawyer on sabbatical, parental leave, disability, or not employed though remaining licensed to practice law may be excused from the requirements of this Rule during the pendency of such status.

The Comments, while following the general format to the Comments to current Rule 6.1, incorporate the changes reflected in the new proposed Rule. The time has come to craft a rule that the general population of lawyers will support, that mandates public and *pro bono* service for all lawyers, that treats public and *pro bono* services as equal branches of the same historical vine, and that recognizes the role of law firms in

supporting the efforts of individual lawyers to meet the requirements of this Rule. The current non-mandatory rule with its emphasis on *pro bono* services to clients of limited means, although well-meaning, has not achieved its desired objectives. It is time to consider a broader Rule 6.1 that recognizes lawyers' traditional role in providing both public and *pro bono* legal services.

The proposed Rule provides reasonable alternatives for lawyers in different employment situations, different practice areas, different experience levels, and different interests. It addresses, as the current rule does, how lawyers who may be prohibited by law or regulation from participating in *pro bono* or public service activities to contribute cash in lieu of services.⁹⁷ The proposed rule, like the current rule, calls upon all lawyers to support legal services to the poor financially, regardless of what other *pro bono* and public service work they do.⁹⁸

The current rule does not address the problems of part-time lawyers, who arguably should only be required to complete *pro bono* and public service hours in proportion to their part-time status; thus a lawyer working half-time, might be expected to donate twenty-five (25) hours of *pro bono* and public service activities. This problem is more critical under a mandatory regimen than a non-mandatory one, because a lawyer who does not meet a mandatory standard would be subject to discipline. For lawyers on sabbatical or parental leave, disability, or not engaging in the practice of law though remaining licensed, who are in effect working no hours, then it would appear appropriate to waive their *pro bono*/public service obligation. The Comments to the proposed Model

⁹⁷ See Proposed Rule 6.1, Comment 10, p. 33 of this article.

⁹⁸ See Proposed Rule 6.1, Comment 11, p. 33 of this article.

Rule make clear that the duty to engage in *pro bono* and public service should be commensurate with part-time and non-practicing status.⁹⁹

Part V. Conclusion

The commitment to *pro bono* and public service ideals has a longstanding tradition in the legal profession, both in America, and in the English, Greek and Roman legal systems of the past. Despite the adoption of a non-mandatory duty to provide services to clients of limited means in the 1983 Model Rules of Professional Conduct,¹⁰⁰ many lawyers do not achieve the standard of fifty (50) hours per year in the current rule. There is even some evidence that increasing workloads have resulted in a withdrawal by some lawyers of their involvement in public service activities.¹⁰¹ Concomitantly, law firms, particularly larger ones, have redoubled their efforts to engage in *pro bono* and public service projects. Many of these firms have accomplished this objective by treating both public service representation and service to individual clients of limited means as acceptable approaches for *pro bono* and public service.

Although *pro bono* and public service programs have made great headway in private practice, the goal of universal service among members of the bar remains elusive. The current definition, while well-intended, continues to serve as an impediment to universal public service by lawyers, consistent with the longstanding tradition of the legal profession to support both *pro bono* and public service activities. The existing rule continues to use language that actually sets back the cause of *pro bono* and public service, by prioritizing *pro bono* over all other forms of public service. This draconian

⁹⁹ See Proposed Rule 6.1, Comment 12, p. 33 of this article.

¹⁰⁰ Model Rules, Rule 6.1.

¹⁰¹ See notes 70-85, and accompanying text.

approach has not worked, and has in fact proved to be a disincentive to proposals to make the duty mandatory.

Large firms in the United States have made significant progress in recent years to expand their *pro bono* and public service activities, in part because they have informally expanded the definition of *pro bono* to also include other forms of public service. Although small firms have not done as much as their large firm counterparts, it is feasible for them to do more, and many would do so under a broader definition of the professional obligation.

What is needed now is to amend the Rule to put all lawyers on the same footing, to recognize the universal and traditional responsibility of all lawyers to engage in public service activities, including but not limited to *pro bono publico* services to indigent clients. The Model Rules of Professional Conduct need to be amended to make clear that all lawyers and law firms have a professional responsibility to engage in these activities, consistent with their personal interests, commitments and professional situations. The fifty (50) hour annual requirement in the current Model Rules would be workable as a mandatory requirement if the scope of activities permitted under the Rule were re-worked to reflect a parity of value among different forms of service. Only when this happens will former ABA President Mike Greco's vision of a "renaissance of idealism" be truly achieved.¹⁰²

¹⁰² See notes 4-10, and accompanying text.