

**Rethinking Professional Responsibility:
The Need to Bolster Lawyers' Ethical Obligations in Pursuit of Social Justice**

“No social role encourages such ambitious moral aspirations as the lawyer’s, and no social role so consistently disappoints the aspirations it encourages.”¹

Even though the United States has the largest population of lawyers in the world, the distribution of their legal services is far from equitable. It is true that many lawyers contribute hundreds of unpaid hours of work to causes of the poor and underprivileged, and many more contribute financial assistance to poverty-stricken people and communities. However, it is not enough: the average contribution for the bar as a whole is less than half an hour a week and fifty cents a day.² In order to increase legal service to the poor, greater incentives and encouragements must be established as positive influences on the profession.

The debate regarding the ethical duty of lawyers to provide pro bono legal services has aroused passionate debate.³ Scholars, professors, and practicing attorneys have argued both for and against a mandatory service obligation to be adopted into the Model Rules that would impose a minimum yearly hourly requirement.⁴ Others propose alternative means of bolstering the obligation, including stronger language in the Rule, reporting requirements and referral systems.⁵ Yet despite the continuing debate over the depth of the duty, the need for pro bono service continues unwaveringly. Studies estimate nationally that only about seventeen percent of lawyers engage in any pro bono activities, including work for bar associations, schools, and

¹ See William H. Simon, *THE PRACTICE OF JUSTICE* 1 (Harvard Univ. Press, 1998).

² See Deborah Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 413 (2003) (citing Alan Berlow, *Requiem for a Public Defender*, AM. PROSPECT, June 5, 2000, 28.)

³ See Mark Hansen, *Countdown to Controversy*, A.B.A. J., 90 (Aug. 2000).

⁴ See *infra*, § II(2)(a) (describing the debate about a mandatory requirement in fuller detail).

⁵ See *infra*, § II(2)(b-c).

charities.⁶ Alongside this trend, the legal needs of the indigent and poor population are not being met; one study found that legal aid programs served less than twenty percent of the serious legal needs of the eligible population, even during the peak of legal aid in the 1980s.⁷ Moreover, the availability of legal aid attorneys is dire, with a ratio of legal aid lawyers to their clients equaling about one to ten thousand.⁸

Another issue is how to comprehensively and accurately define “pro bono publico.” If the definition of what constitutes pro bono work is narrowly tailored to include only specific types of service, such as unpaid legal aid to poor people and indigents, then many other types of service will be excluded. Indeed, many areas of altruistic service – such as work for civic organizations, churches and community groups – would fail to qualify under such a narrowed definition of pro bono. Yet, at the same time, a more exacted and poverty-focused meaning of pro bono would promote and encourage service to the poor. Ultimately, the idea of “pro bono” is extremely difficult to define. While any contraction of what qualifies as pro bono would certainly be divisive and limiting, a narrowed definition would more powerfully exhort lawyers in fulfilling their ethical duty of better serving the needs of the poor.

In this Note, I argue that the obligations on the legal profession of service to the poor – both through pro bono work and indigent defense – must be bolstered and refined. Although existing methods of pro bono service are positive contributions that should be supported, these methods are limited and, as such, are unlikely to change the position of the poor. I argue that effective improvement of legal services to the poor can be accomplished by strengthening the language of the pro bono obligation within the Model Rules of Professional Responsibility,

⁶ See Deborah Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 683 (1994) (citing data from the ABA Consortium on Legal Services for the Poor).

⁷ See Judith L. Maute, *Changing Conceptions*, *supra* note XX at 94 (citing an American Bar Association Committee Report Supporting the 1993 Amendment to Rule 6.1).

⁸ See Jim Miskiewicz, *Mandatory Pro Bono Won't Disappear: Volunteerism Alone Not Enough*, Nat'l L.J., Mar. 23, 1987, at 1.

restructuring law firms' pro bono compensation and requirements, and further developing pro bono service programs in law schools.⁹ A commitment to equal justice is fundamental to the legitimacy of democratic processes;¹⁰ through these three primary professional influences on lawyers, the profession's currently-deficient duty to equal justice may be better fulfilled.

I. A Significant Need: The Current Status of Legal Services to the Poor

Thirty years ago, President Jimmy Carter spoke on the nation's inequitable delivery of legal services, stating that "[n]o resource of talent and training... is more wastefully or unfairly distributed than legal skills. Ninety percent of our lawyers serve ten percent of our people. We are over-lawyered and underrepresented."¹¹ Today, three decades later, the situation has not improved.¹² In short, there are simply not enough lawyers willing or available to do work for the poor. According to one study, the U.S. supplies only about one lawyer for every 1400 people in poverty, and less than one percent of the nation's lawyers assist the seventh of the population that is poor enough to qualify for aid.¹³ Although the majority of lawyers do contribute some pro bono work, it is not frequent; only about 20% of attorneys give pro bono service more than

⁹ Another oft-cited solution that I do not discuss is deregulation, thereby allowing non-lawyers to provide legal services in order to increase access to legal services. *See generally*, Susan R. Martyn, *Justice and Lawyers: Revising the Model Rules of Professional Conduct*, 12 PROF. LAW., Fall 2000, at 20, 22 (discussing deregulation as a substitute for drastic changes in lawyer pro bono requirements); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 410-11 (2004) (mentioning the ABA's rejection of the creation of collaboration service programs between lawyers and non-lawyers).

¹⁰ *See* Rhode, *Access to Justice*, *supra* note 9 at 371.

¹¹ *See* President James E. Carter, REMARKS AT THE 100TH ANNIVERSARY LUNCHEON OF THE LOS ANGELES COUNTY BAR ASSOCIATION (May 4, 1978), reprinted in 64 A.B.A. J. 840, 842 (1978).

¹² *See generally* Am. Bar Ass'n, PERCEPTION OF THE U.S. JUSTICE SYSTEM 51, 59, 63, 65-66 (1999); Access to Justice Working Group, REPORT TO THE STATE BAR OF CALIFORNIA 4-6 (1996); Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES, 199 (1994); Paul R. Tremblay, *Aiding a Very Moral Type of God: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2481-82 (1999).

¹³ *See* Rhode, *Pro Bono in Principle*, *supra* note 9 at 414.

occasionally.¹⁴ American Bar Association (ABA) statistics, although their statistics seem unbelievably optimistic, suggest that the deficiency is less dire, finding that 73% of attorneys take pro bono cases, with each attorney spending an average of 41 hours per year to persons of limited means or organizations serving the poor.¹⁵

However, very little of that time appears to address basic human needs or oppression of poor people. Indeed, much of what passes for “pro bono” is not aid to poverty or to the indigent, but rather favors clients, family or friends in cases where fees are uncollectible.¹⁶ For example, the ABA Report noted that attorneys varied in what entities they believed qualified for pro bono service, showing that 35% believed government agencies qualify, 31% believe that non-indigent government officials qualify and 27% believe that even work for a political candidate qualifies as pro bono work.¹⁷ The Report also shows that while most attorneys received work from pro bono agencies, many attorneys were referred by family and friends asking for help.¹⁸ While volunteer work for civic groups, family members and bar associations is certainly important, it does not address the unmet legal needs of the poor.

Not only are the resources for legal services to the indigent deficient, but the needs for such services by the poor community are vastly unmet. Studies have consistently concluded that only about one in five low-income people with a legal problem receive some form of legal assistance.¹⁹ Another survey estimates that there are 16 million impoverished people every year

¹⁴ Steven Lubet and Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PENN L. REV. 1245, 1252-54 (1997).

¹⁵ See ABA, *Supporting Justice II: A Report on the Pro Bono Work of America’s Lawyers* 11 (Feb. 2009), available at <http://www.abanet.org/legalservices/probono/report2.pdf>.

¹⁶ See Rhode, *Pro Bono in Principle*, *supra* note 2 at 413.

¹⁷ See *Supporting Justice II*, *supra* note 15 at 9.

¹⁸ *Id.* at 14.

¹⁹ Susan R. Martyn, *Justice and Lawyers: Revising the Model Rules of Professional Conduct*, 12 PROF. LAW., Fall 2000, at 20, 21. See also *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751,1789 (1999); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 591(1994); Barbara A. Curran, *THE LEGAL NEEDS OF THE PUBLIC*, (ABA Foundation 1989).

who do not receive representation.²⁰ Part of cause for the deficiency is that government support for legal services and private support of voluntary pro bono programs are steadily declining.²¹ The U.S. recognizes a right to legal assistance only for criminal matters²² – not civil matters – and the federal government only spends about \$8 per year on funding for civil legal aid for those living in poverty.²³ Although there has been a recent movement to create a “civil Gideon” rule under which people with civil legal problems that affect “basic human needs” would receive court-appointed counsel,²⁴ no such rule has yet been adopted.

“The bar’s pro bono commitments are, in short, a reflection of both the profession’s highest ideals and its most grating hypocrisies.”²⁵ These inequalities are particularly appalling for a nation that considers itself a global leader in human rights. As one scholar put it, “Our nation prides itself on a commitment to the rule of law, but prices it out of the reach for the vast majority of its citizens.”²⁶ Thus, with a glaring disparity in legal services recognized and acknowledged, the problem must be alleviated. The most powerful and likely of sources to positively influence legal services to the poor are threefold: bolstering the mandate of service in the Model Rules, requiring and incentivizing pro bono service within law firms, and promoting awareness and education about poverty service in law schools.

²⁰ See Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 2, 13 (2005), available at http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf (estimating that there are about six million poor people who would qualify for legal services under the 125% of the federal poverty standard who do not receive needed services).

²¹ See Susan R. Martyn, *supra* note 19 at 21.

²² Attorneys are appointed in cases where people face criminal charges whereby losing the criminal case may result in jail time. See *Gideon v. Wainright*, 372 U.S. 335, 342-45 (1963).

²³ See Rhode, *Access to Justice*, *supra* note 9 at 373.

²⁴ See generally, Leonard W. Schroeter, *Civil Gideon: If Not, Why Not?*, Washington State Access to Justice Annual Conference Jurisprudence Workshop (June 1999) (arguing that the right to counsel in civil cases is a fundamental right); Rachel Kleinman, Comment, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 *FORDHAM URB. L.J.* 1507 (2004) (suggesting expanding the right to counsel to areas that implicate basic human needs); ABA House of Delegates Resolution 112A 1 (Aug. 2006), <http://abanet.org/legal-services/sclaid/downloads/06A112A.pdf> (urging states and the federal government to provide legal services to people at public expense to cases where basic human needs are at stake).

²⁵ See Rhode, *Pro Bono in Principle*, *supra* note 2 at 413.

²⁶ See Rhode, *Access to Justice*, *supra* note 9 at 371.

II. The Model Rules of Professional Responsibility

The Model Rules of Professional Responsibility present an ideal set of ethical standards and professional obligations. The Rules are enforced as binding law through state government; states have individually adopted the Rules into their legal codes, sometimes with amendments and changes.²⁷ Rules of ethics are the standards of conduct that the legal profession imposes on itself conditioning membership on “an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct.”²⁸ Through state adoption, the Rules constitute a code of ethics which are binding on any person admitted to practice law.

Included in these rules is an obligation of *pro bono publico*: a lawyer’s individual duty to serve the common good of society. Developed and revised throughout the past few decades, the Model Rules have progressed from stating only moral principles for guidance to a stronger articulation of concrete standards of conduct and objective rules.²⁹ ABA President, and future Supreme Court Justice, Lewis F. Powell, Jr. was instrumental in driving the initiative for stronger legal services. He asserted that the legal profession had an affirmative responsibility to see that legal services “were made available on a far broader basis to people who needed them and couldn’t afford to pay for them.”³⁰ Most recently in 2002, the ABA again amended the rule “to give greater prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay.”³¹

²⁷ A.B.A MODEL RULES OF PROF’L CONDUCT (1969) (hereinafter the Rules).

²⁸ See *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 488 (1988) (O’Connor, J., dissenting).

²⁹ See Maute, *Changing Conceptions*, *supra* note 7 at 95. (“Each subsequent formulation has moved forward, recognizing lawyers’ ethical responsibility to volunteer legal services to those who are unable to pay.”)

³⁰ Interview by Olavi Maru with Lewis F. Powell, Jr., Former President, American Bar Association, 1955-56, in Richmond, Va. (July 1975), available at <http://www.abf-sociolegal.org/oralhistory/powell/html>. Justice Powell is also a graduate of Washington and Lee University (1929) and the Washington and Lee University School of Law (1931).

³¹ See ABA, *Development of ABA Model Rule 6.1: Historical Timeline*, available at <http://abanet.org/legalservices/probono/stateethicsrules.html> (noting the revision of adding the language “every lawyer has a professional responsibility to provide legal services to those unable to pay” to the beginning of the rule).

Yet despite the gradual strengthening, the current duty in the Rules is only aspirational and falls short of the level of encouragement that is required to truly address the service demands of the poor. Even as the rule was strengthened through amendments, its aspirational responsibility was highlighted, adding “voluntary” to the title in 1993 and adding commentary explicitly stating its optional status.³² Although I argue that a mandatory rule would be prohibitively divisive and ineffective, the language of the Rules can be strengthened and refined to more vehemently promote the duty of pro bono work on all lawyers.

1. The Current Status of the Obligation of Service in the Model Rules

Model Rule 6.1 calls lawyers to the public service, stating that “[e]very lawyer has a professional responsibility to provide legal services to those who are unable to pay.”³³ The Rule suggests that each lawyer should volunteer 50 hours of unpaid service per year to “persons of limited means” or charitable organizations, as well as “voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”³⁴ The drafters’ comments encourage service especially to people in society who are poor and poverty-stricken, extolling that “personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”³⁵ Inherent also in this Rule is the idea of intercession, promoting the belief that the lawyer must serve as the voice of those who cannot speak for themselves.³⁶ The Rule suggests that attorneys are uniquely positioned in society and can best serve the role of advocate to “address the needs of the disadvantaged, thus giving such

³² MODEL RULES, *supra* note 27 at R. 6.1 & cmt. (1993).

³³ *Id.* at R. 6.1.

³⁴ *Id.*

³⁵ *Id.* at Cmt. 1.

³⁶ See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1455 (2004) (“That oaths and statutes continually have required, or at least urged, service to the poor underscores society's long held view that lawyers are essential to the administration of justice.”).

individuals an equal footing with those in society who are more fortunate.”³⁷ The Rule calls on lawyers to take advantage of this distinctive role and selflessly serve in order to promote their community and society.

However, the Model Rules are fundamentally inadequate in their promotion of public service. Rule 6.1 falls short of requiring pro bono or financial support; indeed, the Rule is merely aspirational, asking lawyers to contribute but by no means requiring it.³⁸ In fact, while most Rules are enforced through a disciplinary process, in which lawyers can face fines and punishment if they violate the Rules, the responsibility for pro bono service is not subject to the disciplinary process.³⁹ This is made clear in the ABA’s Standards for Imposing Lawyer Sanctions, which are used to determine what punishment a lawyer should receive for misconduct; when it comes to Rule 6.1, the standards say “No Applicable [Disciplinary] Standard.”⁴⁰ Also, the comments to the Rule provide loopholes, allowing lawyers to “discharge” their pro bono responsibility and give cash contributions in lieu of services, or even aggregate pro bono responsibility collectively through a group, such as a law firm.⁴¹ These allowances further weaken the Rule’s already feeble mandate of service, underscoring the fact that the responsibility is unenforceable and merely voluntary.

³⁷ See Larry O. Natt Gantt, II, Charles H. Oates & Samuel Pyeatt Menefee, *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT U. L. REV. 1, 74 (2006).

³⁸ *Id.* (“A lawyer should *aspire* to render at least (50) hours of pro bono public legal services per year”) (emphasis added). See also Larry O. Natt Gantt, II, et. al., *supra* note 37 at 72 (“Rule 6.1 provides an *aspirational* standard of fifty (50) hours of pro bono legal services per year.”) (emphasis added).

³⁹ See MODEL RULES, *supra* note 27 at R. 6.1, Cmt. 12.

⁴⁰ ABA, *Standards for Imposing Lawyer Sanctions*, Appendix 1, Cross-Reference Table, *reprinted in* ABA Compendium of Professional Responsibility Rules and Standards 394 (2004).

⁴¹ See MODEL RULES, *supra* note 27 at Cmt. 9 (“[T]here may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support . . . [A]t times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm’s aggregate pro bono activities.”).

2. Possible Solutions for Bolstering the Obligation

There have been many proposals for the best way to improve the Rule's ethical obligation of service. The strongest debate centers on whether to adopt a mandatory service requirement within the rule itself that would demand yearly service hours—by law—for each attorney. There are also alternative solutions that are less drastic than compulsory service, which I argue are more realistic and attainable. The first solution is to implement stronger language into the Rule to make the obligation more compelling and robust. Also, commentary could be added to the Rule to outline recommendations for improving states' financial resources, infrastructure and accessibility to pro bono programs.

Whatever the route taken, it is clear that the Rule itself must be bolstered. Because the Model Rules are the foundation for attorneys' professional obligations, a strengthened pro bono Rule would impose a positive duty of service on every lawyer and impact all levels of the profession. This stronger mandate in the Rule would be a catalyst for increased service throughout legal society, and it would be the most effective first step in the initiative for transforming the ethical obligation for service.

a. Mandatory Pro Bono Requirement

Scholars, practicing attorneys and professors have both advocated and opposed the idea of a mandatory service rule to be adopted into the Model Rules of Professional Responsibility.⁴² Those that advocate a mandatory obligation for pro bono service argue that it is an affirmative duty that comes with the role of attorneys in society.⁴³ On the other hand, those opposed to a

⁴² See MODEL RULES, *supra* note 27.

⁴³ See generally, Helynn Stephens, *Price of Pro Bono Representations: Examining Lawyers' Duties and Responsibilities*, 71 DEF. COUNS. J. 71, 77 (2004) (arguing for a mandatory rule because lawyers have a duty to the public to serve the public's needs); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2416 (1999) (arguing for mandatory pro bono service for both law students and practicing lawyers); Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 215 (1993) (supporting mandatory service or, alternatively, a buyout system);

mandatory service duty argue that such a rule would be inefficient and create a backlash across the profession;⁴⁴ many urge for alternative, less intrusive changes, such as deregulation, increased public funding, state referral systems and reporting requirements.⁴⁵ Some scholars argue for expanding a mandatory rule even further, advocating for incorporating a pro bono service program as a requirement of law school education, as well as into law firm billable hour requirements.⁴⁶

Indeed, a mandatory pro bono service requirement was nearly adopted into Rule 6.1, which would have imposed a minimum yearly service requirement on all practicing attorneys. The ABA Commission on Evaluation of the Rules of Professional Conduct extensively debated the pro bono requirement, calling it the “elephant in the room.”⁴⁷ Although consensus was closely divided, the comments and discussion showed hesitation to implementing a service requirement.⁴⁸ At its meeting in 2000, the Commission predicted that protest and backlash from a mandatory requirement would divert attention from the actual crisis of unmet legal needs.

Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 420 (2007) (arguing that a mandatory pro bono reporting system is the most effective approach to encouraging pro bono service); Lubet & Stewart, *supra* note 14 at 1248 (arguing for a mandatory duty based on lawyers’ public assets).

⁴⁴ See generally, Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. COLLOQUY 182, 190 (2007) (arguing that a mandatory rule would actually increase court costs for civil rights plaintiffs); Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1117 (1992) (arguing that a mandatory pro bono rule would be inefficient).

⁴⁵ See generally, Roger Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1136 (1991) (arguing for increased public funding and deregulation as preferable alternatives to mandatory service); Maute, *Changing Conceptions*, *supra* note 7 at 96 (proposing an annual reporting requirement and lawyer referral systems as alternatives to a mandatory rule).

⁴⁶ See, e.g., Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1412 (2007) (arguing that mandatory pro bono programs in law schools, despite data showing poor reception ~~them~~, should be refined and strengthened); Jessica Davis, *Social Justice and Legal Education: Mandatory Pro Bono Legal Services*, 1 CHARLESTON L. REV. 85, 96 (2006) (arguing that mandatory pro bono programs in law schools will promote both short-term and long-term contributions by law students and attorneys); Richard F. Storrow & Patti Gearhart Turner, *Where Equal Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 UMKC L. REV. 493, 514 (2003) (arguing that mandatory pro bono programs advance the aspirational and pedagogical goals of law schools).

⁴⁷ See Martyn, *Justice and Lawyers*, *supra* note 19 at 21.

⁴⁸ See Maute, *Changing Conceptions*, *supra* note 7 at 139-140 (describing the Commission’s debate over a mandatory pro bono requirement).

“Forced involvement of reluctant attorneys” would present practical difficulties and “could undercut the quality of legal services to the poor.”⁴⁹ Committee members also voiced concern that a mandatory rule would dilute the definition of ‘pro bono’ itself and would be politically unfeasible to impose, as a mandatory service rule would be inconsistent with the concept that law is a public calling.⁵⁰ John Pickering, a founding partner of a leading law firm and recipient of numerous pro bono awards, stated that “[t]he carrot is far more effective than the stick; a mandatory approach...would be ineffective in broadening access to justice, counterproductive to efforts to better serve the poor and unworkable in practice.”⁵¹

In the end, adoption of a mandatory requirement into the Rules has consistently been rejected, suggesting that the profession is not currently ready to meet such a compulsory obligation. Although individual state bars are free to impose stricter state-level ethical obligations, no jurisdiction has yet enacted any form of a mandatory rule. Instead, because of this reluctance to accept a mandatory service requirement, the bar should implement and promote alternative ways to strengthen and encourage pro bono service. “Because not all lawyers are inclined or competent to provide direct services for the poor, the ethics rules should fully respect alternative means of satisfaction, rather than dismissing them as morally repugnant.”⁵² Thus, I support less radical – yet still practical and effective – ways to improve the service obligation.

b. Stronger Language

Instead of focusing on the divisive issue of mandatory service, the bar should focus on strengthening Rule 6.1 to promote awareness and encouragement of the professional

⁴⁹ See *id.* at 141, quoting Ethics 2000 Hearing, Testimony of the Standing Committee on Pro Bono and Public Service (Feb. 10, 2000).

⁵⁰ See Ethics 2000 Hearing, Testimony of Doreen Dodson, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (Feb. 10, 2000).

⁵¹ Written Testimony of John H. Pickering, Founding Senior Counsel, Wilmer, Cutler & Pickering, regarding Proposed Model Rule of Professional Conduct 6.1 (June 20, 2000).

⁵² See Maute, *Changing Conceptions*, *supra* note 7 at 96.

responsibility for service. Rule 6.1 currently reads, “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”⁵³ While this certainly does not mean that a lawyer is *required* to provide a certain number of hours of pro bono service, it does stipulate that every attorney has a “professional responsibility” to in some way provide these legal services. Presumably, if a lawyer does nothing – giving neither money nor actual services – he has violated the Rule.⁵⁴

Yet, without stronger, more specific language, the pro bono obligation remains murky and vague; one professor argued that, following the language of Rule 6.1, “an attorney representing a wealthy suburban athletic league could easily decide that he was meeting his pro bono obligation.”⁵⁵ The Rule’s mandate can be strengthened through two changes in language. First, the buyout provision in the Rule – which allows attorneys to make a financial contribution in lieu of actual service – should be deleted, thus making actual service the sole way to fulfill the duty. Second, the Rule should address and explain specific ways attorneys can help alleviate poverty, so as to provide guidance for attorneys as to what types of cases to take in order to meet this goal. Through these two relatively minor amendments, the Rule could be bolstered to more clearly and effectively promote pro bono legal service.

Under the current Rule, attorneys can discharge their professional duty by buyout ~~of~~ this obligation with a donation to a legal services organization in an amount that is reasonably commensurate with the customary charge for 50 hours of work.⁵⁶ But in practice, the money given does not even come close to the value that attorneys would have charged for actual work,

⁵³ See MODEL RULES, *supra* note 27 at R. 6.1

⁵⁴ See Martyn, *Justice and Lawyers*, *supra* note 19 at 22.

⁵⁵ Spencer Rand, *A Poverty of Representation: The Attorney’s Role to Advocate for the Powerless*, 13 TEX. WESLEYAN L. REV. 545, 558 (2007).

⁵⁶ MODEL RULES, *supra* note 27 at R. 6.1, cmt. 9. (“[A] lawyer 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.”)

with state-suggested contributions falling significantly lower than actual billable rates.⁵⁷ Thus, the money given does not closely approximate covering the work needed. Also, donating money instead of time subtracts from an attorney's ability to understand the problems facing the poor.⁵⁸ Simply writing a check doesn't allow the attorney to experience problems of the poor or face issues of poverty that he otherwise may have felt compelled to address. "The attorney is more likely to think of this donation as a tax on his practice than as a professional responsibility stemming from a clear need that all attorneys must address."⁵⁹ Also, buyouts limit the legal expertise available to the poor by narrowing the range of practices and expertise of volunteering attorneys; by allowing sophisticated, well-educated attorneys forego any actual service, the pro bono services provided to the poor are shallower and less effective. Thus, deleting the buyout provision in Rule 6.1 would mandate that all attorneys fulfill their ethical obligation through actual, physical service to the poor. This would not only benefit the attorney's personal experience, but would also enrich the quality, value and depth of pro bono legal services.

Rule 6.1 should also be amended to specifically address the need for lawyers to take cases that address the condition of the poor. Under the current language and comments, attorneys have little to guide them in deciding what work they should do to fulfill their duty. Left to make these choices on their own, attorneys may choose cases and projects that do not adequately provide legal services to the poor.⁶⁰ If the Rule were to explain the reasons for doing pro bono work and the special value of working on issues of poverty and oppression, it would inherently encourage and promote such work. Although the Rule does explain that poor people

⁵⁷ See Rand, *A Poverty of Representation*, *supra* note 55 at 566.

⁵⁸ *Id.* at 567.

⁵⁹ *Id.*

⁶⁰ *Id.* at 568. ("Left to come up with their own rationales, attorneys might come up with several that have nothing to do with bringing justice to the oppressed.")

need better access to the justice system,⁶¹ it does not describe why greater access is important or why an attorney ought to assist the poor. Not once is the phrase “social justice” – or anything like it – mentioned in Rule 6.1. “Never does it say that the poor should have access to attorneys because the poor are powerless” or that attorneys are in a special position to ensure that people in poverty are not oppressed.⁶²

Also, the Rule could emphasize a preference that attorneys receive pro bono work from public service agencies, which are the best positioned and equipped to refer pro bono work that will truly service the poor. Rule 6.1 should be rewritten to instruct attorneys to prefer pro bono work that addresses the basic human needs of less fortunate individuals.⁶³ Because not all attorneys have the contacts and sources necessary to find pro bono work on their own initiative, the Rule should encourage institutional support and instruct attorneys to take cases from local pro bono agencies. The Rule must address both the need for public service and justifications, so that attorneys seeking to fulfill their pro bono obligation under Rule 6.1 have stronger guidance on how to fulfill the goal.

c. Require Monitoring and Reporting Systems

Another way to strengthen Rule 6.1’s pro bono duty is to insert a requirement for states to construct an annual reporting requirement as a balance between aspirational guidance and regulatory compulsion. This could be accomplished through an annual form that would be part of other compliance statements required by lawyers, and would be designed to “prompt lawyers’ regular reflection on their own involvement, to obtain reliable information on volunteer services

⁶¹ See MODEL RULES, *supra* note 27 at preamble (“Lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”).

⁶² See Rand, *A Poverty of Representation*, *supra* note 55 at 571.

⁶³ The ABA acknowledged some of these basic needs to include “shelter, sustenance, safety, health or child custody.” See ABA, House of Delegates Resolution 112A (Aug. 2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

provided, to encourage increased service activity or financial support, and to create a statewide infrastructure for distribution of legal services for those in need.”⁶⁴ The annual report would allow states and the bar to monitor pro bono service by attorneys and ensure that lawyers are fulfilling their professional duty under Rule 6.1. Some states have gone further than the baseline requirement of the Rule and have already implemented such a reporting requirement.⁶⁵ Seven states require mandatory reporting, and 10 states have voluntary reporting requirements.⁶⁶ However, eight states have explicitly rejected mandatory reporting.⁶⁷

If Rule 6.1 included language that explicitly mandated states to adopt reporting requirements, lawyers would more comprehensively consider their personal service obligation, and bar associations could better monitor pro bono service. Currently, the lack of such monitoring “encourages attorneys to overlook this obligation both individually and as a profession;”⁶⁸ creation of a reporting requirement would provide positive pressure for a lawyer to assess his individual contribution yearly. This requirement of self-reflection and reporting “provides a gauge for self-assessment, and is a convenient means to channel response.”⁶⁹ Just as Cotton Mather urged the faithful to ask daily, “what have you done for the common good?,” so too should attorneys evaluate whether their pro bono services measure up to the standard under the Rule.⁷⁰

⁶⁴ See Maute, *Changing Conceptions*, *supra* note 7 at 142.

⁶⁵ See Thomas C. Mielenhausen & Charles A. Krekelberg, *A Better Idea: Reporting Pro Bono Services*, March 1999 BENCH & BAR 21 (noting the reporting requirement implemented in Texas and Florida).

⁶⁶ ABA, Reporting of Pro Bono Service, *available at* <http://www.abanet.org/legalservices/probono/reporting.html> (listing Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada and New Mexico as requiring pro bono reporting and Arizona, Kentucky, Louisiana, Missouri, Montana, Oregon, Texas Utah and Washington as having voluntary pro bono reporting).

⁶⁷ See *id.* (listing Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee and Utah as explicitly rejecting mandatory pro bono reporting).

⁶⁸ See Rand, *A Poverty of Representation*, *supra* note 55 at 565.

⁶⁹ See Maute, *Changing Conceptions*, *supra* note 7 at 157.

⁷⁰ *Id.*

III. Law Firms

The compelling need for greater pro bono legal services from private law firms cannot be overstated. Statistics suggest that attorneys at only 18 of the 100 most financially successful firms perform the 50 hours of pro bono service that is suggested in Rule 6.1.⁷¹ Law firms are in a unique position of power that allows them to draw on their expertise and extensive resources to help meet the legal needs of the indigent.⁷² Law firms have increasingly recognized their ability to address the public service need and have expanded pro bono programs, institutionalizing the practice of pro bono work and crediting pro bono time to attorneys' billable hours. Firms are realizing that innovative and well-managed pro bono programs can in fact enhance their culture, prosperity, recruitment, and even finances. However, more needs to be done by law firms to encourage Rule 6.1's mandate for pro bono service to the poor. They must take advantage of their unique position in the profession and enhance the infrastructure of pro bono programs to incentivize and encourage individual attorneys to better serve issues of poverty.

Social influences are important in shaping values and encouraging altruistic behavior; in the legal field, this can be ascertained most often through law schools, workplaces, and professional associations.⁷³ For lawyers, helping others is integrally bound up in a sense of professional, as well as personal, identity.⁷⁴ One study found that factors identified by lawyers as most important in encouraging pro bono work were "employer policies and encouragement,

⁷¹ Deborah L. Rhode, *Squeezing the Public Good*, A.B.A. J., Nov. 2000, at 120, 120.

⁷² Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365, 365 (2003).

⁷³ See Deborah Rhode, *Pro Bono in Times of Crisis: Looking Forward by Looking Back*, 31 FORDHAM URB. L.J. 1011, 1013 (2004).

⁷⁴ For studies on social influences on altruistic behavior, see generally Michael L. Gross, ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY 96, 129 (1997); Richard J. Bentley & Luana G. Nissan, ROOTS OF GIVING AND SERVING 9, 33-36 (1996); Frances Ostrower, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY 14-16, 33-38, 59, 133 (1995); Lori Verstegen Ryan & Mark A. Ciavarella, *Tapping the Source of Moral Approbation: The Moral Referent Group*, 38 J. BUS. ETHICS 179 (2002); Jane J. Mansbridge, ON THE RELATION OF ALTRUISM AND SELF-INTEREST, IN BEYOND SELF-INTEREST 133, 133-34 (Jane J. Mansbridge ed., 1990).

and professional benefits such as contacts, referrals, training, trial experience, and involvement with clients.”⁷⁵ Pro bono encouragement from law firms is essential to strengthen individual attorney service. The ABA found that attorney willingness to do pro bono work is significantly affected by the employer’s attitude towards pro bono activity.⁷⁶ Attorneys who provided pro bono service were significantly more likely to indicate that their employers encourage pro bono service (72%) than were non-providing attorneys (36%); attorneys who did no pro bono service were much more likely to state that their employer had no clear pro bono policy or that their employer discouraged pro bono service.⁷⁷ Thus, encouragement and incentives from law firms for service to the poor is extremely important and is a fundamental factor in individual attorney pro bono work. Therefore, law firm pro bono programs must be bolstered to further promote and make accessible poverty services by lawyers.

One justification for strengthening firm pro bono programs is that they are actually beneficial to business. In a profession preoccupied with profit, appeals to “ethics pays” and self-interest may be the most persuasive strategy for implementing change.⁷⁸ While on the surface, donating time, money and resources to non-revenue generating clients might seem unprofitable, quite the opposite is true; not only does pro bono work by firms fulfill a civic duty, but it also makes good business sense.⁷⁹ Pro bono programs in law firms can be an effective marketing strategy for attracting new associates, developing clients, and increasing productivity.⁸⁰ As part of the intense market competition to attract elite law school graduates, many of whom care about pro bono opportunities, law firms have been forced to implement pro bono programs to

⁷⁵ See Rhode, *Pro Bono in Times of Crisis*, *supra* note 73 at 1015-16.

⁷⁶ See ABA, *Supporting Justice II*, *supra* note 15 at 19.

⁷⁷ *Id.*

⁷⁸ See Deborah Rhode, *Profits and Professionalism*, 33 *Fordham Urb. L.J.* 49, 49 (2005).

⁷⁹ See Rand, *A Poverty of Representation*, *supra* note 55 at 56.

⁸⁰ See Justus, *Using Business Strategies*, *supra* note 72 at 366-67.

complement their broader recruitment strategy.⁸¹ Research shows that employee loyalty and morale are significantly greater when organizations are involved in their communities.⁸² Pro bono programs also benefit law firms' need for public perceptions of legitimacy and altruism, as the level of employer charity has a positive correlation with public image and reputation.⁸³ One survey asked what could improve the image of lawyers, and the most popular response was greater free legal services to the needy.⁸⁴ There is also a positive correlation between the most successful law firms in the country and those that have high rates of pro bono services.⁸⁵ Firms with high pro bono scores are among the highest revenue grossing firms in the country; in 2002, seven of the top ten pro bono firms were also among the top fifty in terms of gross revenues.⁸⁶

Still, billable hour requirements for lawyers have dramatically risen over the last decade, and the number of hours in the day remain the same; as a result, lawyers in private law firms feel more pressure to bill to the bottom line, rather than to use their time serving the poor. Private firm lawyers complain that they do not have sufficient time for themselves and their families, much less for charity and volunteerism.⁸⁷ Virtually all firms openly support pro bono service, but only a quarter fully count it toward meeting billable hour requirements; further, only 10% of surveyed lawyers believe that pro bono work is valued the same as billable work.⁸⁸

In order to combat time stresses, law firms must ensure a closer relationship between their professed values of service and daily practices. A leading study identified best practices for

⁸¹ See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 33 (2004).

⁸² See Rhode, *Profits and Professionalism*, *supra* note 78 at 59.

⁸³ See Cummings, *The Politics of Pro Bono*, *supra* note 81 at 34.

⁸⁴ Peter D. Hart Research Assoc., Inc., A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 18 (Jan. 1993).

⁸⁵ Ester F. Lardent, MAKING THE BUSINESS CASE FOR PRO BONO 2 (2000) (citing a 1995 study by professors Marc Galanter and Thomas Palay of the University of Wisconsin Law School showing a positive correlation between changes in pro bono activity and changes in the firms' economic performance).

⁸⁶ *The Am Law 100*, THE AMERICAN LAWYER (July 2003).

⁸⁷ ABA, Career Satisfaction Survey 20 (2000).

⁸⁸ See Rhode, *Pro Bono in Principle*, *supra* note 2 at 138, 140.

improving law firm pro bono programs, which suggested that the first step in encouraging service is to establish a formal pro bono program and policy in order to communicate to employees ways to access service opportunities, expectations, and incentives.⁸⁹ Next, a visible commitment by the firm's leadership to pro bono service will encourage younger associates to contribute as well. Perhaps most the most important practice to implement is granting credit for pro bono work toward billable hour requirements, thus incentivizing public service and combating the most prevalent excuse for failure to volunteer – lack of time.⁹⁰ Finally, law firms should establish a pro bono coordinator or committee to increase accessibility of pro bono work and agencies, as well as to match attorneys with service opportunities.⁹¹ Through these changes, law firms can incentivize and encourage pro bono work, thereby bolstering their own legitimacy while also addressing the needs of the poor.

Finally, in face of the current recession, law firms can use the economic slump as an ideal time to lend a hand to public interest and legal aid agencies. Law firms have been forced to make drastic layoffs because of declining work and clients, and many firms are deferring incoming associates' start dates for months. At the same time, pro bono agencies are suffering equally – if not more – to meet the “desperate need” for volunteer legal assistance to the poor. Esther Lardent, president and CEO of the Pro Bono Institute in Washington, D.C., explained that “[w]hen the economy catches cold, poor people get pneumonia.”⁹² Yet amid all this dark news, there may be a silver lining: the massive layoffs and program cuts are redirecting young

⁸⁹ *Id.* at 169.

⁹⁰ *Id.*

⁹¹ *See id.* Rhode also lists as best practices consideration of pro bono service as a favorable factor in promotion and compensation decisions, recognition and showcasing of service, and compliance with the ABA Model Rules' standard of fifty hours per lawyer per year. *Id.*

⁹² Esther F. Lardent, opinion, “Don't RIF Pro Bono: Despite Downturn, Law Firms Should Make the Right Choice for the Future,” 133 *The Recorder* 44 (March 6, 2009).

graduates and experienced attorneys from corporate firms into the public sector.⁹³ While some law firms are even requiring their deferred associates to work in public interest jobs, others are offering additional stipends for those who choose to pursue pro bono work during the delay.⁹⁴

These deferrals can help address the essential needs and difficult issues faced by both law firms and pro bono groups in a turbulent economic time. For law firms, it is an excellent low-cost tool for training and professional development, allowing future associates to stay active and engaged while gaining experience in new areas of law and poverty issues. It also allows firms to ease departures and deferrals by offering modest financial support for the transition to pro bono work.⁹⁵ At the same time, legal-aid agencies and public-interest organizations are reaping the benefit of immediate help from well-qualified and educated attorneys. Many agencies also hope that the exposure to poverty issues will increase understanding of public service across the profession and inspire greater pro bono service in the future.⁹⁶ The ABA has also recognized the opportunity of deferring attorneys to pro bono work, and is helping both attorneys seeking work, law firms making layoffs, and legal-aid firms seeking assistance.⁹⁷

Of course, the efficacy of these deferrals has yet to be seen; because of the volatile nature of the economy, the legal market could bounce back just as quickly and dramatically as it declined, potentially causing an exodus of lawyers out of the public sector and right back into law firms. This would leave the legal-aid and pro bono agencies right where they started, left once again with a dearth of qualified lawyers. Still, despite an overwhelmingly dire economic time, the transition of experienced attorneys from the private firms to the public sector adds a

⁹³ See Stephanie Chen, "For jobless lawyers, plan B includes good works," CNN.com, available at <http://www.cnn.com/2009/CRIME/03/16/lawyer.layoff.public/?iref=hpmostpop>.

⁹⁴ Rachel Breitman, "Firms Search for Deferred First-Years' Public Interest Posts," 239 *The Legal Intelligencer* 54 (March 20, 2009).

⁹⁵ See Lardent, "Don't RIF Pro Bono," *supra* note 92.

⁹⁶ *Id.*

⁹⁷ ABA, *Strategies for Pro Bono and Public Service During the Recession*, The Standing Committee on Pro Bono and Public Service, available at <http://www.abanet.org/legalservices/probono/downturn/>.

glimmer of hope to improving pro bono service by lawyers. Even if the large-scale transition is only a temporary consequence of the recession, at least pro bono agencies will receive immediate assistance and deferred attorneys can experience pro bono-related work that they otherwise would not have had. At the same time, law firms should continue to encourage and incentivize public service through their own pro bono programs. Through these profession-wide reforms, law firms can help to bolster the ethical obligation of pro bono service for attorneys.

IV. Legal Education

Because law school education is a prerequisite for every practicing attorney, legal education plays an extremely important role in educating lawyers about the responsibilities their privileges entail. Law schools are uniquely positioned to spread awareness of the obligations of the profession, including pro bono service; this overwhelming influence by legal education on the profession suggests that increasing access to justice “should start with law schools.”⁹⁸

Although every law school is required by the ABA to provide appropriate pro bono service opportunities, the strength and efficacy of the service programs vary drastically, and student involvement is usually voluntary and minimal. Issues of professional responsibility are “marginal” in most law schools, and pro bono activities receive even less attention.⁹⁹ One survey found that only one percent of attorneys recalled any discussion of pro bono responsibilities in the law school legal ethics courses.¹⁰⁰ Strikingly, statistics also indicate that most law students graduate without any law-related pro bono experience.¹⁰¹

⁹⁸ Deborah L. Rhode, *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 21 (Deborah L. Rhode ed., 2000).

⁹⁹ See Rhode, *Profits and Professionalism*, *supra* note 78 at 79.

¹⁰⁰ See Rhode, *Pro Bono in Principle*, *supra* note 2 at 24.

¹⁰¹ See Rhode, *Profits and Professionalism*, *supra* note 78 at 79 (citing *The A-List*, AM. LAW., Sept. 1, 2005, at 84.)

Indeed, law schools must do more to educate their students about issues of poverty and inequalities of justice. Gene Nichol, Dean of the University of North Carolina School of Law, called the failure of law education to better address pro bono issues the “greatest shortcoming of American schools.”¹⁰² Messages about legal ethics, pro bono service, and balanced work lives must be reinforced throughout law school education in order to promote and encourage pro bono service both during law school and beyond. I believe that while each law school must implement reform according to its own needs and culture, pro bono service can be improved by mandating a reporting requirement for law schools, strengthening the roles of professors and public service curricula, and by requiring mandatory pro bono service programs in law schools.

a. Law School Pro Bono Reporting Requirement

Although ABA accreditation standards require schools to provide appropriate pro bono service opportunities, many institutions neither keep nor disclose specific information on participation rates. Just as a reporting requirement could improve practicing attorney pro bono service,¹⁰³ so too could a requirement for law schools to report information on law student pro bono programs improve students’ record of public service. Mandating disclosure of students’ public service would yield three primary benefits. First, a reporting requirement would allow schools and the ABA to monitor pro bono services by schools and promote competition for higher levels of service. If faced with numbers from competing schools, administrations would more strongly encourage service by their students. Secondly, publishing the findings would add a positive pressure on schools for the purpose of better rankings. Law school rankings have an incredible force over law school behavior; incorporating service levels as a factor in determining rank would certainly increase pro bono service by law schools. Finally, just as mandatory

¹⁰² Gene R. Nichol, *The Command of Equal Justice*, 31 COLO. L.REV. 57, 58 (July 31, 2002).

¹⁰³ See *infra*, § II(2)(c) (arguing for adoption of a mandatory pro bono reporting requirement in Rule 6.1).

reporting would impose self-reflection by practicing attorneys, law students would be forced to assess their individual pro bono contribution. In this way, the report would stimulate consideration of poverty law issues among students, hopefully instilling an obligation of service into lifelong practice.

b. Role of Law Professors and Law School Curriculum

In order for law schools to serve as a catalyst for stronger pro bono work by the legal profession, law professors and faculty must forge the path through leadership, personal public service, and engaging poverty-related curricula. Professors and lawyers who are committed to teaching poverty law and pro bono issues must “get under the skin” of their law school environment and take on a leadership role to motivate change in both student service and in law school course offerings.¹⁰⁴ Thus, professors must aspire to be “Provocateurs for Justice,” serving as the driving force to inspire students to address issues of social inequality and poverty.¹⁰⁵ Some poverty law scholars have even argued that this leadership by professors is a moral imperative, asserting that faculty have a “moral obligation to serve as community-building ‘elders’” for their students.¹⁰⁶ Through leadership and a visible commitment to pro bono work, professors can inspire law students to undertake pro bono work.

Law schools must also incorporate social justice goals into their curricula. Stronger and more comprehensive poverty-law and service-related courses and clinics can provide relief to underserved members of the local community, instill values of public service in students, and

¹⁰⁴ Marie A. Failinger, *A Home of its Own: The Role of Poverty Law in Furthering Law Schools’ Missions*, 34 FORDHAM URB. L.J. 1173, 1174 (2007).

¹⁰⁵ Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001) (“A provocateur for justice actively imbues... students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.”).

¹⁰⁶ See Failinger, *A Home of its Own*, *supra* note 104 at 1175.

expose students to the dearth of legal access to lawyers available to the poor.¹⁰⁷ Legal clinics are an ideal vehicle for promoting a school's social justice mission, as they can positively impact both the local community and law students.¹⁰⁸ The unaddressed issues of the poor community can be addressed and alleviated, while at the same time students are exposed to the poor and encouraged to provide pro bono work.¹⁰⁹ After a clinical educational experience, students are often inculcated with a sense of civic responsibility and will likely have a greater propensity to volunteer pro bono services or choose public-interest jobs after graduation.¹¹⁰ Incorporating these social justice issues into curricula may ameliorate the erosion of commitment to public interest work that students often experience during and after law school. Indeed, participation in poverty clinics and courses "facilitat[es] transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in law."¹¹¹

Law schools should therefore accept their ethical imperative and use their unique position in the legal profession to inspire positive change in pro bono services. Law schools and legal educators must raise awareness of unequal access to justice through personal leadership and implement new curricula and clinics aimed at ameliorating inequalities in social justice.

¹⁰⁷ See Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1011 (2004). ("In order to increase the number of law school graduates who embrace a professional responsibility to assure access to justice for the poor, clinicians must strive to inculcate in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice.")

¹⁰⁸ See, e.g., Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1929 (2002); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998).

¹⁰⁹ See Catherine L. La Fleur, *Surveying Poverty: Addressing Poverty Law in a Required Course*, 42 WASH. U. J. URB. & CONTEMP. L. 147, 157 (1992) (stating that Loyola New Orleans students who took the mandatory poverty law course "[o]verwhelmingly... felt that the course had changed their attitude about the poor and about doing pro bono work").

¹¹⁰ See Dubin, *Clinical Design*, *supra* note 108 at 1476.

¹¹¹ See Dubin, *Clinical Design*, *supra* note 108 at 1477.

c. Mandatory Pro Bono Service Programs in Law Schools

Just as in the legal profession, there has been significant debate about whether to require mandatory pro bono service by law students. And also similar to the legal profession, the debate has centered on whether forcing students to volunteer public service work is “simply oxymoronic” and inconsistent with the charitable concept of pro bono.¹¹² However, the critique has little impact in the legal education field, as the objections to pro bono made by practicing attorneys fall short when applied to academia. One reason is that a pro bono requirement can be adopted individually by schools, and in varying degrees, as opposed to a sweeping profession-wide mandate that a change in Rule 6.1 would generate. Also, imposing requirements by a school on its students is tremendously less intrusive on students’ liberty interests than the ABA compelling behavior by licensed attorneys. After all, a service requirement would be no different than any other required course, and “is no more like involuntary servitude than is Contracts, Torts or a course on the very Anglo-American legal tradition of public service that supports calls for mandatory pro bono in the first place.”¹¹³

There are strong arguments in favor of mandating pro bono work as a requirement for graduation. Perhaps the most significant justification is that it would send a strong message to future lawyers that performing pro bono legal service is not merely altruistic – but should also be a positive obligation.¹¹⁴ Students would experience pro bono earlier, and the work would help to instill a “culture of commitment” to service and poverty issues that they can continue throughout their careers.¹¹⁵ A mandatory requirement would also obviously increase participation in pro bono, strengthening both the level and depth of service. Widespread service would boost the

¹¹² See Richard F. Storrow & Patti Gearhart Turner, *Where Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 UMKC L. REV. 493, 497 (2003).

¹¹³ *Id.* at 497.

¹¹⁴ Deborah L. Rhode, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 205 (2000).

¹¹⁵ *Id.*

visibility of public service and legal issues of the poor, helping pro bono work gain attention, assistance, and funding. Finally, there is a strong educational value in public service that justifies the resources a law school would have to put into the requirement; pro bono work can “open students’ eyes to the substantive needs of poor people, to the bureaucracies with which they have to deal, and to the courts that hear the matters in which they are involved.”¹¹⁶

Indeed, it is difficult to find anyone who opposes law school pro bono programs, at least in principle.¹¹⁷ Nearly all American law schools have some type of pro bono program, many of which are required for graduation and mandate usually between 20 and 70 hours of unpaid, not-for-credit, supervised legal work.¹¹⁸ Top law schools have already established such programs, including Harvard Law School, University of Pennsylvania Law School, Southern Methodist Law School and Washington and Lee University School of Law.¹¹⁹ At these schools, a

coordinator usually matches a student with a service opportunity and works with local public interest agencies and pro bono groups to maintain support for the school’s initiatives.¹²⁰ At other schools, pro bono requirements are satisfied by participation in specific courses, internships or clinics that espouse poverty law issues, indigent defense and public service. Because of the varying degrees of programs, it is the task of each law school to tailor its pro bono efforts to its particular culture and mission, with the fundamental goal of fostering a culture of commitment to service.¹²¹ Obviously, the stricter the mandate, the stronger the obligation of pro bono service; thus, schools should seek to implement more robust standards for service, including minimal hour requirements and more rigid criteria as to what constitutes pro bono. Law schools must

¹¹⁶ Learning to Serve: A Summary of the Findings and Recommendations of the Association of American Law Schools Commission on Pro Bono and Public Service Opportunities (1998), available at <http://www.aals.org/probono/report2.html#programs>.

¹¹⁷ See Rhode, *Pro Bono in Principle*, *supra* note 2.

¹¹⁸ See Granfield, *Institutionalizing Public Service*, *supra* note 46 at 1370.

¹¹⁹ *Id.* at 1371.

¹²⁰ *Id.*

¹²¹ See Storrow & Turner, *Where Justice Begins*, *supra* note 112 at 499.

better encourage and reinforce messages about legal ethics, public service and issues of poverty throughout law school education. “Surely law schools are in a unique position, and have a unique obligation, to see that issues of access to justice occupy a central place in our study and debate.”¹²² Because of this influence and power, law schools have a moral obligation to promote pro bono service during law school and beyond.

V. Conclusion

Ultimately, meaningful access to justice for all must become a higher priority of the profession. While the reforms suggested in this Note certainly cannot pretend to be an immediate panacea for public service shortfalls, they can serve as a catalyst for profession-wide reform and improvements. Model Rule 6.1’s mandate can be bolstered by adding stronger language, deleting buyout provisions and imposing a mandatory reporting requirement. These seemingly small changes could, because of the foundational power of the Rule, yield effective and widespread results. Because the Model Rules implicitly affect every practicing lawyer, a stronger mandate for service could cause profession-wide improvements. Similarly, reforms to institutionalized pro bono programs in law firms and law schools could, over time, promote and transform the duty of service on the legal profession. Improving the pro bono obligation within these three fundamental aspects of the legal profession would be a strong commencement on what will most certainly be a long road to true transformation and progress. In order to achieve far-reaching and profound change in pro bono service, the profession will also need to seek out increased government funding and institutional support. Still, small and gradual improvements are still indications of success, and these reforms to Rule 6.1, law schools and law firms will help to reinforce the ethical obligation of legal service to the poor.

¹²² Gene R. Nichol, *The Command of Equal Justice*, 31 COLO. LAW. 57, 58 (July 31, 2002).

Justice Sandra Day O'Connor said that it is public service that "marks the difference between a business and a profession."¹²³ In our aspirations to be not merely a profession – but also a noble profession – lawyers must recognize our moral obligation to the poor and strengthen our commitment to pro bono service.

Washington and Lee University

¹²³ S.D. O'Connor, *Professionalism*, WYO. LAWYER, Apr. 2004, at 12, 14.